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THE

LAWS OF ENGLAND.

VOLUME XXIII.

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THE

LAWS OF ENGLAND

BEING

A COMPLETE STATEMENT OF THE WHOLE LAW OF ENGLAND.

BY

THE RIGHT HONOURABLE THE

EARL OF HALSBURY

LORD HIGH CHANCELLOR OF GREAT BRITAIN,
1885-86, 1886-92, and 1895-1905.

AND OTHER LAWYERS.

VOLUME XXIII.

POWERS.
PRACTICE AND PROCEDURE.
PRESS AND PRINTING.
PRISONS.
PRIZE LAW AND JURISDICTION.
PUBLIC AUTHORITIES AND PUBLIC OFFICERS.
PUBLIC HEALTH AND LOCAL ADMINISTRATION.
RAILWAYS AND CANALS.

309558 35
14 1

LONDON
BUTTERWORTH & CO., BELL YARD, TEMPLE BAR.
Law Publishers.

SYDNEY:
BUTTERWORTH & Co. (Australia), Ltd.,
76, Elizabeth Street.

CALCUTTA:
BUTTERWORTH & Co. (India), Ltd.,
8/2, Hastings Street.

1912.

BRADBURY, AGNEW, & CO., LD., PRINTERS,
LONDON AND TONBRIDGE.

Editor in Chief.

THE RIGHT HONOURABLE THE

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City of London Officers ,, CONSTITUTIONAL LAW; METROPOLIS.

Civil Service Commissioners - - - ,, CONSTITUTIONAL LAW.

Clerk of the Crown in Chancery - - ,, CONSTITUTIONAL LAW; PARLIAMENT.

Coal and Metalliferous Mines, Inspectors of - ,, MINES, MINERALS AND QUARRIES.

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Carriage by Sea - ,, SHIPPING AND NAVIGATION.
Carriers' Liability - ,, CARRIERS.
Companies for Statutory Purposes - ,, COMPANIES.
Compulsory Purchase - ,, COMPULSORY PURCHASE OF LAND AND COMPENSATION.
Electrical Undertakings - - - ,, ELECTRIC LIGHTING AND POWER.
Fares - - - ,, CARRIERS.
Highway Authorities - ,, HIGHWAYS, STREETS, AND BRIDGES.
Income Tax - - ,, INCOME TAX.
Light Railways - - ,, TRAMWAYS AND LIGHT RAILWAYS.
Maximum Rates for Traffic - - - ,, CARRIERS.
Negligence - - ,, CARRIERS; NEGLIGENCE.

For Rates for Traffic	*See title*	CARRIERS.
Rating of Railways	,,	RATES AND RATING.
Reasonable Facilities for Traffic	,,	CARRIERS.
Shipping	,,	SHIPPING AND NAVIGATION.
Statutory Duty, Neglect of	,,	NEGLIGENCE.
Telegraphs	,,	TELEGRAPHS AND TELEPHONES.
Terminal Charges	,,	CARRIERS.
Through Rates and Tickets	,,	CARRIERS.
Tramways	,,	TRAMWAYS AND LIGHT RAILWAYS.
Trespass and Trespassers	,,	NEGLIGENCE; TRESPASS.
Undue Preference	,,	CARRIERS.
Workmen's Compensation	,,	MASTER AND SERVANT.
Workmen's Trains	,,	CARRIERS.

RAPE

See CRIMINAL LAW AND PROCEDURE.

ABBREVIATIONS

USED IN THIS WORK.

A. C. (preceded by date) ..	Law Reports, Appeal Cases, House of Lords, since 1890 (*e.g.* [1891] A. C.)
A.-G.	Attorney-General
Act.	Acton's Reports, Prize Causes, 2 vols., 1809—1841
Ad. & El.	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1834—1842
Adam	Adam's Justiciary Reports (Scotland), 1893—(current)
Add.	Addams' Ecclesiastical Reports, 3 vols., 1822—1826
Adv.-Gen.	Advocate-General
Alc. & N.	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1813—1833
Alc. Reg. Cas.	Alcock's Registry Cases (Ireland), 1 vol., 1832—1841
Aleyn	Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649
Amb.	Ambler's Reports, Chancery, 2 vols., 1725—1783
And.	Anderson's Reports, Common Pleas, fol., 2 parts in one vol., 1535—1605
Andr.	Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740
Anon.	Anonymous
Anst.	Anstruther's Reports, Exchequer, 3 vols., 1792—1797
App. Cas.	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—1890
Arkley	Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848
Arm. M. & O.	Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842
Arn.	Arnold's Reports, Common Pleas, 2 vols., 1838—1839
Arn. & H.	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841
Asp. M. L. C.	Aspinall's Maritime Law Cases, 1870—(current)
Ashb.	Ashburner's Principles of Equity, 1902
Atk.	Atkyns' Reports, Chancery, 3 vols., 1736—1754
Ayl. Pan.	Ayliffe's New Pandect of Roman Civil Law
Ayl. Par.	Ayliffe's Parergon Juris Canonici Anglicani
B. & Ad...	Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830—1834
B. & Ald.	Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817—1822
B. & C.	Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822—1830
B. & S.	Best and Smith's Reports, Queen's Bench, 10 vols., 1861—1870
Bac. Abr.	Bacon's Abridgment
Bail Ct. Cas.	Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854
Baild.	Baildon's Select Cases in Chancery (Selden Society, Vol. X.)
Ball & B.	Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814
Bankr. & Ins. R. ..	Bankruptcy and Insolvency Reports, 2 vols., 1853—1855

Bar. & Arn.	Barron & Arnold's Election Cases, 1 vol., 1843—1846
Bar. & Aust.	Barron & Austin's Election Cases, 1 vol., 1842
Barn. (CH.)	Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741
Barn. (K. B.)	Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734
Barnes	Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732—1760
Batt.	Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826
Beat.	Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830
Beav.	Beavan's Reports, Rolls Court, 36 vols., 1838—1866
Beav. & Wal.	Beavan and Walford's Railway Parliamentary Cases, 1 vol., 1846
Beaw.	Beawes's Lex Mercatoria
Bellewe	Bellewe's Cases *temp.* Richard II., King's Bench, 1 vol.
Bell, C. C.	T. Bell's Crown Cases Reserved, 1 vol., 1858—1860
Bell, Ct. of Sess. ..	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792
Bell, Ct. of Sess. fol. ..	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794—1795
Bell, Dict. Dec. ..	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833
Bell, Sc. App.	S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850
Belt's Sup.	Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1756
Benl.	Benloe's (or Bendloe's) Reports, King's Bench and Common Pleas, fol., 1 vol., 1515—1627
Ben. & D.	Benloe and Dalison's Reports, Common Pleas, fol., 1 vol., 1357—1579
Bing.	Bingham's Reports, Common Pleas, 10 vols., 1822—1834
Bing. (N. C.)	Bingham's New Cases, Common Pleas, 6 vols., 1834—1840
Bitt. Prac. Cas.	Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876
Bitt. Rep. in Ch. ..	Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884
Bl. Com.	Blackstone's Commentaries
Bl. D. & Osb.	Blackham, Dundas, and Osborne's Reports, Practice and Nisi Prius (Ireland), 1 vol., 1846—1848
Bli.	Bligh's Reports, House of Lords, 4 vols., 1819—1821
Bli. (N. S.)	Bligh's Reports, House of Lords, New Series, 11 vols., 1827—1837
Bos. & P.	Bosanquet and Puller's Reports, Common Pleas, 3 vols., 1796—1804
Bos. & P. (N. R.) ..	Bosanquet and Puller's New Reports, Common Pleas, 2 vols., 1804—1807
Bract.	Bracton De Legibus et Consuetudinibus Angliæ
Bro. Abr.	Sir J. Brooke's Abridgment
Bro. C. C.	W. Brown's Chancery Reports, 4 vols., 1778—1794
Bro. Ecc. Rep.	W. G. Brooke's Ecclesiastical Reports, Privy Council, 1 vol., 1850—1872
Bro. (N. C.)	Sir R. Brooke's New Cases, 1 vol., 1515—1558
Bro. Parl. Cas.	J. Brown's Cases in Parliament, 8 vols., 1702—1800
Bro. Supp. to Mor. ..	M. P. Brown's Supplement to Morison's Dictionary of Decisions, Court of Session (Scotland), 5 vols.
Bro. Synop.	M. P. Brown's Synopsis of Decisions, Court of Session (Scotland), 4 vols., 1532—1827
Brod. & Bing.	Broderip and Bingham's Reports, Common Pleas, 3 vols., 1819—1822

Brod. & F.	Brodrick and Fremantle's Ecclesiastical Reports, Privy Council, 1 vol., 1705—1864
Broun	Broun's Justiciary Reports (Scotland), 2 vols., 1842—1845
Brown. & Lush. ..	Browning and Lushington's Reports, Admiralty, 1 vol., 1863—1866
Brownl.	Brownlow and Goldesborough's Reports, Common Pleas, 2 parts, 1569—1624
Bruce	Bruce's Decisions, Court of Session (Scotland), 1714—1715
Buchan.	Buchanan's Reports, Court of Session and Justiciary (Scotland), 1806—1813
Buck	Buck's Cases in Bankruptcy, 1 vol., 1816—1820
Bulst.	Bulstrode's Reports, King's Bench, fol., 3 parts in 1 vol., 1610—1626
Bunb.	Bunbury's Reports, Exchequer, fol., 1 vol., 1713—1741
Burr.	Burrow's Reports, King's Bench, 5 vols., 1756—1772
Burr. S. C.	Burrow's Settlement Cases, King's Bench, 1 vol., 1733—1776
Burrell	Burrell's Reports, Admiralty, ed. by Marsden, 1 vol., 1648—1840
C. A.	Court of Appeal
C. B.	Common Bench Reports, 18 vols., 1845—1856
C. B. (N. S.)	Common Bench Reports, New Series, 20 vols., 1856—1865
C. C. A.	Court of Criminal Appeal
C. C. Ct. Cas.	Central Criminal Court Cases (Sessions Papers), 1834—(current)
C. L. R.	Common Law Reports, 3 vols., 1853—1855
C. P. D.	Law Reports, Common Pleas Division, 5 vols., 1875—1880
C. & P.	Carrington and Payne's Reports, Nisi Prius, 9 vols., 1823—1841
Cab. & El.	Cababé and Ellis's Reports, Queen's Bench Division, 1 vol., 1882—1885
Cald. Mag. Cas. ..	Caldecott's Magistrates Cases, 1 vol., 1777—1786
Calth.	Calthrop's City of London Cases, King's Bench, 1 vol., 1609—1618
Camp.	Campbell's Reports, Nisi Prius, 4 vols., 1807—1816
Carp. Pat. Cas.	Carpmael's Patent Cases, 2 vols., 1602—1842
Car. & Kir.	Carrington and Kirwan's Reports, Nisi Prius, 3 vols., 1843—1853
Car. & M.	Carrington and Marshman's Reports, Nisi Prius, 1 vol., 1841—1843
Cart.	Carter's Reports, Common Pleas, fol., 1 vol., 1664—1673
Carth.	Carthew's Reports, King's Bench, fol., 1 vol., 1687—1700
Cary	Cary's Reports, Chancery, 1 vol.
Cas. in Ch.	Cases in Chancery, fol., 3 parts, 1660—1697
Cas. Pract. K. B. ..	Cases of Practice, King's Bench, 1 vol., 1655—1775
Cas. Sett.	Cases of Settlements and Removals, 1 vol., 1689—1727
Cas. *temp.* Finch ..	Cases *temp.* Finch, Chancery, fol., 1 vol., 1673—1680
Cas. *temp.* King ..	Select Cases *temp.* King, Chancery, fol., 1 vol., 1724—1733
Cas. *temp.* Talb.	Cases in Equity *temp.* Talbot, fol., 1 vol., 1730—1737
Ch. (preceded by date) ..	Law Reports, Chancery Division, since 1890 (*e.g.*, [1891] 1 Ch.)
Ch. App.	Law Reports, Chancery Appeals, 10 vols., 1865—1875
Ch. D.	Law Reports, Chancery Division, 45 vols., 1875—1890
Ch. Rob.	Christopher Robinson's Reports, Admiralty, 6 vols., 1798—1808

Char. Pr. Cas.	Charley's New Practice Reports, 3 vols., 1875—1876
Char. Cham. Cas. ..	Charley's Chamber Cases, 1 vol., 1875—1876
Chit.	Chitty's Practice Reports, King's Bench, 2 vols., 1770—1822
Cl. & Fin.	Clark and Finnelly's Reports, House of Lords, 12 vols., 1831—1846
Clay.	Clayton's Reports and Pleas of Assises at Yorke, 1 vol., 1631—1650
Clif. & Rick.	Clifford and Rickards' Locus Standi Reports, 3 vols., 1873—1884
Clif. & Steph.	Clifford and Stephens' Locus Standi Reports, 2 vols., 1867—1872
Cockb. & Rowe	Cockburn and Rowe's Election Cases, 1 vol., 1833
Co. Ent.	Coke's Entries
Co. Inst.	Coke's Institutes
Co. Litt.	Coke on Littleton (1 Inst.)
Co. Rep.	Coke's Reports, 13 parts, 1572—1616
Coll.	Collyer's Reports, Chancery, 2 vols., 1844—1846
Coll. Jurid.	Collectanea Juridica, 2 vols.
Colles	Colles' Cases in Parliament, 1 vol., 1697—1713
Colt.	Coltman's Registration Cases, 1 vol., 1879—1885
Com.	Comyns' Reports, King's Bench, Common Pleas, and Exchequer, fol., 2 vols., 1695—1740
Com. Cas.	Commercial Cases, 1895—(current)
Com. Dig.	Comyns' Digest
Comb.	Comberbach's Reports, King's Bench, fol., 1 vol., 1685—1698
Con. & Law.	Connor and Lawson's Reports, Chancery (Ireland), 2 vols., 1841—1843
Cooke & Al.	Cooke and Alcock's Reports, King's Bench (Ireland), 1 vol., 1833—1834
Cooke, Pr. Cas. ..	Cooke's Practice Reports, Common Pleas, 1 vol., 1706—1747
Cooke, Pr. Reg.	Cooke's Practical Register of the Common Pleas, 1 vol., 1702—1742
Coop. G.	G. Cooper's Reports, Chancery, 1 vol., 1792—1815
Coop. Pr. Cas.	C. P. Cooper's Reports, Chancery Practice, 1 vol., 1837—1838
Coop. *temp.* Brough. ..	C. P. Cooper's Cases *temp.* Brougham, Chancery, 1 vol., 1833—1834
Coop. *temp.* Cott. ..	C. P. Cooper's Cases *temp.* Cottenham, Chancery 2 vols., 1846—1848 (and miscellaneous earlier cases
Corb. & D.	Corbett and Daniell's Election Cases, 1 vol., 1819
Couper	Couper's Justiciary Reports (Scotland), 5 vols., 1868—1885
Cowp.	Cowper's Reports, King's Bench, 2 vols., 1774—1778
Cox, C. C.	E. W. Cox's Criminal Law Cases, 1843—(current)
Cox & Atk.	Cox and Atkinson's Registration Appeal Cases, 1 vol., 1843—1846
Cox, Eq. Cas.	S. C. Cox's Equity Cases, 2 vols., 1745—1797
Cox, M. & H.	Cox, Macrae, and Hertslet's County Courts Cases and Appeals, Vol. I., 1846—1852
Cr. & J.	Crompton and Jervis's Reports, Exchequer, 2 vols., 1830—1832
Cr. & M.	Crompton and Meeson's Reports, Exchequer, 2 vols., 1832—1834
Cr. M. & R.	Crompton, Meeson, and Roscoe's Reports, Exchequer, 2 vols., 1834—1835
Cr. & Ph.	Craig and Phillips' Reports, Chancery, 1 vol., 1840—1841
Cr. App. Rep.	Cohen's Criminal Appeal Reports, 1909—(current)
Craw. & D.	Crawford and Dix's Circuit Cases (Ireland), 3 vols., 1838—1846

Craw. & D. Abr. C. ..	Crawford and Dix's Abridged Cases (Ireland), 1 vol., 1837—1838
Cress. Insolv. Cas. ..	Cresswell's Insolvency Cases, 1 vol., 1827—1829
Cripps' Church Cas. ..	Cripps' Church and Clergy Cases, 2 parts, 1847—1850
Cro. Car.	Croke's Reports *temp.* Charles I., King's Bench and Common Pleas, 1 vol., 1625—1641
Cro. Eliz.	Croke's Reports *temp.* Elizabeth, King's Bench and Common Pleas, 1 vol., 1582—1603
Cro. Jac.	Croke's Reports *temp.* James I., King's Bench and Common Pleas, 1 vol., 1603—1625
Cru. Dig.	Cruise's Digest of the Law of Real Property, 7 vols.
Cunn.	Cunningham's Reports, King's Bench, fol., 1 vol., 1734—1735
Curt.	Curteis' Ecclesiastical Reports, 3 vols., 1834—1844
Dalr.	Dalrymple's Decisions, Court of Session (Scotland), fol., 1 vol., 1698—1720
Dan.	Daniell's Reports, Exchequer in Equity, 1 vol., 1817—1823
Dan. & Ll.	Danson and Lloyd's Mercantile Cases, 1 vol., 1828—1829
Dav. & Mer.	Davison and Merivale's Reports, Queen's Bench, 1 vol., 1843—1844
Dav. Pat. Cas.	Davies' Patent Cases, 1 vol., 1785—1816
Dav. Ir.	Davys' (or Davies' or Davy's) Reports (Ireland), 1 vol., 1604—1611
Day	Day's Election Cases, 1 vol., 1892—1893
Dea. & Sw.	Deane and Swabey's Ecclesiastical Reports, 1 vol., 1855—1857
Deac.	Deacon's Reports, Bankruptcy, 4 vols., 1834—1840
Deac. & Ch.	Deacon and Chitty's Reports, Bankruptcy, 4 vols., 1832—1835
Dears. & B.	Dearsly and Bell's Crown Cases Reserved, 1 vol., 1856—1858
Dears. C. C.	Dearsly's Crown Cases Reserved, 1 vol., 1852—1856
Deas & And.	Deas and Anderson's Decisions (Scotland), 5 vols., 1829—1832
De G.	De Gex's Reports, Bankruptcy, 1 vol., 1844—1848
De G. F. & J.	De Gex, Fisher, and Jones's Reports, Chancery, 4 vols., 1859—1862
De G. & J.	De Gex and Jones's Reports, Chancery, 4 vols., 1857—1859
De G. J. & Sm.	De Gex, Jones, and Smith's Reports, Chancery, 4 vols., 1862—1865
De G. M. & G.	De Gex, Macnaghten, and Gordon's Reports, Chancery, 8 vols., 1851—1857
De G. & Sm.	De Gex and Smale's Reports, Chancery, 5 vols., 1846—1852
Delane	Delane's Decisions, Revision Courts, 1 vol., 1832—1835
Den.	Denison's Crown Cases Reserved, 2 vols., 1844—1852
Dick.	Dickens' Reports, Chancery, 2 vols., 1559—1798
Dig.	Justinian's Digest or Pandects
Dirl.	Dirleton's Decisions, Court of Session (Scotland), fol., 1 vol., 1665—1677
Dods.	Dodson's Reports, Admiralty, 2 vols., 1811—1822
Donnelly	Donnelly's Reports, Chancery, 1 vol., 1836—1837
Doug. El. Cas.	Douglas' Election Cases, 4 vols., 1774—1776
Doug. (K. B.)	Douglas' Reports, King's Bench, 4 vols., 1778—1785
Dow	Dow's Reports, House of Lords, 6 vols., 1812—1818
Dow & Cl.	Dow and Clark's Reports, House of Lords, 2 vols., 1827—1832
Dow. & L.	Dowling and Lowndes' Practice Reports, 7 vols., 1843—1849

Dow. & Ry. (K. B.)	Dowling and Ryland's Reports, King's Bench, 9 vols., 1822—1827
Dow. & Ry. (M. C.)	Dowling and Ryland's Magistrates' Cases, 4 vols., 1822—1827
Dow. & Ry. (N. P.)	Dowling and Ryland's Reports, Nisi Prius, 1 part, 1822—1823
Dowl.	Dowling's Practice Reports, 9 vols., 1830—1841
Dowl. (N. S.)	Dowling's Practice Reports, New Series, 2 vols., 1841—1843
Dr. & Wal.	Drury and Walsh's Reports, Chancery (Ireland), 2 vols., 1837—1841
Dr. & War.	Drury and Warren's Reports, Chancery (Ireland), 4 vols., 1841—1843
Drew.	Drewry's Reports, Chancery, 4 vols., 1852—1859
Drew. & Sm.	Drewry and Smale's Reports, Chancery, 2 vols., 1859—1865
Drinkwater	Drinkwater's Reports, Common Pleas, 1 vol., 1839
Drury *temp.* Nap.	Drury's Reports *temp.* Napier, Chancery (Ireland), 1 vol., 1858—1859
Drury *temp.* Sug.	Drury's Reports *temp.* Sugden, Chancery (Ireland), 1 vol., 1841—1844
Dugd. Orig.	Dugdale's Origines Juridiciales
Dunl. (Ct. of Sess.)	Dunlop, Court of Session Cases (Scotland), 2nd series, 24 vols., 1838—1862
Dunning	Dunning's Reports, King's Bench, 1 vol., 1753—1754
Durie	Durie's Decisions, Court of Session (Scotland), fol., 1 vol., 1621—1642
Dyer	Dyer's Reports, King's Bench, 3 vols., 1513—1581
E. & B.	Ellis and Blackburn's Reports, Queen's Bench, 8 vols., 1852—1858
E. & E.	Ellis and Ellis's Reports, Queen's Bench, 3 vols., 1858—1861
E. B. & E.	Ellis, Blackburn, and Ellis's Reports, Queen's Bench, 1 vol., 1858—1860
Eag. & Y.	Eagle and Younge's Tithe Cases, 4 vols., 1223—1825
East	East's Reports, King's Bench, 16 vols., 1800—1812
East, P. C.	East's Pleas of the Crown
Ecc. & Ad.	Spinks' Ecclesiastical and Admiralty Reports, 2 vols., 1853—1855
Eden	Eden's Reports, Chancery, 2 vols., 1757—1766
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Part I.—Definition and Classification.

PART I. Definition and Classification.

Power.

1. A power (*a*) is an authority reserved by or limited to a person to deal with or dispose of, either wholly or partially, real or personal property, either for his own benefit or that of others (*b*).

Common law power.

2. A common law power is an authority given to one person by another to do an act for him which is recognised by and operative at common law. Such a power may be a bare authority or a power coupled with an interest (*c*). The execution of a common law power by the donee passes the legal estate, but only by virtue of the exercise thereof, and until execution the legal estate remains in the creator of the power, his grantee or heir-at-law, as the case may be. Powers of attorney and powers created by Acts of Parliament are other instances of common law powers (*d*).

Equitable power.

3. An equitable power is a power which affects the equitable and not the legal estate or interest; the legal estate does not pass by the execution of the power, but the legal owner must transfer it in order to complete the title of the appointee, and equity will compel such transfer (*e*), for example, an ordinary power of appointment among children in a marriage settlement by which personalty is vested in trustees.

Power operating under Statute of Uses.

4. A power operating under the Statute of Uses (*f*) is a power of revoking existing or declaring future uses vested in some person named for that purpose in the deed by which the uses to be affected by the operation of the power are created. By virtue of the Statute of Uses (*f*) a power can be created to call legal estates into existence in the future (*g*), which is therefore a common law power.

Powers over real estate:

5. Powers over real estate are either (1) powers of ownership, (2) powers collateral, or (3) powers relating to the estate of the donee of the power in the land, and these are subdivided into powers appendant and in gross.

(*a*) The word is used as a technical term and is distinct from the dominion which a man has over his own property (*Re Armstrong, Ex parte Gilchrist* (1886), 17 Q. B. D. 521, C. A.; *Van Grutten* v. *Foxwell* (*Third Appeal*) (1901), 84 L. T. 545, H. L.; *Commissioner of Stamp Duties* v. *Stephen*, [1904] A. C. 137, P. C.; and see *Goatley* v. *Jones* (No. 1), *Goatley* v. *Jones* (No. 2), [1909] 1 Ch. 557).

(*b*) *Freme* v. *Clement* (1881), 18 Ch. D. 499, 504.

(*c*) Since at common law, apart from the Statute of Uses, estates can only be limited in possession, or by way of remainder or reversion, to take effect on the actual determination of the preceding estate, the grantor of a common law power, not operating under the Statute of Uses, cannot reserve to himself, or confer on any other person, the power of revoking or altering the grant by any future act or instrument (Co. Litt. 237 a).

(*d*) Sugden, Powers, p. 45; the 8th edition, 1861, is referred to throughout this title.

(*e*) *Re Brown, Dixon* v. *Brown* (1886), 32 Ch. D. 597, 601; *Cloutte* v. *Storey*, [1911] 1 Ch. 18, C. A.

(*f*) 27 Hen. 8, c. 10; see title EQUITY, Vol. XIII., p. 89.

(*g*) Sugden, Powers, c. 1. Powers of appointment or revocation may be reserved either in the body of the deed, or by indorsement before the execution of the deed, or by deed of even date (Sugden, Powers, p. 137).

PART I. **Definition and Classification.**

(1) power of ownership;

(2) collateral power;

(3) powers appendant or in gross.

(1) A power of ownership is one which gives the donee complete dominion over the estate, although he has no estate in it, for example, a limitation to such uses as A. shall appoint and in default of appointment to B. gives A. a power of ownership.

(2) A collateral power is a bare power given to a mere stranger who has no interest in the land, for example, a power of sale or exchange given to trustees who have no estate in land settled by legal limitations (*h*).

(3) A power relating to the estate of the donee of the land is a power given to some person having an estate or interest in the land over which it is exercised; such a power is either appendant or in gross (*i*). It is appendant where the estate created by its exercise overrides and affects the estate and interest of the donee of the power; it is in gross where the estate so created is beyond and does not affect the estate or interest of such donee (*k*).

General or special powers.

6. Powers to dispose of property may be either general or special. A general power is such as the donee can exercise in favour of such person or persons as he pleases, including himself (*l*), or his executors and administrators (*m*). A special power can only be exercised in favour of certain specified persons or classes. A husband or wife, donee of a special power, can appoint to the other if an object of the power (*n*).

(*h*) *Dickenson* v. *Teasdale* (1862), 1 De G. J. & Sm. 52, 59, 60.

(*i*) *Re D'Angibau, Andrews* v. *Andrews* (1880), 15 Ch. D. 228, 232, C. A.; *Nottidge* v. *Dering, Raban* v. *Dering,* [1909] 2 Ch. 647; [1910] 1 Ch. 297, C. A.

(*k*) A power of jointuring given to a tenant for life is in gross, and so is a power to appoint the estate in remainder among his own children, but a power of leasing in possession is appendant (Butler's note to Co. Litt. 342). A power to appoint by will real estate, of which the donee was equitable tenant for life for her separate use with remainder in default of appointment in trust for her own right heirs, is appendant (*Penne* v. *Peacock* (1734), Cas. *temp.* Talb. 41; and see *Edwards* v. *Slater* (1665), Hard. 410; Tudor, L. C. Real Prop. 531).

(*l*) *Irvin* v. *Farrer* (1812), 19 Ves. 85.

(*m*) *Mackenzie* v. *Mackenzie* (1851), 3 Mac. & G. 559.

(*n*) *Hughes* v. *Wells* (1852), 9 Hare, 749; *Holder* d. *Sulyard* v. *Preston* (1769), 2 Wils. 400; *Nedby* v. *Nedby* (1852), 5 De G. & Sm. 377; and see title HUSBAND AND WIFE, Vol. XVI., pp. 387, 388. A power to appoint by will only is a general power within the Wills Act, 1837 (7 Will. & 1 Vict. c. 26), s. 27 (*Hawthorn* v. *Shedden* (1856), 3 Sm. & G. 293; *Re Powell's Trusts* (1870), 18 W. R. 228), and so is a power to direct by will that a sum of money be raised and paid (*Re Jones, Greene* v. *Gordon* (1886), 34 Ch. D. 65; *Re Wilkinson, Thomas* v. *Wilkinson,* [1910] 2 Ch. 216; but see *Re Wallinger's Estate,* [1898] 1 I. R. 139, 148; *Re Salvin, Marshall* v. *Wolseley,* [1906] 2 Ch. 459). A power to appoint to whom the donee pleases, except a named person, is a general power so as to make the appointed fund assets for payment of debts (*Edie* v. *Babington* (1854), 4 I. Ch. R. 568), but is not a general power within the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 27 (*Re Byron's Settlement, Williams* v. *Mitchell* [1891] 3 Ch. 474); see title WILLS. Such a power is a general or absolute power within the Legacy Duty Act, 1796 (36 Geo. 3, c. 52) (*Drake* v. *A.-G.* (1843), 10 Cl. & Fin. 257, H. L.). The postponement of the period of distribution of a fund, over which a power of appointment to whom the donee pleases is given, does not prevent the power from being general (*Re Keown's Estate* (1867), 1 I. R. Eq. 372), and, by a revocation of a

7. In addition to the powers already enumerated, there are powers given to a person for the purpose of managing either his own or another person's property; such powers are of sale (*o*), leasing, partition and exchange (*p*).

Powers of management.

8. Finally there are powers to appoint to various offices, of which the power of appointing new trustees is of the most general importance (*q*).

Powers to appoint to offices.

Part II.—Creation of Powers.

SECT. 1.—*Instruments Creating Powers.*

Application of Statute of Uses to powers in deeds.

9. Powers operating otherwise than under the Statute of Uses (*r*) can be inserted in instruments of all kinds, while powers operating under the Statute of Uses (*r*) can only take effect on the legal estate when inserted in deeds operating by transmutation of possession, such as declarations of uses, fines and recoveries, feoffments to uses, releases and grants, where, the conusees, recoverors, feoffees, releasees, or grantees being in by the common law, the use grafted on to their seisin by the exercise of the power is immediately executed by the statute without reference to any consideration (*s*).

Seisin required.

A power to appoint the legal estate operating under the Statute of Uses (*r*) requires a seisin in the grantee to uses out of which the use appointed is to take effect, commensurate with the estate to be appointed. Hence a power to B. to appoint the legal fee cannot be engrafted on a mere demise or on a grant of a life estate to B. (*t*); but there must be a grant to A. in fee to the use of B. for a term or for life and subject thereto to such uses as B. shall appoint.

Application of Statute of Uses by analogy to devises.

10. In the case of a devise to uses the Statute of Uses (*r*) has no direct application, since it was passed before the Statute of Devises (*u*),

bequests "in favour of A.," a limited power of appointment as well as a life interest in A. was revoked (*Re Brough, Currey* v. *Brough* (1888), 38 Ch. D. 456). A power to appoint by will specially referring to the power or before a particular time is not a general power within the Wills Act, 1837 (7 Will 4 & 1 Vict. c. 26), s. 27; see *Phillips* v. *Cayley* (1889), 43 Ch. D. 222, C. A.; *Re Davies, Davies* v. *Davies*, [1892] 3 Ch. 63; but although it may not be within that provision, it may nevertheless remain a general power (*Re Waterhouse, Waterhouse* v. *Ryley* (1908), 77 L. J. (CH.) 30, C. A.). A devise of estates on the trusts to be declared by another with respect to that other's residuary estate is a general power (*Bristow* v. *Skirrow* (No. 1) (1859), 27 Beav. 585); but see *Bristow* v. *Skirrow* (1870), L. R. 10 Eq. 1.

(*o*) See pp. 72 *et seq.*, *post.*

(*p*) See p. 74, *post.*

(*q*) See title TRUSTS AND TRUSTEES.

(*r*) 27 Hen. 8, c. 10.

(*s*) Sugden, Powers, p. 140. Before the Statute of Uses (27 Hen. 8, c. 10), the legal estate would have remained vested in these persons, and they would have been bound in equity to execute the estates created under the power, though not supported by any consideration. As to deeds generally, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 355 *et seq.*

(*t*) Sweet's Bythewood, Vol. V., p. 593, n.

(*u*) Stat. (1540) 32 Hen. 8, c. 1 (repealed 1837).

SECT. 1. Instruments Creating Powers.

but it is applied by analogy, since it is considered that a testator, by devising to uses, shows an intention that the rules, made applicable to deeds by the Statute of Uses (*a*), shall be applied to his will (*b*).

A devise to uses is, however, good without a seisin to serve those uses (*c*), and although no seisin has been raised by the devise, yet the donee in exercising his power may create a seisin to serve uses, for such must have been the intention of the testator (*d*).

Instruments in which powers operating under Statute of Uses are ineffectual.

11. Powers operating under the Statute of Uses (*a*) cannot take effect on the legal estate in a deed not operating by transmutation of possession, such as in a bargain and sale or a covenant to stand seised, but in such instruments a general power of revocation may be reserved and also a power to lease to a named person who is within the consideration, but not a general power to lease to any man. In these instruments there is no conveyance at common law; the immediate legal estate vests by the operation of the statute, and the statute is then powerless to raise any further uses when required in pursuance of the power, since a use cannot be raised upon a use (*e*).

Example of estate by common law and by statute.

12. In the case of a grant "unto and to the use of A. and his heirs" A. is in by the common law, for a conveyance to A. to the use of A. and his heirs gives A. an estate in fee which it could not do under the statute (*f*); but he is also in under the statute, because no further uses can be directly declared (*g*). Whether a power operating on the legal estate can be grafted on to such a grant is doubtful (*h*).

SECT. 2.—*Expression of Intention to Create Powers.*

Intention may be express or implied.

13. No technical or express words are necessary either in a deed or in a will to create a power, so long as the intention is sufficiently denoted (*i*). The intention may be found in a recital or in an exception from a prohibition (*k*), or it may be implied if the

(*a*) 27 Hen. 8, c. 10.

(*b*) *Baker* v. *White* (1875), L. R. 20 Eq. 166, 171; *Cunliffe* v. *Brancker* (1876), 3 Ch. D. 393, C. A.; *Berry* v. *Berry* (1878), 7 Ch. D. 657; *Re Tanqueray-Willaume and Landau* (1882), 20 Ch. D. 465, 478, C. A.; *Re Brooke, Brooke* v. *Brooke*, [1894] 1 Ch. 43.

(*c*) Sugden, Powers, pp. 146, 148.

(*d*) *Ibid.*, p. 198.

(*e*) The question of the consideration required to raise uses under these instruments is of little importance now; see Sugden, Powers, p. 138; Chance on Powers, pp. 50 *et seq.*; see, further, title EQUITY, Vol. XIII., p. 89, note (*q*).

(*f*) *Meredith* v. *Joans* (1632), Cro. Car. 244.

(*g*) *Doe* d. *Lloyd* v. *Passingham* (1827), 6 B. & C. 305.

(*h*) Sugden, Powers, p. 140; *contra*, 1 Sanders on Uses and Trusts, p. 157 (contending that if an estate be limited unto and to the use of A. and his heirs by way of mortgage, a power of leasing limited thereupon to A. is invalid at law because A. is in by the common law).

(*i*) Sugden, Powers, p. 102; *Oxon* (*Bishop*) v. *Leighton* (1700), 2 Vern. 376.

(*k*) *Read* v. *Nashe* (1589), 1 Leon. 147 (powers of jointuring and leasing implied out of a proviso for forfeiture in case of alienation otherwise than

existence of a power is necessary for carrying out some express provision (*l*), or if the person who could have created a power clearly makes his dispositions on the hypothesis that such a power exists (*m*).

SECT. 2. Expression of Intention to Create Powers.

SECT. 3.—*Construction of Powers.*

Creation of power does not vest property.

14. The creation of a power over property does not in any way vest the property in the donee, though the exercise of the power may do so (*n*); and it is often difficult to say whether the intention was to give property or only a power over property.

Gift for life with superadded power of disposition.

If an estate for life is first given and a power of disposition by deed or will added, this is not an absolute gift vesting the property in the donee (*o*). This rule applies although the first gift is on the face of it absolute and is only cut down by subsequent words (*p*); but it is a question of intention, and it has been suggested that the express mention of the life interest might possibly be taken to be

for jointures or leases); *Re Bolton Estates, Russell* v. *Meyrick*, [1903] 2 Ch. 461, C. A.

(*l*) *Bateman* v. *Bateman* (1739), 1 Atk. 421 (power of sale over land implied out of devise of land with proviso for payment of debts out of the devised estate); *Curling* v. *Austin* (1862), 2 Drew. & Sm. 129; *Tait* v. *Lathbury* (1865), L. R. 1 Eq. 174; *Master* v. *De Croismar* (1848), 11 Beav. 184; *Sheffield* v. *Coventry (Earl)* (1852), 2 De G. M. & G. 551; *Re Garnett Orme and Hargreaves' Contract* (1883), 25 Ch. D. 595; *Re Gent and Eason's Contract*, [1905] 1 Ch. 386; *Dean* v. *Dean*, [1891] 3 Ch. 150 (power to enter and take profits and power to convey by revocation of uses implied out of express powers of maintenance and advancement); and see *Re Stamford and Warrington (Earl), Payne* v. *Grey*, [1911] 1 Ch. 255; [1912] 1 Ch. 343, C. A.

(*m*) *Downes* v. *Timperon* (1828), 4 Russ. 334 (a gift over in case a married woman should die without disposing of her interest by will taken to imply a power of appointment, since she could not otherwise have made a will during coverture; see title HUSBAND AND WIFE, Vol. XVI., pp. 386 *et seq.*); *Wood* v. *White* (1839), 4 My. & Cr. 460; *Affleck* v. *James* (1849), 17 Sim. 121; *Wheeler* v. *Howell* (1857), 3 K. & J. 198; *Knocker* v. *Bunbury* (1840), 6 Bing. (N. C.) 306. The use of the word "assigns" has been held to imply the existence of a power of appointment (*A.-G.* v. *Vigor* (1803), 8 Ves. 256, 291; *Tapner* d. *Peckham* v. *Merlott* (1739), Willes, 177; *Quested* v. *Michell* (1855), 1 Jur. (N. S.) 488); but this alone is not now enough (*Brookman* v. *Smith* (1871), L. R. 6 Exch. 291; affirmed (1872), 7 Exch. 271, Ex. Ch.; *Milman* v. *Lane*, [1901] 2 K. B. 745, C. A.).

(*n*) *Re Armstrong, Ex parte Gilchrist* (1886), 17 Q. B. D. 521, C. A.; *Tremayne* v. *Rashleigh*, [1908] 1 Ch. 681, following *Townshend* v. *Harrowby* (1858), 4 Jur. (N. S.) 353, and *Re Gerard (Lord), Oliphant* v. *Gerard* (1888), 58 L. T. 800, not following *Steward* v. *Poppleton*, [1877] W. N. 29, and *Re O'Connell, Mawle* v. *Jagoe*, [1903] 2 Ch. 574 (and see *Bower* v. *Smith* (1871), L. R. 11 Eq. 279), and deciding that a covenant to settle after-acquired property did not extend to property over which the covenantor acquired a general power of appointment.

(*o*) *Bradly* v. *Westcott* (1807), 13 Ves. 445; *Reith* v. *Seymour* (1828), 4 Russ. 263 (a case of personalty); *Nannock* v. *Horton* (1802), 7 Ves. 391; *Liefe* v. *Saltingstone* (1674), 1 Mod. Rep. 189; *Archibald* v. *Wright* (1838), 9 Sim. 161; *Scott* v. *Josselyn* (1859), 26 Beav. 174; *Re Thomson's Estate, Herring* v. *Barrow* (1880), 14 Ch. D. 263, C. A.; *Pennock* v. *Pennock* (1871), L. R. 13 Eq. 144; *Re Sanford, Sanford* v. *Sanford*, [1901] 1 Ch. 939; and see *Espinasse* v. *Luffingham* (1846), 3 Jo. & Lat. 186; *Re Pedrotti's Will* (1859), 27 Beav. 583; *Re Richards, Uglow* v. *Richards*, [1902] 1 Ch. 76.

(*p*) *Re Stringer's Estate, Shaw* v. *Jones-Ford* (1877), 6 Ch. D. 1, C. A.; *Re Pounder, Williams* v. *Pounder* (1886), 56 L. J. (CH.) 113; compare *Re Jones, Richards* v. *Jones*, [1898] 1 Ch. 438.

SECT. 3. Construction of Powers.

merely a mention of one of the advantages attached to the absolute interest passing under the gift (*q*).

If there is a gift by will to a person indefinitely, with a superadded power of disposition by deed or will, the property vests in him absolutely at once (*r*), and this will be so although the first gift is a gift of income only, if it is unlimited in point of time (*s*).

Gifts of income with superadded power.

A gift of income for life, with liberty to use the capital if the income is not sufficient, creates a general power of appointment by deed or writing, but probably not by will, over the capital, where the word "sufficient" means sufficient for the desires of the beneficiary, but not where it means sufficient for his needs (*t*).

Gifts of personal estate with superadded limitations in favour of personal representatives.

15. A limitation of personal estate to the executors and administrators of A. has the same effect as a limitation of real estate to the right heirs of A. (*u*). Consequently a gift to one for life, with remainder as he shall appoint, with remainder to his executors and administrators, is an absolute gift to him whether he appoint or not. So, too, such a gift to a married woman is an absolute gift to her sole and separate use (*a*) ; and the result is the same though the power be testamentary only (*b*), and whether it be contained in a will or in a settlement (*c*). If the ultimate limitation is to the personal representatives of the donee, this (whether in a will or in a deed) is *primâ facie* a limitation to the executors and administrators in their representative capacity (*d*). If the ultimate limitation is to the next of kin, or if, the limitation being to the personal representatives, these words are on the construction of the particular instrument read as equivalent to "next of kin" (*e*), the donee only takes an interest for life with a power of disposition.

Gifts of real estate.

16. If the subject-matter of the power is real estate, and there is a remainder in default of appointment to the heirs of the

(*q*) *Reid* v. *Atkinson* (1871), 5 I. R. Eq. 373, *per* CHRISTIAN, L.J., at p. 382.

(*r*) *Re Jones, Richards* v. *Jones*, [1898] 1 Ch. 438 ; *Howorth* v. *Dewell* (1860), 29 Beav. 18 ; *Doe* d. *Herbert* v. *Thomas* (1835), 3 Ad. & El. 123 ; but compare *Re Sanford, Sanford* v. *Sanford*, [1901] 1 Ch. 939.

(*s*) *Southouse* v. *Bate* (1851), 16 Beav. 132 ; *Weale* v. *Ollive* (No. 2) (1863), 32 Beav. 421 ; *Tredennick* v. *Tredennick*, [1900] 1 I. R. 354 ; and see *Re L'Herminier, Mounsey* v. *Buston*, [1894] 1 Ch. 675.

(*t*) *Re Richards, Uglow* v. *Richards*, [1902] 1 Ch. 76 ; *Re Pedrotti's Will* (1859), 27 Beav. 583.

(*u*) *Anderson* v. *Dawson* (1808), 15 Ves. 532, 536.

(*a*) *London Chartered Bank of Australia* v. *Lemprière* (1873), L. R. 4 P. C. 572, 595.

(*b*) *Holloway* v. *Clarkson* (1843), 2 Hare, 521 ; *Devall* v. *Dickens* (1845), 9 Jur. 550 ; *Page* v. *Soper* (1853), 11 Hare, 321 ; *Gardiner* v. *Young* (1876), 34 L. T. 348 ; *Re Onslow, Plowden* v. *Gayford* (1888), 39 Ch. D. 622 ; *Re Davenport, Turner* v. *King*, [1895] 1 Ch. 361.

(*c*) *Daniel* v. *Dudley* (1841), 1 Ph. 1 ; compare *Bulmer* v. *Jay* (1834), 3 My. & K. 197.

(*d*) *Saberton* v. *Skeels* (1830), 1 Russ. & M. 587 ; *Re Crawford's Trusts* (1854), 2 Drew. 230 ; *Re Wyndham's Trusts* (1865), L. R. 1 Eq. 290 ; *Alger* v. *Parrott* (1866), L. R. 3 Eq. 328 ; *Re Best's Settlement Trusts* (1874), L. R. 18 Eq. 686.

(*e*) *Anderson* v. *Dawson, supra ; Baines* v. *Ottey* (1832), 1 My. & K. 465 ; *Daniel* v. *Dudley, supra*, at p. 6 ; *Briggs* v. *Upton* (1872), 7 Ch. App. 376.

life tenant, the life estate and the fee coalesce by the rule in *Shelley's Case* (*f*). So, too, a devise to A. for life, and after his death to the heirs of his body as he shall by deed or will appoint, and in default of appointment to the heirs of the body of A. as tenants in common, with a devise over in fee for want of such issue, gives A. an estate tail (*g*).

Operation of rule in *Shelley's Case.*

17. Clear words which would create an estate tail in realty generally give an absolute interest in personalty (*h*).

Nature of interest in personalty created by entailing words.

18. The word "issue" in a will *primâ facie* means the same thing as "heirs of the body," and is to be construed as a word of limitation (*i*), and in particular if there is a gift over on general failure of issue (*k*). The existence of a power of appointment among issue does not vary the case, and if there are words of distribution, together with words which would carry an estate in fee, attached to the gift to the issue, whether such gift be express or implied, the ancestor takes an estate for life only. If the fee is vested in the issue, whether by direct words of limitation, or by implication from a power to appoint the fee to them, or otherwise, there is no need to imply an estate tail in the parent for the purpose of carrying out the intention that the estate should not go over until the exhaustion of the particular line, and the parent's interest is limited to an estate for life with a superadded power of appointment (*l*).

Construction of "issue."

19. A power to A. to appoint real or personal estate after his own death is not rendered testamentary only by the mere reference to his death (*m*), but, if any words are used which are inapplicable to an execution by writing *inter vivos*, or if an intention otherwise appears to confine the exercise of the power to an execution by will, it is testamentary only (*n*).

Construction of powers as testamentary,

(*f*) (1581) 1 Co. Rep. 93 b; *Richardson* v. *Harrison* (1885), 16 Q. B. D. 85, C. A. If the word "heirs" refers to persons designate, *Shelley's Case* (1581), 1 Co. Rep. 93 b, does not apply (*Brookman* v. *Smith* (1871), L. R. 6 Exch. 291; *Evans* v. *Evans*, [1892] 2 Ch. 173, C. A.). For the rule in *Shelley's Case*, *supra*, see title REAL PROPERTY AND CHATTELS REAL.

(*g*) *Jesson* v. *Wright* (1820), 2 Bli. 1, H. L.; *Doe* d. *Cole* v. *Goldsmith* (1816), 7 Taunt. 209.

(*h*) *Forth* v. *Chapman* (1720), 1 P. Wms. 663; *Re Wynch's Trusts, Ex parte Wynch* (1854), 5 De G. M. & G. 188, 206, C. A.; *Re Jeaffreson's Trusts* (1866), L. R. 2 Eq. 276; and see title PERSONAL PROPERTY, Vol. XXII., p. 414.

(*i*) *Slater* v. *Dangerfield* (1846), 15 M. & W. 263; *Pelham Clinton* v. *Newcastle* (*Duke*), [1902] 1 Ch. 34, C. A.; affirmed [1903] A. C. 111. As to the general rules for the interpretation of instruments, see titles DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 433 *et seq.*; WILLS.

(*k*) *Roddy* v. *Fitzgerald* (1858), 6 H. L. Cas. 823.

(*l*) *Roddy* v. *Fitzgerald*, *supra*, at p. 855; *Bradley* v. *Cartwright* (1867), L. R. 2 C. P. 511. As to the use of the word "issue" as a word of limitation and otherwise, see title WILLS.

(*m*) *Anon.* (1578), 3 Leon. 71; *Re Davids' Trusts* (1859), John. 495 *Tomlinson* v. *Dighton* (1711), 1 P. Wms. 149; *Ex parte Williams* (1819), 1 Jac. & W. 89; *Humble* v. *Bowman* (1877), 47 L. J. (CH.) 62; *Re Jackson's Will* (1879), 13 Ch. D. 189; but see, *contra*, *Kennedy* v. *Kingston* (1821), 2 Jac. & W. 431; *Reid* v. *Reid* (1858), 25 Beav. 469; *Freeland* v. *Pearson* (1867), L. R. 3 Eq. 658; *Archibald* v. *Wright* (1838), 9 Sim. 161.

(*n*) *Doe* d. *Thorley* v. *Thorley* (1809), 10 East, 438; *Walsh* v. *Wallinger* (1830), 2 Russ. & M. 78; *Paul* v. *Hewetson* (1833), 2 My. & K. 434.

SECT. 3. Construction of Powers.

20. A gift over in default of the exercise of the power, not being a mere residuary gift, is evidence of an intention to create a power and not to give an absolute interest (*o*), as is the fact that the donee is under some disability which the donor cannot remove (*p*).

Gift over in default of exercise.

21. If an estate for life is severed from the power of appointment for the purpose of introducing other distinct and separate contingent estates which never, in fact, arise, the court may in a proper case infer that the donee takes not a mere life estate with a power of appointment, but absolutely (*q*).

Life estate severed from power.

Absolute gift with power and gift over.

22. Where there is an absolute gift, whether of realty or of personalty, followed by words sounding like a power, whether general or limited, and, *semble*, whether by deed or will, with a gift over if it is not exercised, the gift over is repugnant and void (*r*).

Powers of personal representatives over real estate.

23. By the Land Transfer Act, 1897 (*s*), the executors or administrators of a deceased person are given the same powers over his real estate as they have over his chattels real. The Act (*s*) does not apply to the legal estate in copyholds nor to the estates of persons dying before the 1st January, 1898 (*t*), and in these cases the older decisions apply.

Power of sale.

24. All real estate, except copyholds (*u*), now devolves upon the executors, whether expressly devised to them or not (*x*), but questions may still arise in regard to the executors' power of sale in cases not governed by the Land Transfer Act, 1897 (*s*).

General rule before 1898.

The general rule before the 1st January, 1898, was that a devise of land to executors to sell passed an estate, but that (1) a devise

(*o*) *Re Maxwell's Will* (1857), 24 Beav. 246, 250; *Healy* v. *Donnery* (1853), 3 I. C. L. R. 213; compare *Re Brierley, Brierley* v. *Brierley* (1894), 43 W. R. 36, C. A.; *Re Weekes' Settlement*, [1897] 1 Ch. 289.

(*p*) *Reid* v. *Carleton*, [1905] 1 I. R. 147.

(*q*) *Re Maxwell's Will, supra; Goodtitle* d. *Pearson* v. *Otway* (1753), 2 Wils. 6; *Nowlan* v. *Walsh, Nowlan* v. *Wilde* (1851), 4 De G. & Sm. 584; Sugden, Powers, pp. 105, 108.

(*r*) *Re Mortlock's Trust* (1857), 3 K. & J. 456; *Hales* v. *Margerum* (1796), 3 Ves. 299; *Bull* v. *Kingston* (1816), 1 Mer. 314. This is an offshoot of the general rule of law that a gift over in the event of the death or intestacy of the person to whom an absolute interest is given is repugnant and void (*Holmes* v. *Godson* (1856), 8 De G. M. & G. 152, C. A.; *Gulliver* v. *Vaux* (1746), 8 De G. M. & G. 167, n.; *Lightburne* v. *Gill* (1764), 3 Bro. Parl. Cas. 250; *Re Dixon, Dixon* v. *Charlesworth*, [1903] 2 Ch. 458; *Coward* v. *Larkman* (1888), 60 L. T. 1, H. L.; *Parnell* v. *Boyd*, [1896] 2 I. R. 571, C. A.); and see title GIFTS, Vol. XV., p. 422. A doubt whether the rule applies where the power is testamentary only was raised in *Re Mortlock's Trust, supra*, and is supported by *Borton* v. *Borton* (1849), 16 Sim. 552; *Doe* d. *Stevenson* v. *Glover* (1845), 1 C. B. 448; but see, *contra*, *Weale* v. *Ollive* (No. 2) (1863), 32 Beav. 421; *Robinson* v. *Dusgate* (1690), 2 Vern. 181; *Maskelyne* v. *Maskelyne* (1775), Amb. 750; *Hixon* v. *Oliver* (1806), 13 Ves. 108; see also *Southouse* v. *Bate* (1851), 16 Beav. 132; *Elton* v. *Shephard* (1781), 1 Bro. C. C. 532.

(*s*) 60 & 61 Vict. c. 65.

(*t*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), ss. 1, 2; see titles EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 236, 238, 296, 298; SALE OF LAND.

(*u*) See titles COPYHOLDS, Vol. VIII., p. 89; EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 238.

(*x*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1.

that executors should sell the land, or (2) a devise that land should be sold by the executors, or (3) a devise of lands to be sold by the executors, only created a power (*y*).

Executors' power of sale although not named as donees.

25. A power of sale over lands may be created without express words, and although no donee is named, and enables the person who exercises it to pass the legal estate. If, in a will, there is a direction to sell, but the testator does not say by whom the sale is to be made, the executors are presumed to be intended, unless a contrary intention appear from the will, whether the money is to be applied in payment of debts or is given as legacies and is distributable by the executors (*a*). If, however, there is a devise in fee to any other person, no power of sale can be implied in the executors even though the devisee is a minor (*b*).

Executors' power independent of express direction to sell.

26. The power of the executors to sell real estate does not depend upon any express direction that the estate shall be sold, but if, from the whole purview of the will, it appears to have been the intention of the testator that his real estate should be sold, and the proceeds are to be distributed in such a manner as the executors alone can by law carry out, then there is an implied power given to them to sell the estate. The implication that the executors are to take the power arises from the fact that the money is to pass through their hands and to be distributed by them in the execution of their office, as in payment of debts and legacies, or it may be otherwise raised by evidence of intention on the face of the will. A mere division of real estate into shares would probably not be enough, but such a division, coupled with directions for investment of the shares, gives the executors a common law power if the real estate is not directly devised to any other person (*c*).

(*y*) Sugden, Powers, pp. 111—115; *Doe* d. *Hampton* v. *Shotter* (1838), 8 Ad. & El. 905; *R.* v. *Wilson* (1862), 3 B. & S. 201; *Lancaster* v. *Thornton* (1760), 2 Burr. 1027; *Knocker* v. *Bunbury* (1840), 6 Bing. (N. C.) 306; title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 236. This third proposition is not quite free from doubt; see Co. Litt. 113 a.

(*a*) Sugden, Powers, p. 117; 8 Vin. Abr. 463, tit. Devise (Q. e. pl. 1); *Newton* v. *Bennet* (1782), 1 Bro. C. C. 135; *Elton* v. *Harrison* (1674), 2 Swan. 276, n.; *Wareham* v. *Brown* (1690), 2 Vern. 153; *Carvill* v. *Carvill* (1694), 2 Rep. Ch. 156 [301]; *Allum* v. *Fryer* (1842), 3 Q. B. 442, 446; *Bentham* v. *Wiltshire* (1819), 4 Madd. 44; but see, *contra*, *Ward* v. *Devon* (1805), cited in *Forbes* v. *Peacock* (1840), 11 Sim. 152, 160; *Curtis* v. *Fulbrook* (1849), 8 Hare, 25, 278; *Anon.* (1574), 2 Leon. 220 (case 276), referred to, Sugden, Powers, p. 115; see also, *Pitt* v. *Pelham* (1670), 1 Cas. in Ch. 176, *sub nom. Pits* v. *Pelham*, 1 Lev. 304, H. L.; Sugden, Powers, pp. 116, 119. The fact that the distribution of the proceeds of sale is not necessarily entrusted to the executors *virtute officii* would not now be considered conclusive, but only some evidence of intention.

(*b*) *Patton* v. *Randall* (1820), 1 Jac. & W. 189, 196. If the produce of the sale of realty and of the conversion of personalty are treated as blended into one fund, this is sufficient evidence of intention to give the executors the power (*Tylden* v. *Hyde* (1825), 2 Sim. & St. 238).

(*c*) *Doe* d. *Jones* v. *Hughes* (1851), 6 Exch. 223. It is not enough to show that it would be more expedient to have the sale made by the executors than by the heir-at-law (*Mower* v. *Orr* (1849), 7 Hare, 473; but see, *contra*, *Cornick* v. *Pearce* (1848), 7 Hare, 477; *Greenway* v. *Greenway* (1860), 2 De G. F. & J. 128, C. A.; *Davies to Jones and Evans* (1883), 24 Ch. D. 190; *Flux* v. *Best* (1875), 23 W. R. 228; *Buchanan* v. *Angus*

SECT. 3. Construction of Powers.

Power of sale implied by charge for payment of debts.

27. The intention of the testator that the executor should take a power of sale over his real estate is sufficiently shown by his charging that estate with the payment of his debts. A mere general direction that his debts shall be paid effectually charges them upon all his real estate, whether the real estate is devised to the executors or not, and whether the testator effectually disposes of it or dies intestate as to it (*d*). But apart from the Law of Property Amendment Act, 1859 (*e*), the executor in such cases should not before the 1st January, 1898, convey the legal estate to the purchaser unless it was devised to him.

Extent of interest passing under power.

28. In the absence of any expression of a contrary intention, the donor is taken to have created a power to pass the whole of his estate and interest (*f*). Even before the Wills Act, 1837 (*g*), a power to appoint to or among particular objects authorised an appointment of the fee, although no words of inheritance were used, and the better opinion seems to be that a power to appoint to such persons as A. should choose equally authorised a limitation of the fee (*h*). Since the Act (*g*) a general devise without words of inheritance passes the fee, and gives the power over the fee to the person in whom a power of appointing the property is vested, although the power itself does not contain words of inheritance or words equivalent to them (*i*).

Powers created by reference to other powers.

29. Powers created by reference to other powers will be taken to be of the same nature and extent as such other powers, having regard to any change of donee, object, or circumstance. If, however, there is any contingency or restriction personal to the donee of the power to which reference is made, such contingency or restriction is not attached to the created power (*j*), and, if the original power is inconsistent with limitations and conditions to be attached

(1862), 4 Macq. 374, H. L.; *Re Cameron, Nixon* v. *Cameron* (1884), 26 Ch. D. 19, C. A.; *Re Cookes' Contract* (1877), 4 Ch. D. 454; *Re Wintle, Tucker* v. *Wintle*, [1896] 2 Ch. 711; *Carlisle* v. *Cooke*, [1905] 1 I. R. 269).

(*d*) *Shallcross* v. *Finden* (1798), 3 Ves. 738, 739. A mere direction to adjust and pay all claims is not sufficient (*Re Head's Trustees and Macdonald* (1890), 45 Ch. D. 310, C. A.; *Re Adams and Perry's Contract*, [1899] 1 Ch. 554). See, further, title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 236—238, 296—300.

(*e*) 22 & 23 Vict. c. 35 ("Lord St. Leonards' Act") s. 14: see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 236.

(*f*) *Alloway* v. *Alloway* (1843), 4 Dr. & War. 380; *Wykham* v. *Wykham* (1811), 18 Ves. 395, 415; *Tomlinson* v. *Dighton* (1711), 1 P. Wms. 149; *Bradley* v. *Cartwright* (1867), L. R. 2 C. P. 511.

(*g*) 7 Will. 4 & 1 Vict. c. 26.

(*h*) *Doe* d. *Chadwick* v. *Jackson* (1837), 1 Mood. & R. 553; *Saltonhall's Case* (1674), 2 Lev. 104, *sub nom. Liefe* v. *Saltingstone*, 1 Mod. Rep. 189; *R.* v. *Stafford* (*Marquis*) (1806), 7 East, 521; *Crozier* v. *Crozier* (1843), 3 Dr. & War. 353, 383.

(*i*) *Kenworthy* v. *Bate* (1802), 6 Ves. 793 (where the power was contained in a settlement); *Strutt* v. *Braithwaite* (1852), 5 De G. & Sm. 369; *Re L'Herminier, Mounsey* v. *Buston*, [1894] 1 Ch. 675; and see *Pugh* v. *Drew* (1869), 17 W. R. 988; *Re Whiston's Settlement, Lovatt* v. *Williamson*, [1894] 1 Ch. 661; *Re Tringham's Trusts, Tringham* v. *Greenhill*, [1904] 2 Ch. 487; *Re Oliver's Settlement, Evered* v. *Leigh*, [1905] 1 Ch. 191; *Re Thursby's Settlement, Grant* v. *Littledale*, [1910] 2 Ch. 181, C. A.

(*j*) *Harrington* (*Earl*) v. *Harrington* (*Countess Dowager*) (1868), L. R. 3 H. L. 295; *Morgan* v. *Rutson* (1848), 16 Sim. 234.

to the new one, the latter will be made to conform to the intention displayed by such limitations (*k*). If property is given to trustees subject to the powers contained in another settlement, the persons to exercise the new powers are *primâ facie* the trustees of the original settlement (*l*). If the words used are "such or the like" trusts and powers, this means corresponding, and not necessarily identical, trusts and powers (*m*).

Extent of incorporation of provisions by reference

30. A general reference to the trusts and powers of an existing will or settlement incorporates the trusts and powers referred to, but not the point of time when the benefits are to arise (*n*). A reference to the "uses" of another settlement may sometimes be enough to incorporate the powers in that settlement, though not expressly referred to. The implication of an intention to create or keep in existence a power by reference may be rebutted by other evidence of intention. It is a question of intention whether the effect of a second gift is to make the property therein contained a fund to be added and treated for all purposes as an accretion to the funds originally settled, or to create another settlement with referential trusts (*o*).

Restriction of powers.

31. A power expressly created in general terms by an executed instrument is not to be cut down except by express words (*p*), but if the instrument is executory the court may give effect to the intention of the instrument, although not stated in express terms. In the case of marriage articles this may more easily be done so as to give effect to the presumed intention in favour of issue (*q*), but in the case of wills the intention must be very clear to enable a general power to be cut down if expressly given (*r*). It has been held that the fact that a person has a limited power of appointment does not

(*k*) *Crossman* v. *Bevan* (1859), 27 Beav. 502; *Earle* v. *Barker* (1865), 11 H. L. Cas. 280.

(*l*) *Taylor* v. *Miles* (1860), 28 Beav. 411; and see *Shrewsbury* (*Earl*) v. *Keightley* (1866), L. R. 2 C. P. 130, Ex. Ch.

(*m*) *Re Smith, Bashford* v. *Chaplin* (1881), 45 L. T. 246; *Garde* v. *Garde* (1843), 3 Dr. & War. 435; *Marshall* v. *Baker* (1862), 31 Beav. 608.

(*n*) *Hare* v. *Hare* (1876), 24 W. R. 575; *Berchtoldt* (*Countess*) v. *Hertford* (*Marquis*) (1844), 7 Beav. 172; *Minton* v. *Kirwood* (1868), 3 Ch. App. 614.

(*o*) *Eustace* v. *Robinson* (1880), 7 L. R. Ir. 83, C. A.; *Re North, Meates* v. *Bishop* (1897), 76 L. T. 186; *Re Walpole's Marriage Settlement, Thomson* v. *Walpole*, [1903] 1 Ch. 928.

(*p*) *Minton* v. *Kirwood, supra*; *Peover* v. *Hassel* (1860), 1 John. & H. 341; *Wood* v. *Wood* (1870), L. R. 10 Eq. 220; *Meade King* v. *Warren* (1863), 32 Beav. 111; but see, *contra*, *Gould* v. *Gould* (1856), 2 Jur. (N. S.) 484; compare *Cardigan* (*Earl*) v. *Armitage* (1823), 2 B. & C. 197; *Harrison* v. *Symons* (1866), 14 W. R. 959; *Jones* v. *Davies* (1878), 8 Ch. D. 205. A power in a marriage settlement of charging certain sums in certain events must take effect when those events happen, and cannot be limited, controlled, or questioned in any degree on the ground that under different states of circumstances different results would be arrived at (*Knapp* v. *Knapp* (1871), L. R. 12 Eq. 238).

(*q*) *Bristow* v. *Warde* (1794), 2 Ves. 336; *Mildmay's Case* (1584), 1 Co. Rep. 175 a; *Cooke* v. *Briscoe* (1838), 1 Dr. & Wal. 596; *Swift* v. *Swift* (1836), 8 Sim. 168; Sugden, Powers, p. 439; *Tasker* v. *Small* (1834), 6 Sim. 625.

(*r*) *Mackinley* v. *Sison* (1837), 8 Sim. 561; *Re Jefferys' Trusts* (1872), L. R. 14 Eq. 136; compare *Richardson* v. *Harrison* (1885), 16 Q. B. D. 85 C. A.; see title WILLS.

SECT. 3. **Construction of Powers.**

control the generality of words of limitation under which he takes an absolute estate in default of appointment, but the expressed intention must in every case prevail (*s*).

Additional or substitutional powers.

32. If a power of sale, jointuring, or the like already exists, and a second similar power is conferred on the same donee, it is in each case a question of intention whether the second power is intended to be additional or substitutional. If both powers are given to the same person for the same object, and would be a double burden upon the property subjected to them, the presumption is in favour of substitution (*t*), but this presumption does not arise if the powers do not constitute a burden (*a*). If the second power is created by way of reference to the first, the inference is against a duplication of charges (*b*).

Object of power.

33. The object of the power may be of any nature not infringing any rule of law or equity. It may be to revoke, either wholly or in part, the limitations made by the settlement or to raise concurrent interests for different purposes (*c*). It must not be illegal, and must therefore not infringe the rule against perpetuities (*d*), but a power is not bad for remoteness because some of the objects thereof are not within the limits allowed by the law, for those may be selected to whom a valid appointment in this respect may be made (*e*); and limitations in default of appointment under a power which is void for remoteness are not invalid, unless they themselves contravene the rule against perpetuities (*f*).

Part III.—Exercise of Powers.

SECT. 1.—*Personal Capacity.*

General rule.

34. Every person who is capable of disposing of an estate actually vested in him may exercise a power over land, and in

(*s*) *Barrymore* v. *Ellis* (1836), 8 Sim. 1; *Medley* v. *Horton* (1844), 14 Sim. 222; but see, *contra*, *Brown* v. *Bamford* (1842), 11 Sim. 127, reversed (1846), 1 Ph. 620; compare *Harnett* v. *Macdougall* (1845), 8 Beav. 187; *Moore* v. *Moore* (1844), 1 Coll. 54; and see *Van Grutten* v. *Foxwell* (*Third Appeal*) (1901), 84 L. T. 545, H. L.

(*t*) *Wigsell* v. *Smith* (1823), 1 Sim. & St. 321.

(*a*) *Boyd* v. *Petrie* (1872), 7 Ch. App. 385.

(*b*) *Hindle* v. *Taylor* (1855), 5 De G. M. & G. 577; *Cooper* v. *Macdonald* (1873), L. R. 16 Eq. 258; *Eustace* v. *Robinson* (1880), 7 L. R. Ir. 83, C. A.; *Trew* v. *Perpetual Trustee Co.*, [1895] A. C. 264, P. C.

(*c*) Whether the power extends to the whole or only to a part depends upon the intention appearing upon the particular settlement (*Freke* v. *Barrington* (*Lord*) (1791), 3 Bro. C. C. 274).

(*d*) See title PERPETUITIES, Vol. XXII., pp. 293 *et seq.*

(*e*) *Attenborough* v. *Attenborough* (1855), 1 K. & J. 296; *Hockley* v. *Mawbey* (1790), 1 Ves. 143, 150; *Slark* v. *Dakyns* (1874), 10 Ch. App. 35; *Griffith* v. *Pownall* (1843), 13 Sim. 393; *Re Veale's Trusts* (1876), 4 Ch. D. 61; affirmed (1877), 5 Ch. D. 622, C. A.; *Re Blew*, *Blew* v. *Gunner*, [1906] 1 Ch. 624.

(*f*) *Re Abbott*, *Peacock* v. *Frigout*, [1893] 1 Ch. 54; see title PERPETUITIES, Vol. XXII., pp. 293 *et seq.*

like manner every such person may exercise powers affecting personalty (*g*).

SECT. 2.—*Delegation of Powers.*

Distinction to be considered.

35. In considering the delegation of powers the distinction between powers amounting to absolute ownership, those implying personal discretion, and powers to do merely ministerial acts must be borne in mind. The rule is that a power involving the exercise of personal discretion by the donee cannot be delegated (*h*), but a power which is merely ministerial and involves no personal discretion can be delegated (*i*).

(*g*) Sugden, Powers, p. 153. As to an undischarged felon, see *Mainprice* v. *Pearson* (1877), 25 W. R. 768; and as to the power of the administrator of a convict's estate to disentail, see *Re Gaskell and Walters' Contract*, [1906] 2 Ch. 1, C. A.; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 429. As to married women, see title HUSBAND AND WIFE, Vol. XVI., pp. 386 *et seq.*; as to infants, see title INFANTS AND CHILDREN, Vol. XVII., pp. 53, 54; as to persons mentally incapable, see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 396 *et seq.*, 448, 449.

(*h*) *Combes's Case* (1613), 9 Co. Rep. 75 a; *De Bussche* v. *Alt* (1878), 8 Ch. D. 286, 310, C. A.; and see title AGENCY, Vol. I., pp. 149, 169, 170. The attempted delegation is a mere nullity and has no effect (*Carr* v. *Atkinson* (1872), L. R. 14 Eq. 397), and it makes no difference whether the objects of the delegated power are or are not objects of the original power (*Williamson* v. *Farwell* (1887), 35 Ch. D. 128, 141; see *Stockbridge* v. *Story* (1871), 19 W. R. 1049; *Webb* v. *Sadler* (1873), 8 Ch. App. 419; *Burnaby* v. *Baillie* (1889), 42 Ch. D. 282). A person cannot delegate the power to consent to the execution of a power (*Hawkins* v. *Kemp* (1803), 3 East, 410), unless a right to delegate can be implied on construction, from the obvious impossibility at the date of the deed creating the power that the donee can always act in person (*Stuart* v. *Norton* (1860), 9 W. R. 320, P. C.). A trustee cannot delegate a power of sale to his co-trustees in order to buy himself (*Bulteel* v. *Abinger* (*Lord*) (1842), 6 Jur. 410); see title TRUSTS AND TRUSTEES. A tenant for life under the Settled Land Acts (see title SETTLEMENTS) cannot delegate his powers (Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 50). Powers of leasing are powers requiring the exercise of personal discretion (*Robson* v. *Flight* (1865), 4 De G. J. & Sm. 608, 614).

(*i*) *Ingram* v. *Ingram* (1700), 2 Atk. 88; *Alexander* v. *Alexander* (1755), 2 Ves. Sen. 640; *A.-G.* v. *Berryman* (1752), cited 2 Ves. Sen. 643; *Chester* v. *Chadwick* (1842), 13 Sim. 102. A corporation can delegate the implied power of electing corporators in order to preserve the corporation to a select part of themselves, but not to strangers (*R.* v. *Bird* (1811), 13 East, 367); and a majority of such selected corporators can bind the minority (*R.* v. *Monday* (1777), 2 Cowp. 530; *R.* v. *Varlo* (1775), 1 Cowp. 248; *Smyth* v. *Darley* (1849), 2 H. L. Cas. 789); see title CORPORATIONS, Vol. VIII., p. 345. Powers operating under the Statute of Uses (27 Hen. 8, c. 10) must be strictly construed, and can only be exercised so as to pass the legal estate by the person named; see *M'Queen* v. *Farquhar* (1805), 11 Ves. 467, 475; *Newman* v. *Warner* (1851), 1 Sim. (N. S.) 457; but see *Brassey* v. *Chalmers, Seacome* v. *Holme* (1854), 4 De G. M. & G. 528, C. A.; the Trustees and Mortgagees Act, 1860 (23 & 24 Vict. c. 145), s. 27, Lord Cranworth's Act (now repealed), and the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 22. Although a trustee cannot delegate his discretion, there is nothing improper in his consulting beneficiaries; see *Fraser* v. *Murdoch* (1881), 6 App. Cas. 855, 864; *A.-G.* v. *Scott* (1750), 1 Ves. Sen. 413; *Offen* v. *Harman* (1859), 1 De G. F. & J. 253, C. A.; *Re Hetling and Merton's Contract*, [1893] 3 Ch. 269, 280, C. A.; *Re Airey, Airey* v. *Stapleton*, [1897] 1 Ch. 164; title TRUSTS AND TRUSTEES. A father may give two surviving guardians the power to nominate a person in the place of a guardian dying

SECT. 2. **Delegation of Powers.**

A general power equivalent to absolute ownership can be delegated (*j*), and such delegation may be either voluntary or involuntary, that is, by operation of law (*k*).

SECT. 3.—*Survivorship of Powers.*

Distinction to be considered.

36. In considering the survivorship of powers it is necessary to distinguish between powers and trusts: powers are never imperative, but are at the discretion of the donee; trusts are imperative, and if the trustees die or refuse to act the court will supply others in their place; a trust is never allowed to fail for want of a trustee (*l*). Mere powers are strictly construed and can be exercised only by the persons designated either expressly or by reference as donees of the power; such persons may in the case of powers annexed to a trust estate be the persons to whom the estate from time to time may come (*m*).

(*In the Goods of Parnell* (1872), L. R. 2 P. & D. 379; see title INFANTS AND CHILDREN, Vol. XVII., p. 124).

(*j*) *Combes's Case* (1613), 9 Co. Rep. 75 a; *White* v. *Wilson* (1852), 1 Drew. 298, 304. For this purpose an executor is regarded as absolute owner of the testator's personal property, and may delegate his power to collect debts (*Vane* (*Earl*) v. *Rigden* (1870), 5 Ch. App. 663). A mortgage of leaseholds by the executor may contain a power of sale (*Russell* v. *Plaice* (1854), 18 Beav. 21; compare *Sanders* v. *Richards* (1846), 2 Coll. 568; and see *Cruikshank* v. *Duffin* (1872), L. R. 13 Eq. 555; *Ricketts* v. *Lewis* (1882), 20 Ch. D. 745; *Thorne* v. *Thorne*, [1893] 3 Ch. 196; title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 296). A power to mortgage authorises a mortgage containing a power of sale (*Bridges* v. *Longman* (1857), 24 Beav. 27; *Bennett* v. *Wyndham* (1856), 23 Beav. 521; *Selby* v. *Cooling* (1857), 23 Beav. 418; *Cook* v. *Dawson* (1861), 29 Beav. 123, 128; *Re Chawner's Will* (1869), L. R. 8 Eq. 569; and see *Pearson* v. *Benson* (1860), 28 Beav. 598; see, *contra*, *Drake* v. *Whitmore* (1852), 19 L. T. (o. s.) 243: *Clarke* v. *Royal Panopticon* (1857), 4 Drew. 26; see also title MORTGAGE, Vol. XXI., p. 107.

(*k*) (1) Bankruptcy; see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 145; (2) judgments operating as a charge upon any property over which there may be a power of disposition, see Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 13; Law of Property Amendment Act, 1860 (23 & 24 Vict. c. 38); Judgments Act, 1864 (27 & 28 Vict. c. 112); titles EXECUTION, Vol. XIV., pp. 69, 70; JUDGMENTS AND ORDERS, Vol. XVIII., p. 220; (3) lunacy; see Lunacy Act, 1890 (53 & 54 Vict. c. 5), ss. 20, 128, 129; and see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 414, 456.

(*l*) See title TRUSTS AND TRUSTEES.

(*m*) *Cole* v. *Wade* (1807), 16 Ves. 27; *Townsend* v. *Wilson* (1818), 1 B. & Ald. 608; *Hale* v. *Dewes* (1821), Jac. 189; *Lane* v. *Debenham* (1853), 11 Hare, 188; *Cooke* v. *Crawford* (1842), 13 Sim. 91; *Mortimer* v. *Ireland* (1847), 11 Jur. 721; *Re Morton and Hallett* (1880), 15 Ch. D. 143, C. A.; *Re Ingleby and Boak and Norwich Union Insurance Co.* (1883), 13 L. R. Ir. 326; *Re Pixton and Tong's Contract*, [1897] W. N. 178; *Re Rumney and Smith*, [1897] 2 Ch. 351, C. A.; *Re Bacon, Toovey* v. *Turner*, [1907] 1 Ch. 475; *Re Waidanis, Rivers* v. *Waidanis*, [1908] 1 Ch. 123; *Re Crunden and Meux's Contract*, [1909] 1 Ch. 690; see *Re Routledge's Trusts, Routledge* v. *Saul*, [1909] 1 Ch. 280; *Re Davies and Kent's Contract*, [1910] 2 Ch. 35, C. A.; but see, *contra*, *Osborne to Rowlett* (1880), 13 Ch. D. 774; and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 304. A power to A. and B. and their heirs is exercisable by B. and the heir of A. after the death of A. (*Mansell* (*Lady*) v. *Mansell* (*Sir E.*) (1757), Wilm. 36, 51; *Townsend* v. *Wilson*, *supra*; *Hale* v. *Dewes*, *supra*). A power to A. and his assigns is exercisable by the grantee, devisee, heir, or executor of the donee (*How*

SECT. 3. Survivorship of Powers.

Rules as to survivorship.

Apart from the Conveyancing Acts, 1881 and 1882 (*n*), a bare power given to two or more named persons cannot be exercised by the survivor (*o*), but when the power is given to three or more generally, as to "my trustees," "my sons," and not by name, the authority survives whilst the plural number remains (*p*); and where the instrument creating the power came into operation since the 31st December, 1881, after the death of the survivor the authority now survives to his personal representative until new trustees are appointed (*q*).

SECT. 4.—*Powers Annexed to an Office.*

Powers given to persons or annexed to office.

37. When a power is annexed to an office all persons who fill the office can exercise the power, but if the power is given to persons named officially (*r*), it is a question of intention in each case whether the power is given to the persons or annexed to the office (*s*). If, however, the power arises by implication, it attaches to the office and may be exercised by the holder for the time being (*t*).

v. *Whitfield* (1679), 1 Vent. 338; *Saloway* v. *Strawbridge* (1855), 1 K. & J. 371; affirmed 7 De G. M. & G. 594; *Hind* v. *Poole* (1855), 1 K. & J. 371). A power of sale given to a person, his executors and administrators, can be well executed by an adminstrator *durante minoris ætate* (*Monsell* v. *Armstrong* (1872), L. R. 14 Eq. 423; *Re Thompson and M'Williams' Contract*, [1896] 1 I. R. 356, C. A.; but see *Re Robinson and Sords* (1879), 3 L. R. Ir. 429). The only limit to his authority is the duration of the minority (*Re Cope, Cope* v. *Cope* (1880), 16 Ch. D. 49; see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 198). A discretionary power to carry on a business, given to an executor who renounces, cannot, however, be exercised by the administrator (*Lambert* v. *Rendle* (1863), 3 New Rep. 247). By the Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), s. 8, the legal personal representative of a sole trustee, or, where there was more than one, the legal personal representative of the last surviving trustee, can exercise any power or trust which the sole or last surviving trustee could have exercised; and see the text, *infra*.

(*n*) 44 & 45 Vict. c. 41; 45 & 46 Vict. c. 39; and see note (*m*), p. 16, *ante*.

(*o*) *Mansell* (*Lady*) v. *Mansell* (*Sir E.*) (1757), Wilm. 36, 51. This rule applies to a power of revocation (*Montefiore* v. *Browne* (1858), 7 H. L. Cas. 241), and to a power to consent (*Atwaters* v. *Birt* (1601), Cro. Eliz. 856), but does not apply to protectors of settlements (*Bell* v. *Holtby* (1873), L. R. 15 Eq. 178; *Re Bayley-Worthington and Cohen's Contract*, [1908] 1 Ch. 26, C. A.; affirmed [1908] A. C. 97; and see *Clarke* v. *Chamberlin* (1880), 16 Ch. D. 176); see, further, title SETTLEMENTS.

(*p*) *Lee* v. *Vincent* (1584), Cro. Eliz. 26; *Jeffreys* v. *Marshall* (1870), 19 W. R. 94; but see, *contra*, *Sykes* v. *Sheard* (1863), 2 De G. J. & Sm. 6, C. A.

(*q*) Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), s. 8; and see title TRUSTS AND TRUSTEES.

(*r*) For example, "to my executors, A. & B."

(*s*) *Howell* v. *Barnes* (1634), Cro. Car. 382; *Eaton* v. *Smith* (1839), 2 Beav. 236; *Brassey* v. *Chambers, Seacome* v. *Holme* (1853), 4 De G. M. & G. 528, C. A.; *Byam* v. *Byam* (1854), 19 Beav. 58; *Bartley* v. *Bartley* (1855), 3 Drew. 384; *Re Cookes' Contract* (1877), 4 Ch. D. 454; *Devitt* v. *Kearney* (1883), 13 L. R. Ir. 45, C. A.; *Delany* v. *Delany* (1885), 15 L. R. Ir. 55; *Re Mellor, Ex parte Butcher* (1880), 13 Ch. D. 465, C. A.; *Crawford* v. *Forshaw*, [1891] 2 Ch. 261, C. A.; *Re Smith, Eastick* v. *Smith*, [1904] 1 Ch. 139; see *White* v. *M'Dermott* (1872), 7 I. R. C. L. 1; *Re Bacon, Toovey* v. *Turner*, [1907] 1 Ch. 475; but see, *contra*, *Danne* v. *Annas* (1562), Dyer, 219 a; *Lock* v. *Loggin* (1584), 1 And. 145; *Anon.* (1560), Dyer, 177 a; and see *Robson* v. *Flight* (1865), 4 De G. J. & Sm. 608, 613; title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 304.

(*t*) *Anon.* (1574), 2 Leon. 220 (case 276); *Anon.* (1580), Dyer, 371 b;

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SECT. 5.—*Requisites for Valid Execution of a Power.*

SUB-SECT. 1.—*In General.*

Strict observance of every requirement.

38. Subject to the statutory rules in regard to powers executed by deed or will (*u*), every circumstance, required by the instrument creating the power to accompany the execution of it, must be strictly observed (*v*). The author of a power may surround its execution with as many solemnities and direct it to be carried out by such instruments, at such times, and with the consent (*x*) of, or by, such persons as he pleases, provided that he does not transgress the rules of law or equity.

SUB-SECT. 2.—*As to Deeds.*

Execution of deeds.

39. Since the 13th August, 1859, a deed, executed in the presence of and attested by two or more witnesses in the manner in which deeds are ordinarily executed and attested, is, so far as respects the execution and attestation thereof, a valid exercise of a power of appointment by deed, or by any instrument in writing not testamentary, notwithstanding that it shall have been expressly required that a deed or instrument in writing made in exercise of such power should be executed or attested with some additional or other form of execution or attestation or solemnity (*a*).

SUB-SECT. 3.—*As to Wills.*

Execution of wills.

40. In the case of wills made after the 31st December, 1837, no appointment made by will in exercise of any power is valid, unless the same is executed as a will in writing signed and acknowledged by the testator in the presence of two witnesses, and every will so executed is, so far as regards its execution and attestation, a valid execution of a power of appointment by will, although it shall have been expressly required that a will made in execution

and see *Milward* v. *Moore* (1580), Sav. 72; *Forbes* v. *Peacock* (1843), 11 M. & W. 630; *Sabin* v. *Heape* (1859), 27 Beav. 553. In all cases of trustees since the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), powers survive; see Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 38, repealed by the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 22; and as to disclaimer of powers, see Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 6; *Re Fisher and Haslett* (1884), 13 L. R. Ir. 546; *Devitt* v. *Kearney* (1883), 13 L. R. Ir. 45, C. A.; and *Thompson* v. *Todd* (1864), 15 I. Ch. R. 337.

(*u*) See the text, *infra*, and p. 26, *post*.

(*v*) *Rutland* v. *Doe* d. *Wythe* (1843), 10 Cl. & Fin. 419, H. L.

(*x*) *Bateman* v. *Davis* (1818), 3 Madd. 98; *Cocker* v. *Quayle* (1830), 1 Russ. & M. 535; *Wiles* v. *Gresham* (1854), 2 Drew. 258, 267. But where the person whose consent is required is under disability, see *Re T.* (1880), 15 Ch. D. 78; *Re Neave's Estates* (1880), 28 W. R. 976; *Re Cardross's Settlement* (1878), 7 Ch. D. 728; title INFANTS AND CHILDREN, Vol. XVII., p. 54. In some cases it may be presumed that the deed of appointment is duly executed although the deed containing the terms of the power is lost (*Hougham* v. *Sandys* (1827), 2 Sim. 95); and see *Skipwith* v. *Shirley* (1805), 11 Ves. 64; *Re Airey*, *Airey* v. *Stapleton*, [1897] 1 Ch. 164 (where the deed of appointment was lost).

(*a*) Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), s. 12. The statute is not retrospective. The donee may, if he pleases, execute the power otherwise than by an instrument executed and attested as an ordinary deed, but in that case he must follow the exact terms of the power; see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 395.

of such power should be executed with some additional or other form of execution or solemnity (*b*). If a power is exercisable "in writing" and the donee exercises it by writing in the nature of a will, this is an appointment by will within the meaning of the above provision, and the power is not properly exercised unless the writing is duly executed as a will (*c*).

Power, exercisable "in writing" exercised by will.

41. If the power is exercised by a person domiciled in a foreign country by a will made according to the law of that country, the will is admitted to probate in England although it is not executed in accordance with the forms required by the Wills Act, 1837 (*d*), and the exercise may therefore be valid notwithstanding the want of attestation or some other requirement of the Act (*d*).

Power executed by will made according to foreign law.

42. An English power of appointment by will is properly exercised if it is exercised by a will in the English form, even though the person appointing is domiciled abroad and the will is not properly executed according to the law of the domicil, and the will is admissible to probate for the purpose of the appointment even if not admissible for any other purpose (*e*). In the case of a special power, the appointment is valid although the effect is to dispose of the property in a manner in which the donee could not dispose of his own property according to the law of his domicil: in the case of a general power, the exercise of the power makes the property assets of the appointor so far as is necessary to pay debts, but not necessarily for all purposes; if, on construction he has made it his own for all purposes, he can dispose of the beneficial interest only to the same extent and in the same manner as his own property of which he has made it part; but, if he has not appointed

Power executed by will in English form of person domiciled abroad.

(*b*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), ss. 9, 10. It is submitted that, having regard to *ibid.*, ss. 11, 27, a nuncupative will by a sailor or soldier on active service, making a general gift of his personal estate, would exercise a general power of appointment over personal estate. The statute is not retrospective, but it refers to powers created since as well as to those created before the Act, notwithstanding the words "shall have been required" (*Hubbard* v. *Lees and Purden* (1866), L. R. 1 Exch. 255).

(*c*) *Re Daly's Settlement* (1858), 25 Beav. 456; *Re Barnett, Dawes* v. *Ixer*, [1908] 1 Ch. 402, not following *Re Broad, Smith* v. *Draeger*, [1901] 2 Ch. 86; compare p. 27, *post*. The Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 1, interprets the word "will" as including "an appointment by will or by writing in the nature of a will in exercise of a power"; and see *Re Edmonstone, Bevan* v. *Edmonstone* (1901), 49 W. R. 555; title WILLS.

(*d*) *D'Huart* v. *Harkness* (1865), 34 Beav. 324; *Re Harman, Lloyd* v. *Tardy*, [1894] 3 Ch. 607; *Re Price, Tomlin* v. *Latter*, [1900] 1 Ch. 442; but see *Re D'Este's Settlement Trusts, Poulter* v. *D'Este*, [1903] 1 Ch. 898; *Re Scholefield, Scholefield* v. *St. John, Re Young, Smith* v. *St. John*, [1905] 2 Ch. 408; and see titles CONFLICT OF LAWS, Vol. VI., pp. 228, 229; EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 158. As to the necessity for compliance in such cases with provisions requiring a special form of execution, see title CONFLICT OF LAWS, Vol. VI., pp. 228, note (*e*), 229. As to powers contained in wills rendered valid by the Wills Act, 1861 (24 & 25 Vict. c. 114), see title CONFLICT OF LAWS, Vol. VI., pp. 228, 229.

(*e*) *Tatnall* v. *Hankey* (1838), 2 Moo. P. C. C. 342; *Barnes* v. *Vincent* (1846), 5 Moo. P. C. C. 201; *In the Goods of Alexander* (1860), 6 Jur. (N. S.) 354; *In the Goods of Hallyburton* (1866), L. R. 1 P. & D. 90; *In the Goods of Huber*, [1896] P. 209; *Re Baker's Settlement Trusts, Hunt* v. *Baker*, [1908] W. N. 161; *Murphy* v. *Deichler*, [1909] A. C. 446; see title CONFLICT OF LAWS, Vol. VI., p. 228, note (*e*).

SECT. 5. **Requisites for Valid Execution of a Power.**

so as to make it his own for all purposes, for example, if he has appointed to A. in such a manner that if A. predeceased him the persons entitled in default would take, then his disposition to A. takes effect although it would be invalid wholly or in part by the law of his domicil if it was his own property (*f*).

SUB-SECT. 4.—*Operation of Lord St. Leonards' Act and the Wills Act.*

Essential requisites to execution not dispensed with.

43. The provisions of the statutes above referred to (*g*) have rendered unnecessary the strict observance of mere formalities, but they do not operate to dispense with any essential requisite to the execution of a power, and nothing can make good an execution which defeats what the person creating the power has declared by express or necessary implication to be a material part of his intention.

Presumption as to valid execution.

44. Subject to the provisions of the statute already referred to (*h*), if a power requires two or more formalities to be attested and the attestation clause expressly certifies that one of such formalities has been performed, then the power is not well executed. If, however, the attestation, though a limited and special one, is of such a nature that it must necessarily be inferred that the other requisites were complied with, or if the attestation is general, then the execution is valid unless the contrary is shown (*i*).

SUB-SECT. 5.—*Consent to Exercise of Powers.*

When consent must be given.

45. The consent of any person required to consent, and also all formalities annexed to the execution, must be respectively given and perfected during the lifetime of the donee of the power (*k*). If a power is given to be executed with the consent of one or more persons, and that one or any one of the others dies, the power is gone (*l*).

(*f*) *Pouey* v. *Hordern*, [1900] 1 Ch. 492 (a case of a special power); *Re Pryce, Lawford* v. *Pryce*, [1911] 2 Ch. 286, C. A., following *Re Hadley, Johnson* v. *Hadley*, [1909] 1 Ch. 20, C. A., and distinguishing *Re Bald, Bald* v. *Bald* (1897), 76 L. T. 462, and *Re Mégret, Tweedie* v. *Maunder*, [1901] 1 Ch. 547.

(*g*) *I.e.*, the Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35) (Lord St. Leonards' Act), and the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26); see p. 18, *ante*.

(*h*) *I.e.*, the Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), s. 12; see p. 18, *ante*.

(*i*) *Vincent* v. *Sodor and Man* (*Bishop*) (1851), 4 De G. & Sm. 294; *Newton* v. *Ricketts* (1861), 9 H. L. Cas. 262; *Wright* v. *Wakeford* (1811), 17 Ves. 454; *Stanhope* v. *Keir* (1824), 2 Sim. & St. 37; *Simeon* v. *Simeon* (1831), 4 Sim. 555; *Smith* v. *Adkins* (1872), L. R. 14 Eq. 402; *Mackinley* v. *Sison* (1837), 8 Sim. 561; *Waterman* v. *Smith* (1840), 9 Sim. 629; *Bartholomew* v. *Harris* (1845), 15 Sim. 78; *Burdett* v. *Spilsbury* (1843), 10 Cl. & Fin. 340, H. L.; *Warren* v. *Postlethwaite* (1845), 2 Coll. 108; *Re Wrey's Trust* (1850), 17 Sim. 201.

(*k*) *Hawkins* v. *Kemp* (1803), 3 East, 410; *Offen* v. *Harman* (1859), 1 De G. F. & J. 253, C. A. Since the Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), the time for perfecting accompanying formalities is less important; but compare *Wright* v. *Wakeford* (1812), 4 Taunt., 213; *Doe* d. *Mansfield* v. *Peach* (1814), 2 M. & S. 576; *Newman* v. *Warner* (1851), 1 Sim. (N. S.) 457.

(*l*) *Hutton* v. *Simpson* (1716), 2 Vern. 722; *Atwaters* v. *Birt* (1601),

SECT. 6.—*Contingent Powers.*

SUB-SECT. 1.—*Powers to be Exercised on a Contingency.*

Execution before contingency.

46. A power presently given to a designated person to be exercised, whether by deed or will, upon a contingency, can be well executed before the contingency happens, and the execution will take effect on the subsequent happening of the event (*m*). If, before the event happens, the donee covenants for valuable consideration to exercise the power and fails to do so, the court will, if the power is exercisable by deed, aid the defective execution and treat the power as properly executed as from the date of the happening of the event (*n*); but if the power is exercisable by will only the remedy, if any, will be an action for damages (*o*).

SUB-SECT. 2.—*Powers to Arise on a Contingency.*

Defective execution aided.

47. A power which is not to arise until a future or contingent event happens, or until a condition is fulfilled, cannot be exercised until the event happens or the condition is fulfilled, for until then it has no existence (*p*). So, too, where the performance of an

Cro. Eliz. 856; *Danne* v. *Annas* (1562), Dyer, 219 a; *Franklin's Case* (undated) cited in *Anon.* (1564), Moore (K. B.), 61, 62, and in *Hewett* v. *Hewett* (1765), 2 Eden, 332, 333; but a contrary intention may appear; compare *Green* v. *Green* (1845), 2 Jo. & Lat. 529.

(*m*) *Wandesforde* v. *Carrick* (1871), 5 I. R. Eq. 486; *Logan* v. *Bell* (1845), 1 C. B. 872; *Sutherland (Countess)* v. *Northmore* (1729), 1 Dick. 56; *Anon.* (1574), 2 Leon. 220; *Holt* v. *Burley* (1710), 2 Vern. 651; *Dalby* v. *Pullen* (1824), 2 Bing. 144; *Eden* v. *Wilson* (1852), 4 H. L. Cas. 257, 283; *Re Coulman, Munby* v. *Ross* (1885), 30 Ch. D. 186; but see, *contra*, *Re Walsh's Trusts* (1878), 1 L. R. Ir. 320; *Blight* v. *Hartnoll* (1881), 19 Ch. D. 294.

(*n*) *Jackson* v. *Jackson* (1793), 4 Bro. C. C. 462; *Coventry (Countess Dowager)* v. *Coventry (Earl)* (1724), 2 P. Wms. 222; *Affleck* v. *Affleck* (1857), 3 Sm. & G. 394; *Johnson* v. *Touchet* (1867), 16 W. R. 71; *Re Lambert's Estate*, [1901] 1 I. R. 12; and see p. 55, *post*.

(*o*) *Palmer* v. *Locke* (1880), 15 Ch. D. 294, C. A.; *Re Evered, Molineux* v. *Evered*, [1910] 2 Ch. 147, 156, C. A.

(*p*) *Meyrick* v. *Coutts* (1806), Sugden, Powers, p. 266; *Blacklow* v. *Laws* (1842), 2 Hare, 40; *Johnstone* v. *Baber* (1845), 8 Beav. 233; *Mosley* v. *Hide* (1851), 17 Q. B. 91; *Shaw* v. *Borrer* (1836), 1 Keen, 559; *Want* v. *Stallibrass* (1873), L. R. 8 Exch. 175; *Earle* v. *Barker* (1865), 11 H. L. Cas. 280; *Re Verschoyle's Trusts* (1879), 3 L. R. Ir. 43; *Wilkinson* v. *Thornhill* (1889), 61 L. T. 362; compare *Uvedale* v. *Uvedale* (1744), 3 Atk. 117; *Ashford* v. *Cafe* (1836), 7 Sim. 641. Where in a mortgage a power of sale is made exercisable only after notice given, purchasers may be protected from the necessity of ascertaining whether such notice has in fact been given, but, if they know that the notice has not been given, the exercise of the power is invalid, notwithstanding the provision for their protection; compare *Parkinson* v. *Hanbury* (1860), 1 Drew. & Sm. 143; *Selwyn* v. *Garfit* (1888), 38 Ch. D. 273, C. A.; *Forster* v. *Hoggart* (1850), 15 Q. B. 155; see *Barker* v. *Illingworth*, [1908] 2 Ch. 20; see title MORTGAGE, Vol. XXI., p. 258. This rule would probably be held to apply to the analogous case of the power of sale given by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41); see also the Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), s. 5. In *Davidson* v. *Rook* (1856), 22 Beav. 206, it was held that a power was exercisable when part only of a condition had been fulfilled, but Lord St. Leonards (Sugden, Powers, p. 266) disapproves of the decision. The mere fact that the property subject to a power of sale is a reversion does not imply a condition that the power shall not be exercised until the

SECT. 6. Contingent Powers.

act is made a condition precedent to the exercise of a power, and such performance is illegal or becomes impossible, the power cannot be executed (*q*).

SUB-SECT. 3.—*Exercise of Powers by Contingent Persons.*

Distinction between general and limited power.

48. A general power of appointment, whether affecting the legal estate or the equitable estate, may be well exercised by deed or will by a contingent person who in the event proves to be the person actually entitled to exercise the power (*r*). A limited power given to a contingent person cannot be exercised until the person to exercise it is determined (*s*).

Acceleration of event.

The event on which the power is to arise can be accelerated by the parties if the power is simply administrative, but not if it is a power to charge or is otherwise burdensome to the estate (*t*).

SUB-SECT. 4.—*Exercise of Determinable Powers.*

Exercise must precede event.

49. A power determinable on the happening of any event must be exercised before such event happens (*a*). In the case of the testamentary exercise of a determinable power, the making of the will cannot ordinarily be treated as an act exercising the power so as to make the exercise take effect as from the date of the will instead of the date of the death (*b*). Hence a testamentary appointment by a donee who outlives the power may fail to take effect even though

property falls into possession; compare *Blackwood* v. *Borrowes* (1843), 4 Dr. & War. 441; *Clark* v. *Seymour* (1834), 7 Sim. 67; *Giles* v. *Homes* (1846), 15 Sim. 359; *Tasker* v. *Small* (1834), 6 Sim. 625.

(*q*) *Shrewsbury* (*Earl*) v. *Scott* (1859), 6 C. B. (N. S.) 1, 220.

(*r*) *Thomas* v. *Jones* (1862), 1 De G. J. & Sm. 63. Under the older law a general power affecting the legal estate could not, but a similar power affecting equitable interests could, be exercised before the person to exercise it was determined by the event. The case of a power which has no existence in the events which happen must be distinguished—*e.g.*, the power of a married woman arising on the death of her husband; for this, see title HUSBAND AND WIFE, Vol. XVI., p. 387.

(*s*) *MacAdam* v. *Logan* (1791), 3 Bro. C. C. 310; *Cave* v. *Cave* (1856), 8 De G. M. & G. 131, C. A.; *Re Twiss's Trust* (1867), 15 W. R. 540; *Re Moir's Settlement Trusts* (1882), 46 L. T. 723; *Re Blackburn, Smiles* v. *Blackburn* (1889), 43 Ch. D. 75; and see *Re Hayes, Turnbull* v. *Hayes*, [1901] 2 Ch. 529, C. A.; *Re Bradshaw, Bradshaw* v. *Bradshaw*, [1902] W. N. 15; *Re Walpole's Marriage Settlement, Thomson* v. *Walpole*, [1903] 1 Ch. 928.

(*t*) *Truell* v. *Tysson* (1856), 21 Beav. 437; and see *Re Petre's Settlement Trusts, Legh* v. *Petre*, [1910] 1 Ch. 290; *Re Trevanion, Trevanion* v. *Lennox*, [1910] 2 Ch. 538.

(*a*) *Potts* v. *Britton* (1871), L. R. 11 Eq. 433; *Parsons* v. *Parsons* (1744), 9 Mod. Rep. 464; *Re Borrowes' Estate* (1868) 2 I. R. Eq. 468. But, as to sales by trustees after the time authorised by the trust instrument has expired, see *Pearce* v. *Gardner* (1852), 10 Hare, 287; *Cuff* v. *Hall* (1855), 1 Jur. (N. S.) 972; and title TRUSTS AND TRUSTEES.

(*b*) *Re Moses, Beddington* v. *Beddington*, [1902] 1 Ch. 100, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 115; affirmed on appeal, *sub nom. Beddington* v. *Baumann*, [1903] A. C. 13 (where the question had reference to premiums arising out of the property appointed after the execution of the will containing the appointment, but before the death of the appointor and not expressly included in the appointment).

Rule as to testamentary powers.

the will was executed while the power was still exercisable (*c*). The question, however, is really a question of the construction of the instrument creating the power, and, if it is not made essential that the exercise of the power should become operative as well as take place during the continuance of the power, an inchoate exercise by will within the time limited for its exercise is good, even though the will does not become operative by the death of the testator until after that time (*d*).

SECT. 7.—*Power of Appointment among a Class.*

Limitations in default not defeated by power limiting proportions or partially ineffectual.

50. A power of appointment among a class, if on its true construction it is nothing more than a power to limit the proportions in which the members of the class are to take, cannot be exercised if there is an only object to whom the property is limited in default of appointment (*e*). The power, however, may be framed so as to enable the appointor to make the property pass by, and not in default of, appointment (*f*), and such a power may be well exercised although there is but one object and that object takes in default of appointment (*g*). A limitation in default of appointment to the only object of a power cannot be defeated by an appointment to such object which fails in the event that happens. The estate in default can only be defeated by an appointment which takes effect, and only to the extent to which such appointment does take effect (*h*).

(*c*) *Cooper* v. *Martin* (1867), 3 Ch. App. 47; *Potts* v. *Britton* (1871), L. R. 11 Eq. 433.

(*d*) *Re Illingworth, Bevir* v. *Armstrong*, [1909] 2 Ch. 297, *per* EVE, J., following *Burnham* v. *Bennett* (1845), 2 Coll. 254, and distinguishing *Cooper* v. *Martin* (1867), 3 Ch. App. 47. *Re Illingworth, Bevir* v. *Armstrong, supra* (where the power was to appoint by will or deed during coverture, and the testatrix dying discovert, an appointment by a will executed during coverture was held good), is not easily reconciled with *dicta* in *Re Moses, Beddington* v. *Beddington*, [1902] 1 Ch. 100, C. A. (see note (*b*), p. 22, *ante*), but the decision in the latter case turned upon a separate point, and the question dealt with was the date as at which the property included in a testamentary appointment is to be ascertained, rather than the period within which the appointment must be exercised. See also *Cave* v. *Cave* (1856), 8 De G. M. & G. 131, C. A.; *Re Blackburn, Smiles* v. *Blackburn* (1889), 43 Ch. D. 75; *Holliday* v. *Overton* (1832), 14 Beav. 467. Other cases on powers to appoint during coverture are *Trimmell* v. *Fell* (1853), 16 Beav. 537; *Price* v. *Parker* (1848), 16 Sim. 198. A power of revocation, to be exercised by A. and B. or the survivor of them during their joint lives, determines on the death of either A. or B. (*Re Twiss's Trust* (1867), 15 W. R. 540). For the converse case of a power given to the survivor to be exercised "after the decease of the other of them," see *Re Blackburn, Smiles* v. *Blackburn, supra*. A power for the survivor of husband and wife to appoint amongst their children is not well exercised by a deed executed by both (*MacAdam* v. *Logan* (1791), 3 Bro. C. C. 310).

(*e*) *Campbell* v. *Sandys* (1803), 1 Sch. & Lef. 281; *Folkes* v. *Western* (1804), 9 Ves. 456, 461.

(*f*) *Boyle* v. *Peterborough* (*Bishop*) (1791), 1 Ves. 299, *per* Lord THURLOW, L.C., at p. 309.

(*g*) *Bray* v. *Bree* (1834), 2 Cl. & Fin. 453, H. L.; *Noel* v. *Walsingham* (*Lord*) (1824), 2 Sim. & St. 99, 112; *Woodcock* v. *Renneck* (1841), 4 Beav. 190; *Re Cotton, Wood* v. *Cotton* (1888), 40 Ch. D. 41.

(*h*) *Roe* d. *Buxton* v. *Dunt* (1767), 2 Wils. 336, and *Doe* d. *Brownsmith* v. *Denny* (1756), there cited at p. 337.

SECT. 7. **Power of Appointment among a Class.**

Powers authorising exclusion: death of member of class.

51. In the case of a power which authorises exclusion, the death of objects who could have been excluded leaves the power unaffected with regard to surviving objects. Where a person is empowered to divide a fund amongst the members of a particular class, the death of some members of that class before the exercise of the power does not prevent the donee of the power from exercising it in favour of the surviving members of the class, even though the deceased persons, if they had been alive, must have had a share (*i*).

Non-exclusive powers.

It has been said that, in the case of a non-exclusive power given by will to appoint amongst several objects to whom the estate in default of appointment is given as individuals and as tenants in common, not as joint tenants, the death of any of the objects in the lifetime of the testator *pro tanto* defeats the power and devise over, so that the power and devise over only remain as to the shares of the survivors (*k*); but even where the power is non-exclusive and testamentary, and the objects in default of appointment would take as individuals and as tenants in common, the death of an object after the death of the testator, though in the lifetime of the donee of the power and before any execution, leaves the power fully exercisable in favour of surviving objects (*l*).

SECT. 8.—*Appointment by Successive Instruments.*

Power exercised partially at various times.

52. A power may in general be executed by different appointments made at various times, and a partial execution, even though the power is non-exclusive, need not give a share to every object (*m*).

(*i*) *Boyle* v. *Peterborough* (*Bishop*) (1791), 1 Ves. 299; *Butcher* v. *Butcher*, *Gooday* v. *Butcher* (1812), 1 Ves. & B. 79, 92; *Vane* v. *Dungannon* (*Lord*) (1804), 2 Sch. & Lef. 118; *M'Ghie* v. *M'Ghie* (1817), 2 Madd. 368; *Houston* v. *Houston* (1831), 4 Sim. 611; *Ricketts* v. *Loftus* (1841), 4 Y. & C. (EX.) 519, 533; *Woodcock* v. *Renneck* (1841), 4 Beav. 190; *Paske* v. *Haselfoot* (1863), 33 Beav. 125, *per* ROMILLY, M.R., at p. 127.

(*k*) Sudgen, Powers, p. 419; *Reade* v. *Reade* (1801), 5 Ves. 744. Since the Powers of Appointment Act, 1874 (37 & 38 Vict. c. 37) (Lord Selborne's Act), the point is of little importance.

(*l*) *Re Ware*, *Cumberlege* v. *Cumberlege-Ware* (1890), 45 Ch. D. 269, *per* STIRLING, J., at p. 276; *Paske* v. *Haselfoot*, *supra*; and see *Houston* v. *Houston*, *supra*.

(*m*) *Wilson* v. *Piggott* (1794), 2 Ves. 351, 354; *Bristow* v. *Warde* (1794), 2 Ves. 336; *Lee's* (*Sir Richard*) *Case* (1581), 1 And. 67 (power of revocation); Co. Litt. 237 a; *Digges's Case* (1600), 1 Co. Rep. 173 a (power to revoke uses); *Snape* v. *Turton* (1637), Cro. Car. 472; *Bovey* v. *Smith* (1682), 1 Vern. 84 (general power of appointment); *Hervey* v. *Hervey* (1739), 1 Atk. 561 (power to raise portions); *Zouch* d. *Woolston* v. *Woolston* (1761), 2 Burr. 1136 (power to jointure); *Doe* d. *Milborne* v. *Milborne* (1788), 2 Term Rep. 721 (but see, *contra*, *Brown* v. *Nisbett* (1750), 1 Cox, Eq. Cas. 13; as to which see *Webster* v. *Boddington* (1848), 16 Sim. 177); *Re Simpson's Settlement* (1851), 4 De G. & Sm. 521; *Cuninghame* v. *Anstruther* (1872), L. R. 2 Sc. & Div. 223; *Sumpton* v. *Genner* (1667), 2 Keb. 261. A life estate may be appointed on one occasion and the fee on another (*Bovey* v. *Smith*, *supra*. The powers conferred by the Settled Land Acts (see title SETTLEMENTS) upon a tenant for life or trustees or the Board of Agriculture and Fisheries or the court are expressly made exercisable from time to time (Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 55 (1)). The costs of successive appointments are borne rateably by the appointees in accordance with the general rule in the case of appointments (*Re Chisholm*, *Goddard* v. *Brodie*, [1902] 1 Ch. 457; see p. 45, *post*). The

SECT. 8. Appointment by Successive Instruments.

And where there is a primary power, and, in default of its execution, a secondary power, a partial exercise of the primary power does not preclude an exercise of the secondary power over the portion of the fund which remains unaffected by the exercise of the primary power (*n*).

Power exercised fully at law; partially in equity.

53. A power may be fully exercised at law by one appointment but not thereby exhausted in equity, as where a general power is exercised by way of mortgage in fee and the equity of redemption is subsequently appointed (*o*).

SECT. 9.—*Appointment by way of Mortgage.*

Appointment operating on equity of redemption.

54. In an appointment by way of mortgage, the reservation of the right to redeem to persons other than those to whom the estate is limited in default of appointment in the deed creating the power is not of itself an appointment of the equity of redemption (*p*).

The appointment by way of mortgage may, however, be intended to have a double operation so as not only to create a charge upon the property appointed, but also to alter the limitations upon which that property is held, in which case the appointment takes effect according to its terms (*q*).

Question of intention.

The extent to which such an appointment operates depends entirely upon the intention to be collected from the deed taken as a whole, but, if no indication of intention exists, there is a presumption that nothing more than a mortgage was meant (*r*).

donee of a power making a partial appointment cannot alter, in respect of the part left unappointed, the range of investments authorised by the instrument creating the power (*Re Falconer's (William) Trusts, Re Falconer's (Ann) Trusts, Property and Estates Co., Ltd.* v. *Frost*, [1908] 1 Ch. 410).

(*n*) *Mapleton* v. *Mapleton* (1859), 4 Drew. 515, 519, where KINDERSLEY, V.-C., followed the opinion of Lord St. Leonards (Sudgen, Powers, p. 272) in preference to that of Lord HENLEY, L.C., in *Simpson* v. *Paul* (1761), 2 Eden, 34.

(*o*) *Perkins* v. *Walker* (1682), 1 Vern. 97; *Thorne* v. *Thorne* (1683), 1 Vern. 141, 182; *Ruscombe* v. *Hare* (1828), 2 Bli. (N. S.) 192, H. L., and other cases cited in notes (*p*) *et seq.*, *infra*. Similarly a devise was held revoked by a mortgage in fee to the devisee (*Lassells* v. *Cornwallis* (*Lord*) (1704), Prec. Ch. 232; *Peach* v. *Phillips* (1777), 2 Dick. 538; *Baxter* v. *Dyer* (1800), 5 Ves. 656); see now Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 23; title WILLS.

(*p*) *Ruscombe* v. *Hare, supra*; *Heather* v. *O'Neil* (1858), 2 De G. & J. 399, C. A.; *Whitbread* v. *Smith* (1854), 3 De G. M. & G. 727; Co. Litt. 47 a, 208 a, n.; *Bates* v. *Dandy* (1741), 2 Atk. 207; *Pitt* v. *Pitt* (1823), Turn. & R. 180; *Hipkin* v. *Wilson* (1850), 3 De G. & Sm. 738; *Re Byron's Settlement, Williams* v. *Mitchell*, [1891] 3 Ch. 474, 481.

(*q*) *Jackson* v. *Innes* (1819), 1 Bli. 104, 114, H. L.; *Heather* v. *O'Neil, supra*; *Reeve* v. *Hicks* (1825), 2 Sim. & St. 403; *Barnett* v. *Wilson* (1843), 2 Y. & C. Ch. Cas. 407; *Eddleston* v. *Collins* (1853), 3 De G. M. & G. 1, 15, C. A.; and see title MISTAKE, Vol. XXI., p. 15.

(*r*) *Heather* v. *O'Neil, supra*; *Whitbread* v. *Smith, supra*; *Plomley* v. *Felton* (1888), 14 App. Cas. 61, P. C.; *Jackson* v. *Innes, supra*; *Re Betton's Trust Estates* (1871), L. R. 12 Eq. 553, 557; title MORTGAGE, Vol. XXI., p. 122. Where the mortgage is one by the husband of property belonging to the wife the presumption is aided by that fact; see *Bates* v. *Dandy* (1741), 2 Atk. 207; *Whitbread* v. *Smith, supra*;

SECT. 10.
Exercise by Instruments Specified by the Author of the Power.

SECT. 10.—*Exercise by Instruments Specified by the Author of the Power.*

Instrument specified by author of power must be used.

55. A power cannot be validly executed except by such instrument or instruments as have been specified by the author of the power (*s*), so that a power required to be executed by deed cannot be validly exercised by will (*t*), and a power to be executed by will cannot be validly exercised by any instrument to take effect in the lifetime of the donee of the power (*a*). An instrument in the form of a deed is not, however, necessarily incapable of exercising a power exercisable only by will; if, though in form a deed, it is really testamentary, it validly exercises a power which is to be exercised by will (*b*); but the mere fact that the limitations cannot take effect until after the death of the appointor does not make the instrument testamentary (*c*).

Construction of terms:—
"by deed or otherwise";
"by will or otherwise";
"by instrument in writing";

56. A power "to appoint by deed or otherwise" or "by will or otherwise" includes all methods by which the property subject to the power can legally pass.

A power to be executed "by an instrument in writing" can be executed by a will, for a will is an instrument in writing (*d*), but any added requirements must be satisfied, since the statutory provision (*e*) dispensing with additional solemnities in the case of a power of appointment by will does not apply to a power to

Martin v. *Mitchell* (1820), 2 Jac. & W. 413, 424; *Clark* v. *Burgh* (1845), 2 Coll. 221; but see, *contra*, *Rowel* v. *Walley* (1661), 1 Rep. Ch. 116 [218]; *Reeve* v. *Hicks* (1825), 2 Sim. & St. 403; *Anson* v. *Lee* (1831), 4 Sim. 364; *Plowden* v. *Hyde* (1852), 2 De G. M. & G. 684, C. A.; *Jackson* v. *Innes* (1819), 1 Bli. 104, 114, H. L.; *Jones* v. *Davies* (1878), 8 Ch. D. 205, 210; and see titles HUSBAND AND WIFE, Vol. XVI., pp. 323 *et seq.*; TRUSTS AND TRUSTEES.

(*s*) *MacAdam* v. *Logan* (1791), 3 Bro. C. C. 310; *Dormer* v. *Thurland* (1729), 2 P. Wms. 506; *Ross* v. *Ewer* (1744), 3 Atk. 156; *Sanders* v. *Franks* (1817), 2 Madd. 147.

(*t*) *Darlington* (*Earl*) v. *Pulteney* (1775), Cowp. 260; *Cavan* (*Countess Dowager*) v. *Doe* d. *Pulteney* (1795), 6 Bro. Parl. Cas. 175; *Re Phillips*, *Robinson* v. *Burke* (1889), 41 Ch. D. 417, 419; *Bushell* v. *Bushell* (1803), 1 Sch. & Lef. 90. As to the characteristics of a deed, see Co. Litt. 171 b; Shep. Touch. 50; and title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 378 *et seq.* If, on the true construction of the instrument, writing only is required, a will suffices though a deed appears to have been contemplated (Sugden, Powers, p. 214; *Roscommon* (*Countess Dowager*) v. *Fowke* (1745), 6 Bro. Parl. Cas. 158; *Edwards* v. *Edwards* (1818), 3 Madd. 197; (1821), Jac. 335).

(*a*) *Reid* v. *Shergold* (1805), 10 Ves. 370.

(*b*) *Majoribanks* v. *Hovenden* (1843), Drury *temp.* Sug. 11; compare *Fortescue* v. *Hennah* (1812), 19 Ves. 67; and see title WILLS.

(*c*) *Hougham* v. *Sandys* (1827), 2 Sim. 95, 148. Nor will the reservation of a power of revocation make such an instrument testamentary (*Tompson* v. *Browne* (1835), 3 My. & K. 32); and see *Re Waddington*, *Bacon* v. *Bacon*, [1897] W. N. 6.

(*d*) *West* v. *Ray* (1854), Kay, 385; *Orange* v. *Pickford* (1858), 4 Drew. 363; *Smith* v. *Adkins* (1872), L. R. 14 Eq. 402; and see *Longford* v. *Eyre* (1721), 1 P. Wms. 740. As to the exercise, by writing in the nature of a will, of a power exercisable "in writing," see p. 19, *ante*.

(*e*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 10; see p. 19, *ante*.

appoint "by an instrument in writing" though exercised by will (*f*). On the other hand, a will exercising a power of this description is revocable though no express power of revocation is reserved (*g*).

SECT. 10. **Exercise by Instruments Specified by the Author of the Power.**

A power exercisable "by deed, instrument, or will" can be validly exercised in a number of ways, including a written order to the trustees of the fund, a letter from the donee of the power referring to the power or the property, and accompanying a gift of money which it states to be in pursuance of the power or out of the property, and, when the donee of the power is himself sole trustee of the fund, a cheque on the bankers where the fund is lying, if the appointor has no money of his own there (*h*).

"by deed, instrument, or will";

A power exercisable "by any writing in the nature of or purporting to be a will or codicil" can be exercised by a document purporting to be a will but not capable of being admitted to probate (*i*).

"by any writing in the nature of or purporting to be a will or codicil."

A general testamentary power which has to be exercised by a will which "expressly purports to exercise such power" is validly exercised by a residuary bequest of personal estate over which the testator has "any disposing power" (*j*).

General testamentary power.

57. A power to be executed by one instrument may be executed by several assurances which, although insufficient if taken singly, operate together as one complete act; but, in order to enable the court to read the whole series as one instrument, that must have been the intention of the parties expressed on the perfection of the first assurance (*k*).

Execution of powers by successive assurances.

58. A power to revoke uses by any deed or writing, and by any such deed or writing to declare new uses, may be exercised by one deed (*l*).

Power of revocation and new appointment.

SECT. 11.—*Compliance with the Statute of Frauds.*

59. If the property subject to the power is real estate or chattels real, any uses or trusts affecting it must be declared in such a

Distinction between powers over real and powers over personal estate.

(*f*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 10; *Taylor* v. *Meads* (1865), 4 De G. J. & Sm. 597. *Buckell* v. *Blenkhorn* (1846), 5 Hare, 131, is overruled on this point; see *Collard* v. *Sampson* (1853), 4 De G. M. & G. 224, C. A.; *West* v. *Ray* (1854), Kay, 385. On the other hand, the prohibitory portion of the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 10, does extend to a power exercisable in writing and exercised by will; see p. 19, *ante*.

(*g*) *Lisle* v. *Lisle* (1781), 1 Bro. C. C. 533.

(*h*) *Brodrick* v. *Brown* (1855), 1 K. & J. 328.

(*i*) *Re Broad, Smith* v. *Draeger*, [1901] 2 Ch. 86; but see *Re Barnett, Dawes* v. *Ixer*, [1908] 1 Ch. 402; and compare p. 19, *ante*.

(*j*) *Re Waterhouse, Waterhouse* v. *Ryley* (1907), 77 L. J. (CH.) 30, C. A.; *Re Rolt, Rolt* v. *Burdett*, [1908] W. N. 76; *Re Lane, Belli* v. *Lane*, [1908] 2 Ch. 581. Cases on the effect of the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 27 (see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 281; and see p. 29, *post*), such as *Phillips* v. *Cayley* (1889), 43 Ch. D. 222, C. A., and cases on special powers, such as *Re Teape's Trusts* (1873), L. R. 16 Eq. 442, are distinguishable.

(*k*) *Braybrooke* (*Lord*) v. *A.-G.* (1860), 9 H. L. Cas. 150, 167.

(*l*) *Fitzwilliam's Case* (1604), 6 Co. Rep. 32 a, 33.

SECT. 11. Compliance with Statute of Frauds.

manner as to satisfy the Statute of Frauds (*m*). If the property is personal, no writing is necessary unless the power requires it (*n*).

SECT. 12.—*Expression of Intention to Exercise Powers.*

SUB-SECT. 1.—*Proof of Intention Generally.*

Technical words or recital of power unnecessary.

60. If the intention is clear, no technical words or recital of the power are necessary for the execution of a power (*o*).

(*m*) *Hawke* v. *Hawke* (1877), 26 W. R. 93; compare *Dye* v. *Dye* (1884), 13 Q. B. D. 147, C. A.; *Marlborough* (*Duke*) v. *Godolphin* (*Lord*) (1750), 2 Ves. Sen. 61, 79; *Jones* v. *Clough* (1751), 2 Ves. Sen. 365; Statute of Frauds (29 Car. 2, c. 3), s. 9; and see title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 361, 374, 375.

(*n*) *Proby* v. *Landor* (1860), 28 Beav. 504; *Bailey* v. *Hughes* (1854), 19 Beav. 169; *Duff* v. *Dalzell* (1782), 1 Bro. C. C. 147. A parol trust can be declared of personal estate, and the execution of the power over personalty is merely the declaration of the trust; see titles DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 374; EQUITY, Vol. XIII., p. 154.

(*o*) *Maundrell* v. *Maundrell* (1804), 10 Ves. 246, 257; *Clere's* (*Sir Edward*) *Case* (1599), 6 Co. Rep. 17 b; *Scrope's Case* (1612), 10 Co. Rep. 143 b, 144 a; *Blake* v. *Marnell* (1811), 2 Ball & B. 35, 44; *Carver* v. *Richards* (1860), 1 De G. F. & J. 548, C. A.; *Smith* v. *Adkins* (1872), L. R. 14 Eq. 402; *Maddison* v. *Andrew* (1747), 1 Ves. Sen. 57, 61; *Webb* v. *Honnor* (1820), 1 Jac. & W. 352, 357; *Cuninghame* v. *Anstruther* (1872), L. R. 2 Sc. & Div. 223, 233. Informal statements treated as exercising powers are exemplified in the following cases:—*Allen* v. *Papworth* (1748), 1 Ves. Sen. 163; *Fortescue* v. *Gregor* (1800), 5 Ves. 553 (petition); *Lee* v. *Head* (1855), 1 K. & J. 620 (recital); *Foster* v. *Cautley* (1855), 6 De G. M. & G. 55 (appointment); *Carter* v. *Carter* (1730), Mos. 365 (answer); *Irwin* v. *Farrer* (1812), 19 Ves. 86 (bill); *Holloway* v. *Clarkson* (1843), 2 Hare, 521 (petition); *Re Davids' Trusts* (1859), John. 495, 500 (petition); *Cambridge* v. *Rouse* (No. 2) (1858), 25 Beav. 574 (petition); *Cuninghame* v. *Anstruther*, *supra* (settlement); *Wilson* v. *Piggott* (1794), 2 Ves. 351 (settlement); *Poulson* v. *Wellington* (1729), 2 P. Wms. 533 (settlement); *Re Farnell's Settled Estates* (1886), 33 Ch. D. 599 (recital); *Marler* v. *Tommas* (1873), L. R. 17 Eq. 8 (transfer); *Farington* v. *Parker* (1867), L. R. 4 Eq. 116 (gift *inter vivos*); *Re Bennett's Settlement Trusts* (1868), 16 W. R. 331 (appointment of new trustee); *Proby* v. *Landor*, *supra* (memorandum); *Re Jennings* (1854), 8 I. Ch. R. 421, P. C. (letter); *Eaton* v. *Smith* (1839), 2 Beav. 236 (statement of facts); *Burke* v. *Lambert* (1867), 15 W. R. 913 (bond); *Tomlinson* v. *Dighton* (1711), 1 P. Wms. 149 (conveyance by lease and release); *Irwin* v. *Irwin* (1859), 10 I. Ch. R. 29 (settlement); *Bailey* v. *Hughes*, *supra* (mere enumeration of the parties to be benefited). A recital by one unaware of the existence of the power and joining in a deed for another purpose would not be sufficient (*Griffith-Boscawen* v. *Scott* (1884), 26 Ch. D. 358; *Minchin* v. *Minchin* (1871), 5 I. R. Eq. 258, 267, C. A.; *Re Horsfall*, *Hudleston* v. *Clifton*, [1911] 2 Ch. 63); nor is the renewal of a lease by a tenant for life with a power of appointment in his own favour sufficient (*Brookman* v. *Hales* (1813), 2 Ves. & B. 45); nor a mere change of investment by a tenant for life who is also the donee of a general power of appointment (*Reith* v. *Seymour* (1828), 4 Russ. 263); "acts of ownership by a tenant for life with a power do not make him owner, unless they are such acts as are prescribed by the power for vesting the property" (*Brookman* v. *Hales*, *supra*, *per* GRANT, M.R., at p. 50); nor is a receipt upon a compulsory purchase, "in respect of the lands part of our estates required for the purpose" of a railway company, the sale not going through in the manner intended, sufficient (*Morgan* v. *Milman* (1853), 3 De G. M. & G. 24, C. A.); nor the execution of a power of attorney to sell out stock, though with the formalities requisite to the execution of a general power of appointing the stock, for powers of attorney are instruments of substitution only, not

SUB-SECT. 2.—*Proof of Intention where the Wills Act applies.* SECT. 12.

Expression of Intention to Exercise Powers.

61. It was formerly essential that the intention of the appointor that the power should be exercised should clearly appear from the language employed. Since the 31st December, 1837, however, a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, is to be construed to include any real estate, or any real estate to which the description extends, as the case may be, which the testator has power to appoint in any manner he may think proper, and is to operate as an execution of such power, unless a contrary intention appears by the will; and, in like manner, a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, is to be construed to include any personal estate, or any personal estate to which such description extends, as the case may be, which he has power to appoint in any manner he may think proper, and is to operate as an execution of such power, unless a contrary intention appears by the will (*p*).

Effect of Wills Act.

The object of the provision above referred to (*q*) was to abolish the distinction between property and general powers to the extent of making it unnecessary in framing a will to refer to the instrument creating the power or to the subject of the power (*r*). The provision (*q*) extends the operation of general devises and bequests, and renders it necessary to show a contrary intention in order to exclude the execution of a power instead of, as under the old law, an intention to execute the power (*s*).

Abolition of distinction between property and general powers.

The provision (*q*) applies only to general powers, not to limited powers (*t*); and its language confines its operation to property

Application to general powers

instruments of alienation; they are authorities and not directions, and it is the instrument of alienation, or the direction to alienate, which amounts to an exercise of the power of appointment, and which must be executed with the requisite formalities (*Hughes* v. *Wells* (1852), 9 Hare, 749, 764; but see *Marler* v. *Tommas* (1873), L. R. 17 Eq. 8). As to the general rules for the interpretation of deeds and other non-testamentary instruments, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 433 *et seq.*

(*p*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 27; *Lake* v. *Currie* (1852), 2 De G. M. & G. 536, *per* Lord ST. LEONARDS, L.C., at p. 547; see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 281; as to construction of wills generally, see title WILLS. The following cases illustrate the position before the Act:—*Langham* v. *Nenny* (1797), 3 Ves. 467; *Croft* v. *Slee* (1798), 4 Ves. 60; *Griffin* v. *Nanson* (1798), 4 Ves. 344; *M'Leroth* v. *Bacon* (1799), 5 Ves. 159; *Bradly* v. *Westcott* (1807), 13 Ves. 445; *Roach* v. *Haynes* (1803), 8 Ves. 584; *Standen* v. *Standen* (1795), 2 Ves. 589; *Jones* v. *Curry* (1818), 1 Swan. 66; *Maddison* v. *Andrew* (1747), 1 Ves. Sen. 57; *Maples* v. *Brown* (1828), 2 Sim. 327; *Hoste* v. *Blackman* (1821), Madd. & G. 190; *Napier* v. *Napier* (1826), 1 Sim. 28; *Bourn* v. *Gibbs* (1830), 1 Russ. & M. 614; *Ponton* v. *Dunn* (1830), 1 Russ. & M. 402; and see p. 32, *post.*

(*q*) *I.e.*, Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 27.

(*r*) *Re Wilkinson* (1869), 4 Ch. App. 587, *per* SELWYN, L.J., at p. 590.

(*s*) *Lake* v. *Currie* (1852), 2 De G. M. & G. 536, *per* Lord ST. LEONARDS, L.C., at p. 547.

(*t*) *Re Williams* (*Esther*), *Foulkes* v. *Williams* (1889), 42 Ch. D. 93, C. A. A general power for this purpose includes one exercisable by will only (*Re Powell's Trusts* (1869), 39 L. J. (CH.) 188; *Hawthorn* v. *Shedden* (1856), 3 Sm. & G. 293, 303), and one to be exercised by a married woman during

SECT. 12.

Expression of Intention to Exercise Powers.

operating on general descriptions.

described in a general manner, and does not include gifts of particular property (*u*). General pecuniary legacies are bequests of personal property described in a general manner, and, if no fund is indicated out of which they are to be paid, money over which the testator had a general power of appointment is made available by the provision above referred to (*a*) to the extent to which the testator's own property is insufficient for this purpose (*b*). A gift of "stocks, shares and securities," or of "all stocks, shares and securities which I possess or to which I am entitled" (*c*), is within the provision (*a*). A gift of "my real estate" or "my personal estate" is not the less general because the testator uses the word "my" (*d*). So, too, the appointment of a residuary legatee, without any words of gift, is equivalent to a general residuary bequest and consequently has the same operation as such a bequest (*e*) under the above provision (*a*); and the appointment of an executor, coupled with the gift of pecuniary legacies, operates as an appointment of a fund the subject of a general power of appointment to the extent of the amount required for the payment of the legacies (*f*), and also of the debts which must be discharged before the legacies can be paid (*g*); and

coverture (*Bernard* v. *Minshull* (1859), John. 276), and a power to appoint to "any person or persons, child or children" (*Cofield* v. *Pollard* (1857), 3 Jur. (N. S.) 1203). A direction that the fund is not to be distributed until twelve months after the death of the appointor does not prevent the power from being general (*Re Keown's Estate* (1867), 1 I. R. Eq. 372). Powers to appoint amongst children (*Cloves* v. *Awdry* (1850), 12 Beav. 604; *Russell* v. *Russell* (1861), 12 I. Ch. R. 377), or amongst relations and friends of the donee (*Re Caplin's Will* (1865), 2 Drew. & Sm. 527), or to anyone except A., unless, perhaps, A. is dead at the date of appointment (*Re Byron's Settlement, Williams* v. *Mitchell*, [1891] 3 Ch. 474; *Re Wilkinson, Thomas* v. *Wilkinson*, [1910] 2 Ch. 216; *Edie* v. *Babington* (1854), 3 I. Ch. R. 568), are for this purpose not general, but special or limited, powers. A power to be exercised by a testamentary instrument "expressly referring to the power" (*Phillips* v. *Cayley* (1889), 43 Ch. D. 222, C. A.; *Re Davies, Davies* v. *Davies*, [1892] 3 Ch. 63; compare *Re Lane, Belli* v. *Lane*, [1908] 2 Ch. 581; and see p. 27, *ante*), or by a will executed after the death of A. (*Phillips* v. *Cayley*, *supra*, at p. 230), is not a general power for this purpose; and see p. 27, *ante*.

(*u*) *Re Greaves' Settlement Trusts* (1883), 23 Ch. D. 313; see *ibid.*, *per* FRY, J., at p. 318.

(*a*) *I.e.*, Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 27; see p. 29, *ante*.

(*b*) *Re Wilkinson's Settlement Trusts* (1869), L. R. 8 Eq. 487; affirmed 4 Ch. App. 587; *Hawthorn* v. *Shedden* (1856), 3 Sm. & G. 293; *Wilday* v. *Barnett* (1868), L. R. 6 Eq. 193; *Hurlstone* v. *Ashton* (1865), 11 Jur. (N. S.) 725; *Re Davies' Trusts* (1871), L. R. 13 Eq. 163, 166; *Re Seabrook, Gray* v. *Baddeley*, [1911] 1 Ch. 151; and see pp. 39, 44, *post*.

(*c*) *Turner* v. *Turner* (1852), 21 L. J. (CH.) 843; *Re Jacob, Mortimer* v. *Mortimer*, [1907] 1 Ch. 445; *Francombe* v. *Hayward* (1845), 9 Jur. 344.

(*d*) *Chandler* v. *Pocock* (1880), 15 Ch. D. 491; affirmed (1881), 16 Ch. D. 648, C. A.; *Freme* v. *Clement* (1881), 18 Ch. D. 499; *Francombe* v. *Hayward*, *supra*.

(*e*) *Re Spooner's Trust* (1851), 2 Sim. (N. S.) 129. The appointment of a "residuary legatee" may even be tantamount to a residuary devise if aided by the context; see *Singleton* v. *Tomlinson* (1878), 3 App. Cas. 404, *per* Lord CAIRNS, L.C., at p. 418; *Hawthorn* v. *Shedden* (1856), 3 Sm. & G. 293, 304; title WILLS.

(*f*) *Hawthorn* v. *Shedden*, *supra*; *Re Davies' Trusts*, *supra*, *per* WICKENS, V.-C., at p. 166.

(*g*) *Re Seabrook, Gray* v. *Baddeley*, *supra*.

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a direction for the payment of the debts, without more, is also sufficient (*h*), but it has not yet been decided that an appointment of an executor, without more, would make the fund assets for all purposes (*i*).

General bequest operating as an appointment of a sum charged on land.

A general bequest operates as an appointment under a power to appoint a sum charged on land, even though the will also contains an appointment, under another power, of the land upon which the money is secured (*j*). The provision above referred to (*k*) presupposes the existence of some real estate or some personal estate, as the case may be, which is subject to a general power of appointment, and which, though not the testator's property, is in his uncontrolled disposition; and it does not extend to the creation of property at the expense of another, or to the imposition of an otherwise non-existent charge upon the property of another, or to the conversion *pro tanto* of the real estate of another into a money charge, which if and when charged will be personal estate which the testator will have power to appoint as he may think fit, but which has no existence unless and until the testator creates it (*l*). On the other hand, where the creation of the charge is effected by the same instrument which confers power to appoint the amount charged, the charge is already in existence when the power comes to be exercised, and a general bequest within the above provision (*k*) is an effectual appointment (*m*).

Devise operating as bequest; bequest as devise.

62. A general devise does not pass personalty nor a general bequest realty which are respectively subject to a general power of appointment (*n*). Whether a general devise passes personalty liable to be converted into realty, or a general bequest passes realty liable

(*h*) *Re Davies' Trusts* (1871), L. R. 13 Eq. 163.

(*i*) "And so to hold would appear to give a very unnatural construction to the section" (*Re Davies' Trusts, supra, per* WICKENS, V.-C., at p. 166; see also *Re Thurston, Thurston* v. *Evans* (1886), 32 Ch. D. 508, *per* CHITTY, J., at p. 511; compare *Re Pinède's Settlement* (1879), 12 Ch. D. 667, *per* JESSEL, M.R., at p. 674; *Hawthorn* v. *Shedden* (1856), 3 Sm. & G. 293, *per* STUART, V.-C., at pp. 304, 305); see p. 39, *post*.

(*j*) *Clifford* v. *Clifford* (1852), 9 Hare, 675; compare *Farmer* v. *Bradford* (1827), 3 Russ. 354; see also *Maddison* v. *Andrew* (1747), 1 Ves. Sen. 57, 60.

(*k*) *I.e.*, Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 27; see p. 29, *ante*.

(*l*) *Re Wallinger's Estate*, [1898] 1 I. R. 139, C. A., *per* FITZGIBBON, L.J., at p. 148: "It is not enough to show an intention to appoint, an intention to charge ought also to be shown"; *Re Salvin, Marshall* v. *Wolseley*, [1906] 2 Ch. 459, *per* BUCKLEY, L.J., at p. 464: "I am unable to find" [in the section] "any words which provide that, where there is a power to charge upon real estate a sum which when charged will be personal estate, general words of gift are to be construed as effecting, first, the creation of the personal estate by charging it on the real estate, and, secondly, the bequest of the personal estate thus created"; compare *Pomfret* v. *Perring* (1854), 5 De G. M. & G. 775, C. A.

(*m*) *Re Jones, Greene* v. *Gordon* (1886), 34 Ch. D. 65. The same result follows where the power is an overriding one to appoint mixed realty and personalty (*Re Wilkinson, Thomas* v. *Wilkinson*, [1910] 2 Ch. 216).

(*n*) *Clifford* v. *Clifford, supra*; *Chandler* v. *Pocock* (1880), 15 Ch. D. 492; and see *Re Salvin, Marshall* v. *Wolseley, supra*, at p. 464.

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to be converted into personalty, depends, in a case where the testator has not shown it to be his intention that the property shall be treated as converted, upon whether any person other than the testator has a right to call for conversion. Where this is the case, money liable to be converted into land is real estate of the testator, and a gift of "my real estate" would pass it, but a gift of "my personal estate" would not, and conversely with land. Where the question of conversion rests with the testator alone, the equity to convert would only arise in the absence of appointment, and a general bequest will operate as an appointment of what is actually personalty, and a general devise as an appointment of what is actually realty (*o*).

Construction to be adopted.

63. The construction imposed by the Wills Act, 1837 (*p*), on devises and bequests which fall within the provision above referred to (*q*), is the construction to be adopted in the absence of a contrary intention appearing on the will itself (*r*).

SUB-SECT. 3.—*Proof of Intention Apart from the Wills Act.*

Cases in which intention to exercise power must be shown.

64. In the case of general powers exercised by wills made before the 1st January, 1838, and not republished after that date (*s*), and of general powers not exercised by will or exercised by wills not

(*o*) *Gillies* v. *Longlands* (1851), 4 De G. & Sm. 372; *Re Greaves' Settlement Trusts* (1883), 23 Ch. D. 313; *Adams* v. *Austen* (1829), 3 Russ. 461; *Chandler* v. *Pocock* (1880), 15 Ch. D. 492; affirmed 16 Ch. D. 648, C. A.; *Gale* v. *Gale* (1856), 21 Beav. 349; *Blake* v. *Blake* (1880), 15 Ch. D. 481; *Re Cleveland's* (*Duke*) *Settled Estates*, [1893] 3 Ch. 244, C. A.; *Re Harman*; *Lloyd* v. *Tardy* [1894] 3 Ch. 607.

(*p*) 7 Will. 4 & 1 Vict. c. 26.

(*q*) *Ibid.*, s. 27; see p. 29, *ante*.

(*r*) *Scriven* v. *Sandom* (1862), 2 John. & H. 743. "There is no contrary intention within the meaning of the statute unless you find something in the will inconsistent with the view that the general devise was meant as an execution of the power" (*ibid.*, *per* WOOD, V.-C., at p. 744; *Lake* v. *Currie* (1852), 2 De G. M. & G. 536; *Hutchins* v. *Osborne* (1858), 4 K. & J. 252; *Thome* v. *Jones* (1862), 2 John. & H. 475). "The gift of part of an estate or of a rentcharge out of it may fairly be considered as inconsistent with a gift of the whole" (*Scriven* v. *Sandom*, *supra*, *per* WOOD, V.-C., at p. 745). A clear intention to except the subject-matter of the power from an earlier appointment in the will is not such a contrary intention as to prevent its passing by a residuary bequest to the same person (*Bernard* v. *Minshull* (1859), John. 276); and the qualification "which I possess or to which I am entitled" does not show a contrary intention (*Re Jacob*, *Mortimer* v. *Mortimer*, [1907] 1 Ch. 445). In *Moss* v. *Harter* (1854), 2 Sm. & G. 45, the restriction of the general bequest to residue "not otherwise effectually disposed of" was held to show contrary intention in the case of property effectually disposed of apart from the will. The suggestion of LORD ST. LEONARDS (Sugden, Powers, pp. 305, 306), that a general gift in a will in order to defeat the testator's own provisions in default of appointment by himself, would require some indication of his intention to defeat his own settlement, conflicts with the language of the statute, and is not borne out by the cases. It makes no difference whether the settlement creating the power was made by the testator himself or by a stranger (*Re Clay Estate*, *Maddick* v. *Marks* (1880), 14 Ch. D. 422, C. A.; *Boyes* v. *Cook* (1880), 14 Ch. D. 53, C. A.; *Airey* v. *Bower* (1887), 12 App. Cas. 263; see *dicta* in *Re Wallinger's Estate*, [1898] 1 I. R. 139, C. A.).

(*s*) See Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 34.

containing any general devise or bequest, and in the case of special powers, whenever and in whatever manner exercised, it is necessary to show affirmatively an intention on the part of the appointor that the instrument shall operate as an execution of the power (*t*); and in order to do this the instrument must refer either to the power or to the property subject to the power, or it must affect to deal with some property in general terms, not defining it, under such circumstances that it cannot have effect except upon the property comprised in the power (*a*). Within these limits the presence or absence of the requisite intention is a question to be determined upon the language of the instrument, and it is impossible to lay down any invariable rule (*b*); but the cases have established certain *indicia* which aid in arriving at a conclusion.

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Essential references in instrument.

65. Thus, with regard to references to the power, general words with reference to "all powers" operate as an appointment under a general power, and are a sufficient reference to a limited power if the donee has no other and if the appointee is an object (*c*); but

References to the power.

(*t*) *Re Weston's Settlement, Neeves* v. *Weston*, [1906] 2 Ch. 620; and see cases cited in note (*p*), p. 29, *ante*. A mere reference to or mention of the fund, without any apparent intention to dispose of or deal with it, is not sufficient, although accompanied by a confirmation of the instrument containing the power (*Re Bringloe's Trusts* (1872), 26 L. T. 58); and, *a fortiori*, a mention of the fund or power coupled with an expressed intention not to exercise the power, or not to deal legally with the fund, does not operate as an execution (*Garth* v. *Townsend* (1869), L. R. 7 Eq. 220; *Pennefather* v. *Pennefather* (1873), 7 I. R. Eq. 300); even though the expression of a contrary intention was due to a misapprehension (*Langslow* v. *Langslow* (1856), 21 Beav. 552; *Carver* v. *Richards* (1859), 27 Beav. 488, 496; *L'Estrange* v. *L'Estrange* (1890), 25 L. R. Ir. 399; and see *Re Jack, Jack* v. *Jack*, [1899] 1 Ch. 374; and cases cited in notes (*o*), (*p*), p. 35, *post*). It is not, however, necessary to show an intention actually to exercise a power if a disposition of the property is intended which cannot be effected otherwise than by an execution (*Re Morgan* (1857), 7 I. Ch. R. 18, P. C.; *Byrne* v. *Cullinan*, [1904] 1 I. R. 42, C. A.).

(*a*) *Brodrick* v. *Brown* (1855), 1 K. & J. 328, *per* WOOD, V.-C., at p. 332; *Harvey* v. *Stracey* (1852), 1 Drew. 73, 115; *Hales* v. *Margerum* (1796), 3 Ves. 299, 301; *Bennett* v. *Aburrow* (1803), 8 Ves. 609; *Hughes* v. *Turner* (1834), 3 My. & K. 666, 696; *Curteis* v. *Kenrick* (1840), 9 Sim. 443; *Churchill* v. *Dibben* (1754), 9 Sim. 447, n.; *Andrews* v. *Emmot* (1788), 2 Bro. C. C. 297; *A.-G.* v. *Wilkinson* (1866), L. R. 2 Eq. 816; *Shelford* v. *Ackland* (1856), 23 Beav. 10; *Re Williams (Esther), Foulkes* v. *Williams* (1889), 42 Ch. D. 93, C. A.; *Hunloke* v. *Gell* (1830), 1 Russ. & M. 515; *Roake* v. *Denn* (1830), 4 Bli. (N. S.) 1; *Re Walsh's Trusts* (1878), 1 L. R. Ir. 320; *Evans* v. *Evans* (1856), 23 Beav. 1; *Cooke* v. *Cunliffe* (1851), 17 Q. B. 245; *Langham* v. *Nenny* (1797), 3 Ves. 467; *Re Edmonstone, Bevan* v. *Edmondstone* (1901), 49 W. R. 555; compare *Re Sharland, Re Rew, Rew* v. *Wippell*, [1899] 2 Ch. 536.

(*b*) *Bailey* v. *Lloyd* (1829), 5 Russ. 330; *Re Mills, Mills* v. *Mills* (1886), 34 Ch. D. 186; *Re Sharland, Re Rew, Rew* v. *Wippell, supra*; *Re Hayes, Turnbull* v. *Hayes*, [1901] 2 Ch. 529, C. A.; *Kent* v. *Kent*, [1902] P. 108; *Re Mayhew, Spencer* v. *Cutbush*, [1901] 1 Ch. 677; *Re Weston's Settlement, Neeves* v. *Weston, supra*; *Wrigley* v. *Lowndes*, [1908] P. 348; *Re Sanderson, Sanderson* v. *Sanderson*, [1912] W. N. 54. As to the interpretation of deeds generally, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 433 *et seq.*

(*c*) *Re Old's Trusts, Pengelley* v. *Herbert* (1886), 54 L. T. 677 (general power); *Bailey* v. *Lloyd* (1829), 5 Russ. 330 (but see Sugden, Powers, p. 295); *Re Teape's Trusts* (1873), L. R. 16 Eq. 442; *Pidgely* v. *Pidgely* (1844),

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language, referring to powers in general terms and applied to a fund disposed of as part of a residue which is subjected to debts, may not suffice to execute a limited power over a fund out of which the debts could not be made payable (*d*), unless *reddendo singula singulis* the debts can be construed as made payable out of what is the testator's own property only, and not out of the fund which he has a limited power to appoint (*e*). If the testator shows that he has the distinction between a general and a particular power clearly before his mind, words applicable to a general power do not execute a particular power (*f*). Although there is no specific reference to the particular power, it may be shown on construction that the testator intended its exercise (*g*). Where the donee has more than one power, the exercise of one will not, without more, show an intention to exercise the rest (*h*); but where the intention to pass the property is clear, the power by which alone it can pass is held to have been executed although another is referred to, the mere indication that it is to pass in a particular manner not controlling the general intention that it shall pass in any event (*i*); but in this case the words must be sufficient to amount to an execution of the first power (*k*).

References to property.

66. With regard to references to the property, language equivalent to a specific or demonstrative gift of the subject-matter of the power points to an intention to exercise the power (*l*). Hence,

1 Coll. 255; *Banks* v. *Banks* (1853), 17 Beav. 352; *Gainsford* v. *Dunn* (1874), L. R. 17 Eq. 405; *Hope* v. *Hope* (1854), 5 Giff. 13; compare *Beamish* v. *Beamish* (1869), 4 I. R. Eq. 120; *Re Richardson's Trusts* (1886), 17 L. R. Ir. 436; *Cooke* v. *Cunliffe* (1851), 17 Q. B. 245; *Re Milner, Bray* v. *Milner*, [1899] 1 Ch. 563; *Re Mayhew, Spencer* v. *Cutbush*, [1901] 1 Ch. 677; but there may be other indications which prevent the inference from arising (*Re Weston's Settlement, Neeves* v. *Weston*, [1906] 2 Ch. 620).

(*d*) *Clogstoun* v. *Walcott* (1843), 13 Sim. 523; *Re Cotton, Wood* v. *Cotton* (1888), 40 Ch. D. 41; *Re Porter's Settlement, Porter* v. *De Quetteville* (1890), 45 Ch. D. 179, C. A.; compare *Re Swinburne, Swinburne* v. *Pitt* (1884), 27 Ch. D. 696; *Price* v. *Price* (1882), 46 L. T. 228; *Doe* d. *Hellings* v. *Bird* (1809), 11 East, 49.

(*e*) *Ferrier* v. *Jay* (1870), L. R. 10 Eq. 550; *Cowx* v. *Foster* (1860), 1 John. & H. 30; *Re Teape's Trusts* (1873), L. R. 16 Eq. 442; *Thornton* v. *Thornton* (1875), L. R. 20 Eq. 599; *Pidgely* v. *Pidgely* (1844), 1 Coll. 255; *Re Harris' Trusts* (1872), 20 W. R. 742; *Bailey* v. *Lloyd* (1829), 5 Russ. 330.

(*f*) *Butler* v. *Gray* (1869), 5 Ch. App. 26. As to whether a reference to a "beneficial" power of appointment is sufficient to exercise a special power, see *Ames* v. *Cadogan* (1879), 12 Ch. D. 868; *Von Brockdorff* v. *Malcolm* (1885), 30 Ch. D. 172.

(*g*) *Wrigley* v. *Lowndes*, [1908] P. 348, *per* GORELL BARNES, P., at p. 352.

(*h*) *A.-G.* v. *Vigor* (1803), 8 Ves. 256; *Saward* v. *McDonnell* (1848), 2 H. L. Cas. 88; *Trollope* v. *Linton* (1823), 1 Sim. & St. 477; *Maunsell* v. *Maunsell* (1871), 19 W. R. 1003; *Saunders* v. *Carden* (1891), 27 L. R. Ir. 43; *Cooke* v. *Cunliffe* (1851), 17 Q. B. 245.

(*i*) *Ward* v. *Hartpole* (1776), 3 Bli. 470, H. L.; *Re Morgan* (1857), 7 I. Ch. R. 18, P. C.

(*k*) *Bruce* v. *Bruce* (1871), L. R. 11 Eq. 371; *Re Wilmot* (1861), 29 Beav. 644; *Hamilton* v. *Royse* (1804), 2 Sch. & Lef. 315, 331; *A.-G.* v. *Vigor* (1803), 8 Ves. 256; and see *Re Denton, Bannerman* v. *Toosey* (1890), 63 L. T. 105; *Re Flower, Matheson* v. *Goodwyn* (1890), 63 L. T. 201, C. A.

(*l*) As to the effect of the testator describing the property subject t

the appointment of the fund to a stranger, subject to legacies already given to objects, is a sufficient appointment of the legacies to the objects (*m*); but the circumstance of legacies being identical in amount with a fund subject to the power, without more, is not sufficient (*n*); and a gift referring to part of the subject, or to some of many subjects, of a power does not show an intention to exercise the power as to the whole (*o*); nor does an appointment of an estate generally show an intention to exercise a power of appointing a sum secured by a term on the estate (*p*).

When intention expressed, particular reference not essential.

67. If the will purports to be made in pursuance of a power and the power is referred to, the property need not be mentioned except in general terms (*q*); and, if a clear intention appears that the subject-matter of the power shall pass to one of its objects, there need be no mention of the power (*r*), even the existence of which may have been not known or forgotten, provided a positive intention not to exercise it is not apparent (*s*). Even a wrong reference to the power or the nature of the property does not prevent the instrument from operating as a valid execution, if the intention to exercise the power is otherwise clear (*t*), and, if the

the power as his own, see *Wildbore* v. *Gregory* (1871), L. R. 12 Eq. 482; *Re Comber's Settlement Trusts* (1865), 14 W. R. 172; *Innes* v. *Sayer* (1851), 3 Mac. & G. 606, 612; *Reid* v. *Reid* (1858), 25 Beav. 469; *Re Davids' Trusts* (1859), John. 495; *Webb* v. *Honnor* (1820), 1 Jac. & W. 352; *Re Mattingley's Trusts* (1862), 2 John. & H. 426; *Napier* v. *Napier* (1826), 1 Sim. 28; *Re Wait, Workman* v. *Petgrave* (1885), 30 Ch. D. 617; *Lowe* v. *Pennington* (1840), 10 L. J. (CH.) 83; *Price* v. *Price* (1882), 46 L. T. 228.

(*m*) *Disney* v. *Crosse, Eyre* v. *Parker* (1866), L. R. 2 Eq. 592; *Elliott* v. *Elliott* (1846), 15 Sim. 321; *Gainsford* v. *Dunn* (1874), L. R. 17 Eq. 405.

(*n*) *Davies* v. *Thorns* (1849), 3 De G. & Sm. 347; *Jones* v. *Tucker* (1817), 2 Mer. 533; *Buxton* v. *Buxton* (1837), 1 Keen, 753; *Lowe* v. *Pennington* (1840), 10 L. J. (CH.) 83; compare *Lownds* v. *Lownds* (1827), 1 Y. & J. 445; *Walker* v. *Laxton* (1827), 1 Y. & J. 557; *Rooke* v. *Rooke* (1862), 2 Drew. & Sm. 38.

(*o*) *Hughes* v. *Turner* (1834), 3 My. & K. 666; *Lewis* v. *Llewellyn* (1823), Turn. & R. 104; *Napier* v. *Napier* (1826), 1 Sim. 28; *Elliott* v. *Elliott, supra;* compare *Re Wait, Workman* v. *Petgrave, supra; Re Comber's Settlement Trusts, supra; Reid* v. *Reid, supra; Walker* v. *Mackie* (1827), 4 Russ. 76, as to which see *Hughes* v. *Turner, supra.*

(*p*) *Farmer* v. *Bradford* (1827), 3 Russ. 354; *Clifford* v. *Clifford* (1852), 9 Hare, 675.

(*q*) *Harvey* v. *Stracey* (1852), 1 Drew. 73, 113; *Bailey* v. *Lloyd* (1829), 5 Russ. 330; *Davies* v. *Fisher* (1842), 5 Beav. 201; *Reid* v. *Reid* (1858), 25 Beav. 469; *Maunsell* v. *Maunsell* (1871), 19 W. R. 1003.

(*r*) *Ward* v. *Hartpole* (1776), 3 Bli. 470, H. L.; *Re Morgan* (1857), 7 I. Ch. R. 18, P. C.; *Peirce* v. *M'Neale,* [1894] 1 I. R. 118; compare *Robinson* v. *Sykes* (1856), 23 Beav. 40; *Brookman* v. *Hales* (1813), 2 Ves. & B. 45; *Carver* v. *Richards* (1859), 27 Beav. 488, 496; *Probert* v. *Morgan* (1739), 1 Atk. 440; *Re Caswall, Ex parte Caswall* (1744), 1 Atk. 559; *Molton* v. *Hutchinson* (1739), 1 Atk. 558; *Bradly* v. *Westcott* (1807), 13 Ves. 445; *Dillon* v. *Dillon* (1809), 1 Ball & B. 77, 92; *Byrne* v. *Cullinan,* [1904] 1 I. R. 42, C. A.

(*s*) *Re Porter's Settlement, Porter* v. *De Quetteville* (1890), 45 Ch. D. 179, C. A.; *Minchin* v. *Minchin* (1871), 5 I. R. Eq. 258, C. A., *per* CHRISTIAN, L.J., at p. 273.

(*t*) *Re Wilmot* (1861), 29 Beav. 644; *Fletcher* v. *Fletcher* (1880), 7 L. R. Ir. 40.

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donee of a limited power erroneously recites that he has thereby appointed, this is evidence of an intention thereby to appoint. If, however, the recital erroneously states that an object of the power is entitled to the subject-matter so as to suggest that he is so entitled by independent title, this negatives any exercise of the power. It is otherwise if the assumed independent title is one which the donee of the power wrongly supposes himself to have conferred (*a*).

Effect of erroneous recital.

Burden of proof.

68. None of the circumstances above mentioned is *per se* conclusive, but they are *indicia* which point to an intention to execute. While the burden of proving the intention to execute a power voluntarily is upon the volunteer, if the person alleging the execution is a purchaser, it is said that there is a presumption in his favour (*b*).

Admissibility of evidence of state of property or of existence of power.

69. There is a rule, of some importance before 1838 (*c*), with regard to all powers, general and special, but, since 1838, that is only of importance with respect to special powers—namely, in a gift of real estate, the court may examine whether the testator's own property is such as to enable effect to be given to his will without recourse to the property subject to the power, although in a gift of personalty the rule is otherwise (*d*). Where the gift is *primâ facie* specific, evidence of the state of the property at the date of the will is admissible (*e*). Where a testator purports to appoint

(*a*) *Pennefather* v. *Pennefather* (1873), 7 I. R. Eq. 300, *per* Lord O'HAGAN, L.C., at p. 310; *Minchin* v. *Minchin* (1871), 5 I. R. Eq. 178, 258, C. A.; *Re Walsh's Trusts* (1878), 1 L. R. Ir. 320; *L'Estrange* v. *L'Estrange* (1890), 25 L. R. Ir. 399; *Lees* v. *Lees* (1871), 5 I. R. Eq. 549; *Morgan* v. *Gronow* (1873), L. R. 16 Eq. 1. See the parallel cases on erroneous recitals of direct gifts by will (*Adams* v. *Adams* (1842), 1 Hare, 537, 540; *Nugent* v. *Nugent* (1874), 8 I. R. Eq. 78; *Hall* v. *Lietch* (1870), L. R. 9 Eq. 376; and see title WILLS).

(*b*) *Pennefather* v. *Pennefather*, *supra*; *Blake* v. *Marnell* (1803), 2 Ball & B. 38, n., *per* Lord REDESDALE, L.C., at p. 39, n.; *Wilson* v. *Piggott* (1794), 2 Ves. 351; *L'Estrange* v. *L'Estrange*, *supra*; *Minchin* v. *Minchin*, *supra*, at pp. 258, 268, C. A.

(*c*) *I.e.*, before the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26); see *ibid.*, s. 34.

(*d*) *Jones* v. *Curry* (1818), 1 Swan. 66; *Jones* v. *Tucker* (1817), 2 Mer. 533; *Standen* v. *Standen* (1795), 2 Ves. 589; *Andrews* v. *Emmot* (1788), 2 Bro. C. C. 297; *Nannock* v. *Horton* (1802), 7 Ves. 391, 398; *Lovell* v. *Knight* (1829), 3 Sim. 275; *Lempriere* v. *Valpy* (1832), 5 Sim. 108; *Dummer* v. *Pitcher* (1833), 2 My. & K. 262, 275; *Grant* v. *Lynam* (1828), 4 Russ. 292; *Re Mills*, *Mills* v. *Mills* (1886), 34 Ch. D. 187; *Webb* v. *Honnor* (1820), 1 Jac. & W. 352; *Re Williams* (*Esther*), *Foulkes* v. *Williams* (1889), 42 Ch. D. 93, C. A.; *Harvey* v. *Harvey* (1875), 32 L. T. 141; *Molton* v. *Hutchinson* (1739), 1 Atk. 558; *Re Huddleston*, *Bruno* v. *Eyston*, [1894] 3 Ch. 595; *Lownds* v. *Lownds* (1827), 1 Y. & J. 445; *Davies* v. *Thorns* (1849), 3 De G. & Sm. 347.

(*e*) *Innes* v. *Sayer* (1851), 3 Mac. & G. 606; *Walker* v. *Mackie* (1827), 4 Russ. 76; *Mackinley* v. *Sison* (1837), 8 Sim. 561; *Shuttleworth* v. *Greaves* (1838), 4 My. & Cr. 35, 38; *Elliott* v. *Elliott* (1846), 15 Sim. 321; *Horwood* v. *Griffith* (1853), 4 De G. M. & G. 700, 708, C. A.; *Re Gratwick's Trusts* (1865), L. R. 1 Eq. 177; *Rooke* v. *Rooke* (1862), 2 Drew. & Sm. 38; *Re Morgan* (1857), 7 I. Ch. R. 18, P. C.; *Re Williams* (*Esther*), *Foulkes* v. *Williams*, *supra*; *Re Mills*, *Mills* v. *Mills*, *supra*; *Tredennick* v. *Tredennick*, [1900] 1 I. R. 354; *Re Hayes*, *Turnbull* v. *Hayes*, [1901] 2 Ch. 529, C. A.

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real estate or personal estate under a power, evidence may be given of the existence of one power and of the absence of any other (*f*); but evidence that the existence of the power had been forgotten is not admissible (*g*); and, although surrounding circumstances at the time the will was made may be looked at, a settlement creating a power subsequently to the will is not a surrounding circumstance (*h*).

Effect given to exercise of power where appointor has also the interest.

70. If a man has both a power and an interest, and does an act generally as owner of the land without reference to the power, the land passes by virtue of his ownership, not of his power; but, where the disposition will be absolutely void if it does not enure as an execution of the power, effect will be given to it by that construction (*i*). If he both grants his estate and exercises his power, the estate passes in the manner best adapted to carry out the intention of the parties (*k*). If he either grants his estate or exercises his power, and full effect will not be thereby given to the intention of the parties, the estate will be held to pass in the manner not expressed to be intended in order to effectuate the general intention (*l*); and if the power is executed but proves to have been previously destroyed, or to have been in its inception badly created, the donee's interest will make good the default in appointment (*m*).

Exercise of power subsequent to invalid execution.

71. A power may be well exercised notwithstanding a previous invalid execution (*n*); but if such invalidity is due to fraud the

(*f*) *Re Mayhew, Spencer* v. *Cutbush*, [1901] 1 Ch. 677; *Re Milner, Bray* v. *Milner*, [1899] 1 Ch. 563.

(*g*) *Re Boyd, Nield* v. *Boyd* (1890), 63 L. T. 92.

(*h*) *Boyes* v. *Cook* (1880), 14 Ch. D. 53, C. A.; but the instrument creating the power may, of course, be referred to, though subsequent to the alleged execution, for the purpose of ascertaining whether its requirements are satisfied by the previous instrument (*Pettinger* v. *Ambler, Bunn* v. *Pettinger* (1866), L. R. 1 Eq. 510).

(*i*) *Clere's Case* (1599), 6 Co. Rep. 17 b; *Roscommon* (*Countess Dowager*) v. *Fowke* (1745), 6 Bro. Parl. Cas. 158; *Blake* v. *Marnell* (1811), 2 Ball & B. 35; *Maundrell* v. *Maundrell* (1805), 10 Ves. 246, 257; *Re Bidwell's Settlement* (1863), 32 L. J. (CH.) 71.

(*k*) *Cox* v. *Chamberlain* (1799), 4 Ves. 631; *Re Griffiths' Settlement, Griffiths* v. *Waghorne*, [1911] 1 Ch. 246; compare *Mogridge* v. *Clapp*, [1892] 3 Ch. 382, C. A., *per* LINDLEY, L.J., at p. 395; but see *Roach* v. *Wadham* (1805), 6 East, 289 (as to which see Sugden, Powers, p. 359); *Child* v. *Douglas* (1856), 2 Jur. (N. S.) 950; *Spoor* v. *Green* (1874), L. R. 9 Exch. 99.

(*l*) *Tomlinson* v. *Dighton* (1711), 1 P. Wms. 149; *Langley* v. *Brown* (1741), 2 Atk. 195, 199; *Campbell* v. *Leach* (1775), Amb. 740; *Parker* v. *Kett* (1701), 1 Ld. Raym. 658, 660; *Andrews* v. *Emmot* (1788), 2 Bro. C. C. 297, 303; *A.-G.* v. *Griffith* (1807) 13 Ves. 565, 580; *Doe* d. *Daniel* v. *Keir* (1829), 4 Man. & Ry. (K. B.) 101; *Wade* v. *Paget* (1784), 1 Bro. C. C. 363, 366 (as to which see Sugden, Powers, p. 348); *Wynne* v. *Griffith* (1826), 1 Russ. 283. Parol evidence is not admissible to show an intention not to exercise the power (*Blake* v. *Marnell, supra*: *MacAndrew* v. *Gallagher* (1874), 8 I. R. Eq. 490; *Shove* v. *Pincke* (1793), 5 Term Rep. 124, 310; *Coventry* (*Countess Dowager*) v. *Coventry* (*Earl*) (1724), 2 P. Wms. 222).

(*m*) *Mandeville* v. *Roe* (1844), 1 Jo. & Lat. 371; *Cross* v. *Hudson* (1789), 3 Bro. C. C. 31; *Mortlock* v. *Buller* (1804), 10 Ves. 292, 314; *Sing* v. *Leslie* (1864), 2 Hem. & M. 68, 86; *Jones* v. *Southall* (1861), 30 Beav. 187.

(*n*) *Hervey* v. *Hervey* (1739), 1 Atk. 561, *per* Lord HARDWICKE, L.C., at

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validity of the second execution depends on proof that such fraud no longer exists (*o*). The burden of proof requisite to support a second appointment in such a case rests on the appointee, and in the case of fraudulent appointments, whether set aside by the court or revoked by the appointor, if the second appointment is to the same person as the first, the difficulty of showing that the second appointment is free from the fraud which vitiated the first is so great as to be almost insuperable (*p*).

Sufficient expression of intention.

In the case of a second execution following a previous invalid execution there must be some expression of an intention to exercise the power; but an expressed intention to pass the property the subject of the power, and apt words to execute the power suffices, it seems, without any expressed intention, to retract the invalid execution (*q*).

Confirmation of invalid appointment.

Although the mere expression of a desire to confirm an invalid appointment does not establish it, yet if the appointor, having made an appointment which was at the time of making it invalid, afterwards does not merely express a desire to confirm such appointment, but proceeds to do so by way of appointment, then, if events have since happened which render such an appointment unobjectionable, it will be upheld (*r*).

SECT. 13.—*Operation of Appointment.*

SUB-SECT. 1.—*Extent of Execution.*

Question of extent of execution of general powers.

72. In the case of a will exercising a general power of appointment (*s*), it is a question of intention whether the donee of the power meant by the exercise of it to take the appointed property out of the instrument creating the power for all purposes, or only for the limited purpose of giving effect to the particular disposition expressed; and there is no difference in this respect between real and personal estate. The general rule is that the appointment is to be taken as an exercise of the power so far as is necessary to give effect to the particular disposition, but no further. It lies upon

p. 567; *Edwards* v. *Sleater* (1665), Hard. 410; *Tippet* v. *Eyres* (1690), 5 Mod. Rep. 457, *per* VENTRIS, J.; *Hole* v. *Escott* (1838), 4 My. & Cr. 187; *Ward* v. *Tyrrell* (1858), 25 Beav. 563.

(*o*) *Topham* v. *Portland* (*Duke*) (1869), 5 Ch. App. 40; *Hutchins* v. *Hutchins* (1876), 10 I. R. Eq. 453; *Askham* v. *Barker* (1850), 12 Beav. 499; *Jackson* v. *Jackson* (1843), Drury *temp.* Sug. 91; *Farmer* v. *Martin* (1828), 2 Sim. 502; but see Sugden, Powers, p. 355, and *Irwin* v. *Rogers* (1848), 12 I. Eq. R. 159; see also *Carver* v. *Richards* (1859), 27 Beav. 488; *Birley* v. *Birley* (1858), 25 Beav. 299; *Henderson* v. *Astwood*, *Astwood* v. *Cobbold*, *Cobbold* v. *Astwood*, [1894] A. C. 150, 162, P. C.

(*p*) *Topham* v. *Portland* (*Duke*), *supra*, *per* GIFFARD, L.J., at p. 61; *Hutchins* v. *Hutchins*, *supra*, *per* CHATTERTON, V.-C., at p. 457; *Humphrey* v. *Olver* (1859), 5 Jur. (N. S.) 946; compare *Huguenin* v. *Baseley* (1807), 14 Ves. 273. As to the presumption of undue influence, see title FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., pp. 103 *et seq.*

(*q*) *Jackson* v. *Jackson*, *supra*; *Carver* v. *Richards* (1859), 27 Beav. 488.

(*r*) *Morgan* v. *Gronow* (1873), L. R. 16 Eq. 1; and see *Armytage* v. *Arymtage* (1842), 1 Y. & C. Ch. Cas. 461.

(*s*) As to the case of a limited power, see p. 40, *post.*

the party claiming the fund to show sufficient indication of intention that, in the event of the appointee being incapable of taking under the appointment, the fund was not left by the donee to go as in default of appointment (*t*).

Appointments to trustees.

No general rule as to sufficient indication can be laid down, but the cases suggest the following principles:—An appointment to trustees for an appointee who predeceases the testator suggests that the testator intended to withdraw the appointed fund and to vest it in the trustees of his will, who hold it upon the same trusts as if it had been the appointor's own property (*a*). The same applies to an appointment to trustees where no trusts are declared, or the trusts declared do not exhaust the fund (*b*); but a direction that the trustees of the instrument creating the power hold the property in trust for a person who predeceases him suggests the contrary inference (*c*).

Appointment to person predeceasing testator. Other *indicia*.

An appointment to A. who dies before the testator suggests no inference of an intention to make the property the testator's own for all purposes (*d*); but there may be other *indicia*, such as a will treating the appointed fund and the testator's own property as one mass, and charging the entirety with debts and expenses and appointing executors (*e*). The appointment of an executor alone is, however, not enough (*f*), although such appointment suffices to make the property assets for payment of debts and legacies (*g*).

Appointment to executors and administrators.

73. An appointment by deed by the donee of a general power to his own executors and administrators gives the absolute interest to himself (*h*); and an appointment by will to the appointor's executors and administrators, followed by directions which either fail or do not exhaust the fund, makes the appointed fund part of the appointor's assets; so that an appointment to executors, as executors, of a fund which is treated as blended with the appointor's own property raises the presumption that the testator intended to

(*t*) *Re De Lusi's Trusts* (1879), 3 L. R. Ir. 232; *Re Pinède's Settlement* (1879), 12 Ch. D. 667; *Re Van Hagan, Sperling* v. *Rochfort* (1880), 16 Ch. D. 18, 31, C. A.; *Coxen* v. *Rowland*, [1894] 1 Ch. 406; *Re Boyd, Kelly* v. *Boyd*, [1897] 2 Ch. 232; *Re Hodgson, Darley* v. *Hodgson*, [1899] 1 Ch. 666; *Re Marten, Shaw* v. *Marten*, [1902] 1 Ch. 314, C. A.; *Lefevre* v. *Freeland* (1857), 24 Beav. 403; *Re Elen, Thomas* v. *McKeckine*, [1893] W. N. 90.

(*a*) *Chamberlain* v. *Hutchinson* (1856), 22 Beav. 444; *Wilkinson* v. *Schneider* (1870), L. R. 9 Eq. 423; *Re Davies' Trusts* (1871), L. R. 13 Eq. 163; *Re Van Hagan, Sperling* v. *Rochfort, supra*; *Re Scott, Scott* v. *Hanbury*, [1891] 1 Ch. 298.

(*b*) *Goodere* v. *Lloyd* (1830), 3 Sim. 538; *Lefevre* v. *Freeland* (1857), 24 Beav. 403.

(*c*) *Re Thurston, Thurston* v. *Evans* (1886), 32 Ch. D. 508; *Re Pinède's Settlement, supra*; *Re Marten, Shaw* v. *Marten, supra*.

(*d*) *Re Davies' Trusts, supra*; *Re De Lusi's Trusts, supra*.

(*e*) *Re Ickeringill's Estate, Hinsley* v. *Ickeringill* (1881), 17 Ch. D. 151; *Willoughby Osborne* v. *Holyoake* (1882), 22 Ch. D. 238; *Re Marten, Shaw* v. *Marten, supra*.

(*f*) *Re Thurston, Thurston* v. *Evans, supra*; *Re Boyd, Kelly* v. *Boyd, supra*, at p. 236; *Laing* v. *Cowan* (1857), 24 Beav. 112.

(*g*) *Re Seabrook, Gray* v. *Baddeley*, [1911] 1 Ch. 151; see p. 30, *ante*, p. 44, *post*.

(*h*) *Mackenzie* v. *Mackenzie* (1851), 3 Mac. & G. 559.

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make the fund his own for all purposes (*i*). The same result follows, though the settled fund is appointed to trustees who are not also executors, if the fund is treated as blended with the appointor's own property (*k*).

The rule is the same as to real and personal estate (*l*), and applies to cases of disclaimer as well as to cases of lapse (*m*).

SUB-SECT. 2.—*Lapse and Abatement.*

Limited powers.

74. In the case of a limited power the donee cannot make the property his own in any case, and the question is whether the appointment lapses entirely or whether there are other words by which the property can pass.

Failure of devise of real estate.

The statutory provision that, unless a contrary intention appears by the will, real estate, or an interest in real estate, comprised or intended to be comprised in a devise contained in a will which fails or is void by reason of the death of the devisee in the lifetime of the testator, or because the devise is contrary to law or otherwise incapable of taking effect, shall be included in any residuary devise contained in the will, has no application to appointments under a special power, such a disposition not being a "devise" within the meaning of the statute (*n*).

Exclusion of lapse by appointment to executors and administrators.

75. Lapse may be excluded, in the case of a general power, by an express appointment to the executors and administrators of the appointee in substitution for him; but the intention to exclude lapse must be clearly shown and the substitutional appointees definitely designated; mere words of limitation do not suffice (*o*). In the case of limited powers, lapse cannot be thus excluded unless the substituted appointees are objects of the power (*p*).

Appointments of residue.

76. In the case of an appointment to two or more of an ascertained sum in definite fractions, no appointee can take more under that gift than the fraction expressed to be his; and, if fractions or fixed sums are appointed and then "the rest" or "the remainder" of the ascertained sum is appointed to another, he cannot claim any share which may lapse in consequence of the death of a former appointee in the lifetime of the testator, or fail by reason of the appointee being a stranger to the power, if the true construction of the appointment is that all that was intended

(*i*) *Brickenden* v. *Williams* (1869), L. R. 7 Eq. 310; *Bristow* v. *Skirrow* (1870), L. R. 10 Eq. 1; *Chamberlain* v. *Hutchinson* (1856), 22 Beav. 444.

(*k*) *Lefevre* v. *Freeland* (1857), 24 Beav. 403; *Re Pinède's Settlement* (1879), 12 Ch. D. 667.

(*l*) *Re Van Hagan, Sperling* v. *Rochfort* (1880), 16 Ch. D. 18, C. A.; *Re Horton, Horton* v. *Perks, Horton* v. *Clark* (1884), 51 L. T. 420.

(*m*) *A.-G.* v. *Brackenbury* (1863), 1 H. & C. 782; compare *A.-G.* v. *Mumby* (1858), 3 H. & N. 826. As to lapse, see, further, the text, *infra*.

(*n*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 25; *Holyland* v. *Lewin* (1884), 26 Ch. D. 266, C. A.

(*o*) *Browne* v. *Hope* (1872), L. R. 14 Eq. 343; *Stevens* v. *King*, [1904] 2 Ch. 30.

(*p*) *Maddison* v. *Andrew* (1747), 1 Ves. Sen. 57; *Butcher* v. *Butcher*, *Gooday* v. *Butcher* (1812), 1 Ves. & B. 79.

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to be given is a sum arrived at by subtracting the previously named sums from the whole fund (*a*). If, however, the intention is to appoint the residue strictly as residue, or to appoint the entire fund charged with the sums specified in the previous appointments, the residuary clause is read as an appointment, not of the mere balance of the fund after the sums previously appointed have been deducted from it, but of the entire fund subject to the appointments previously made (*b*).

Abatement of specific sums and of "residue" rateably.

77. Where a fund is appointed by one and the same instrument in aliquot shares, and it proves insufficient, the shares abate proportionately, and, if specific sums in excess of the total are appointed, abatement is rateable (*c*). Where, after the appointment of specific sums, part of an ascertained (*d*) fund, "all the rest" or "all the remainder" of the fund is appointed to another, the latter appointment, being treated as a gift of the exact amount left after deducting from the fund the specific amounts already given, abates rateably (*e*); and, if the intention is clear, the amount of a charge for portions on an estate covenanted to be bought for a certain sum may abate if the full amount is not forthcoming for the purchase of the estate to be charged (*f*). In these cases the question is whether the intention is to appoint a specific sum and a residue strictly as residue, or to appoint the entire fund charged with the specific sum.

Liability of residuary appointments and latest appointments to bear loss.

If the appointment is not made so as to operate on a fund of unvarying amount, or if the appointor does not assume that a given sum or an estate of a given value will be available, the residuary appointment must bear the loss (*g*). If there are successive independent appointments by separate instruments, which in the aggregate more than exhaust the fund, the latest appointment must bear

(*a*) *Harley* v. *Moon* (1861), 1 Drew. & Sm. 623; *Baker* v. *Farmer* (1868), 3 Ch. App. 537, 540; *Easum* v. *Appleford* (1840), 5 My. & Cr. 56; *Re Harries' Trust* (1859), John. 199; *Lakin* v. *Lakin* (1865), 34 Beav. 443; *Swete* v. *Tindall* (1874), 31 L. T. 223; *Falkner* v. *Butler* (1765), Amb. 514; *Champney* v. *Davy* (1879), 11 Ch. D. 949, 958; but see *Holyland* v. *Lewin* (1884), 26 Ch. D. 266, C. A.; *Ratcliffe* v. *Hampson* (1855), 1 Jur. (N. S.) 1104; *Re Jeaffreson's Trusts* (1866), L. R. 2 Eq. 276; *Wilkinson* v. *Schneider* (1870), L. R. 9 Eq. 423.

(*b*) *Oke* v. *Heath* (1748), 1 Ves. Sen. 135; *Re Hunt's Trusts* (1885), 31 Ch. D. 308; *Re Crawshay, Crawshay* v. *Crawshay* (1890), 43 Ch. D. 615; *Re Meredith's Trusts* (1876), 3 Ch. D. 757; *Duguid* v. *Fraser* (1886), 31 Ch. D. 449; *Champney* v. *Davy, supra*; *Carter* v. *Taggart* (1848), 16 Sim. 423.

(*c*) *Laurie* v. *Clutton* (1851), 15 Beav. 65.

(*d*) *Petre* v. *Petre* (1851), 14 Beav. 197; *Re Currie, Bjorkman* v. *Kimberley* (1888), 36 W. R. 752.

(*e*) *Page* v. *Leapingwell* (1812), 18 Ves. 463; *Easum* v. *Appleford, supra*; *Elwes* v. *Causton* (1862), 30 Beav. 554; *Walpole* v. *Apthorp* (1867), L. R. 4 Eq. 37; *Haynes* v. *Haynes* (1853), 3 De G. M. & G. 590, C. A.; *Booth* v. *Alington* (1856), 6 De G. M. & G. 613; *Re Cruddas, Cruddas* v. *Smith*, [1900] 1 Ch. 730, C. A.; *Butler* v. *Blackall*, [1907] 1 I. R. 405; *Re Saunders, Saunders* v. *Gore*, [1898] 1 Ch. 17, C. A.

(*f*) *Chambers* v. *Chambers* (1730), Mos. 333; *Miller* v. *Huddlestone* (1868), L. R. 6 Eq. 65.

(*g*) *Petre* v. *Petre, supra*; *De Lisle* v. *Hodges* (1874), L. R. 17 Eq. 440.

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the loss (*h*); but, if the appointments are all made by one instrument which at once takes effect as to all the objects, and the whole fund is given to several objects, one of whom is necessarily named last, the last-named cannot be made to bear the loss merely because he is mentioned last (*i*); to effect this result the intention must clearly appear, and the burden of proof lies on the person seeking to establish priority (*k*). Where an appointment is made to take effect out of a trust fund generally and afterwards an appointment is made of a specific portion of the trust fund, the portion of the fund not specificially appointed must be first applied in satisfaction of the first appointment, and the specifically appointed portion is only to be resorted to in the event of a deficiency (*l*).

Effect of lapse in aiding deficiency.

78. Where a fund is appointed in sums of which the aggregate exceeds the total sum subject to the power, the lapse of any appointment augments the amount available for the rest (*m*).

SUB-SECT. 3.—*Ademption.*

Ademption.

79. An appointment under a power may be adeemed (*n*) in the same manner as a specific devise or bequest (*o*).

By alienation.

Although it is provided by statute (*p*) that no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death, this provision does not apply to cases where the thing meant to be given is gone.

Change in property subject to general or special power.

80. Where there is a change in the character of the property subject to the power subsequent to its execution by will, the answer to the question whether the subsequent dealing has effected an ademption depends upon whether, upon the true construction of his will, the testator has appointed the property subject to the power, in whatever way invested, or whether he has appointed a specific property and nothing else. The test to be applied is whether his expressed intention is to execute his power, whatever may be the property subject to it at his death, or to give a particular estate, his title to dispose of which happens to arise from power and not from property (*q*).

(*h*) *Trollope* v. *Routledge* (1847), 1 De G. & Sm. 662; *Stokes* v. *Bridgman* (1878), 47 L. J. (CH.) 759; *Wilson* v. *Kenrick* (1885), 31 Ch. D. 658; *Gilbert* v. *Whitfield* (1882), 52 L. J. (CH.) 210.

(*i*) *Bulteel* v. *Plummer* (1870), 6 Ch. App. 160, 162.

(*k*) *Miller* v. *Huddlestone* (1851), 3 Mac. & G. 513.

(*l*) *Morgan* v. *Gronow* (1873), L. R. 16 Eq. 1.

(*m*) *Eales* v. *Drake* (1875), 1 Ch. D. 217; *Re Lyne's Estate, Sands* v. *Lyne* (1869), L. R. 8 Eq. 482; *Barry* v. *Barry* (1876), 10 I. R. Eq. 397.

(*n*) As to ademption generally, see titles EQUITY, Vol. XIII., pp. 131, 135; WILLS.

(*o*) As to revocation, see p. 48, *post*.

(*p*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 23; see title WILLS.

(*q*) *Gale* v. *Gale* (1856), 21 Beav. 349 (see Sugden, Powers, p. 308); *Collinson* v. *Collinson* (1857), 24 Beav. 269; *Blake* v. *Blake* (1880), 15

In this respect there is no distinction between general and special powers (*r*).

Accession of legal to beneficial interest.

81. The mere accession of the legal to the beneficial interest does not operate as an ademption (*s*). Where a specific fund held by trustees for the appointor is appointed and is received by the appointor who changes the investment, the appointment is adeemed, but by reason of the change of investment, not of the transfer by the trustees to the appointor (*a*).

SUB-SECT. 4.—*Time from which Execution Operates.*

Appointment by will speaks from death.

82. A will made or republished after the 31st December, 1837, is, by the Wills Act, 1837 (*b*), s. 24, construed with reference to the real estate and personal estate comprised in it to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will (*c*). It follows from this and from the Wills Act, 1837 (*b*), s. 27 (*d*), that a general power of appointment may be well exercised by a will executed previously to the creation of the power, and that, too, by a mere residuary gift (*e*) unless a contrary intention appears by the will (*f*). It is doubtful, however, whether the first-mentioned

Ch. D. 481; *Re Johnstone's Settlement* (1880), 14 Ch. D. 162; *Cooper* v. *Martin* (1867), 3 Ch. App. 47; *Re Dowsett, Dowsett* v. *Meakin*, [1901] 1 Ch. 398; *Re Moses, Beddington* v. *Beddington*, [1902] 1 Ch. 100, C. A.; affirmed *sub nom. Beddington* v. *Baumann*, [1903] A. C. 13; *Willett* v. *Finlay* (1891), 29 L. R. Ir. 156, 497, C. A.; *Re Hayes, Turnbull* v. *Hayes*, [1901] 2 Ch. 529, C. A.; but see *Walker* v. *Armstrong* (1855), 21 Beav. 284.

(*r*) *Thompson* v. *Simpson* (1881), 50 L. J. (CH.) 461; *Re Dowsett, Dowsett* v. *Meakin, supra; Beddington* v. *Baumann, supra.*

(*s*) *Dingwell* v. *Askew* (1788), 1 Cox, Eq. Cas. 427; *Clough* v. *Clough* (1834), 3 My. & K. 296; *Lee* v. *Lee* (1858), 6 W. R. 846; *Lawrence* v. *Wallis* (1788), 2 Bro. C. C. 319.

(*a*) *Jones* v. *Southall* (No. 2) (1862), 32 Beav. 31; *Lee* v. *Lee* (1858), 6 W. R. 846.

(*b*) 7 Will. 4 & 1 Vict. c. 26.

(*c*) *Ibid.*, s. 24.

(*d*) See p. 29, *ante*.

(*e*) *Stillman* v. *Weedon* (1848), 16 Sim. 26, is usually cited for this, but the power there was a limited power, and the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 27, should not have been treated as applicable; see *Re Hayes, Turnbull* v. *Hayes*, [1900] 2 Ch. 332, 335, 338; [1901] 2 Ch. 529, C. A.; *Moss* v. *Harter* (1854), 2 Sm. & G. 458; *Patch* v. *Shove* (1862), 2 Drew. & Sm. 589; *Boyes* v. *Cook* (1880), 14 Ch. D. 53, C. A.; *Pettinger* v. *Ambler, Bunn* v. *Pettinger* (1866), L. R. 1 Eq. 510; *Cofield* v. *Pollard* (1857), 5 W. R. 774; *Hodsdon* v. *Dancer* (1868), 16 W. R. 1101; *Meredyth* v. *Meredyth* (1871), 5 I. R. Eq. 565; *Re Old's Trusts, Pengelley* v. *Herbert* (1886), 54 L. T. 677. Before the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), the republication of a will after the creation of a power in the testator would not operate to make a will, executed prior to such creation, an execution of the power (*Cowper* v. *Mantell* (No. 1) (1856), 22 Beav. 223, 229); but see now *Re Blackburn, Smiles* v. *Blackburn* (1889), 43 Ch. D. 75. The Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 8, does not prevent *ibid.*, ss. 24, 27, from applying to the will of a married woman (*Thomas* v. *Jones* (1862), 1 De G. J. & Sm. 63).

(*f*) The contrary intention must appear by the will (*Boyes* v. *Cook, supra; Re Clark's Estate, Maddick* v. *Marks* (1880), 14 Ch. D. 422, C. A.; *Re Hernando, Hernando* v. *Sawtell* (1884), 27 Ch. D. 284; but see *Re Phillips, Robinson* v. *Burke* (1889), 41 Ch. D. 417; *Phillips* v.

SECT. 13. **Operation of Appointment.**

provision (*g*) has any application to limited powers (*h*), and they are not within the second provision (*i*) above referred to (*k*). A man can, however, execute only such powers as are given to him during his lifetime; he cannot execute a power given by the will of a person who survives him unless the Wills Act, 1837 (*l*), s. 33, applies (*m*).

Application of rule to limited powers.

SUB-SECT. 5.—*Property Rendered Assets by Appointment.*

Effect of exercise of general power.

83. Both real and personal estate subject to general powers of appointment become assets for the payment of the appointor's debts if the power is actually exercised by will in favour of volunteers; and it makes no difference whether the power is exercisable by deed or by will, or by will only (*n*).

Cayley (1889), 43 Ch. D. 222, C. A.; *Re Tarrant's Trust* (1889), 58 L. J. (CH.) 780; *Re Ruding's Settlement* (1872), L. R. 14 Eq. 266, is overruled). The fact that the language in which the power is conferred points to a future execution is not such a contrary intention (*Airey* v. *Bower* (1887), 12 App. Cas. 263; compare *Thompson* v. *Simpson* (1881), 50 L. J. (CH.) 461). Nor is the circumstance that a residuary devise contains limitations during the life of B. conclusive evidence of an intention not to execute a power which would only come into existence in the event of B. predeceasing the testator (*Thomas* v. *Jones* (1862), 2 John. & H. 475; *Re Waterhouse, Waterhouse* v. *Ryley* (1908), 77 L. J. (CH.) 30, C. A.). In the case of a general devise or bequest by will, followed by an instrument which, while exercising a power of appointment, reserves a power of revocation and new appointment, the antecedent date of the will is sufficient evidence of a contrary intention to prevent its operating as an exercise of the power of revocation and new appointment created by the subsequent instrument (*Re Gibbes' Settlement, White* v. *Randolf* (1887), 37 Ch. D. 143; *Re Wells' Trusts, Hardisty* v. *Wells* (1889), 42 Ch. D. 646).

(*g*) *I.e.*, the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 24; see p. 43, *ante*.

(*h*) It is doubtful whether property appointed under a limited power can be said to be "comprised in" the will within the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 24 (*Re Wells' Trusts, Hardisty* v. *Wells, supra*; *Re Hayes, Turnbull* v. *Hayes*, [1901] 2 Ch. 529, C. A.; *Doyle* v. *Coyle*, [1895] 1 I. R. 205). The duty of fair distribution among the objects of the power with due regard to all the circumstances is hardly compatible with the creation of the power subsequently to its execution; see *Thomas* v. *Jones, supra*.

(*i*) *I.e.*, the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 27.

(*k*) See p. 29, *ante*. Hence an express intention to execute must be found (see p. 33, *ante*), and if regard be had to the date of the will this is not easy; see *Re Wells' Trusts, Hardisty* v. *Wells, supra*; *Cave* v. *Cave* (1856), 8 De G. M. & G. 131, C. A.

(*l*) 7 Will. 4 & 1 Vict. c. 26.

(*m*) *Re Hensler, Deceased, Jones* v. *Hensler* (1881), 19 Ch. D. 612; *Jones* v. *Southall* (No. 2) (1862), 32 Beav. 31; *Sharpe* v. *M'Call*, [1903] 1 I. R. 179; and see title WILLS.

(*n*) *Beyfus* v. *Lawley*, [1903] A. C. 411; *Jenney* v. *Andrews* (1822), Madd. & G. 264; *Fleming* v. *Buchanan* (1853), 3 De G. M. & G. 976, C. A.; *Williams* v. *Lomas* (1852), 16 Beav. 1; *Shirley* v. *Ferrers* (*Lord*) (1733), 7 Ves. 503, n.; *Lassells* v. *Cornwallis* (*Lord*) (1704), 2 Vern. 465; *Townshend* (*Lord*) v. *Windham* (1750), 2 Ves. Sen. 1, 10; *Holmes* v. *Coghill* (1806), 12 Ves. 206; *Re Hodgson, Darley* v. *Hodgson*, [1899] 1 Ch. 666, 670; and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 223. If an appointment has been made, and the appointor has induced the trustee to pay over to himself the amount appointed, his creditors cannot recover it from the trustees (*Re Newnham's Estate, Amoore* v. *Elmslie*, [1881] W. N. 69; cited in *Re Lawley, Zaiser* v. *Lawley*, [1902] 2 Ch. 799, C. A. *per* STIRLING, J., at p. 806). See also pp. 30, 39, *ante*.

A direction in the will of the donee of a general power for the payment of his debts is sufficient to render the fund, which he has power to appoint, liable to supply the deficiency in his own assets, whether an executor is appointed or not (*o*); and the appointment of an executor and bequests of general pecuniary legacies is also sufficient (*p*).

Direction for payment of debts.

Appointment of executor.

SUB-SECT. 6.—*Divesting of Vested Estates.*

84. The existence of a power of appointment does not prevent the vesting of the property subject to the power in the persons entitled in default of the appointment, until the power is exercised, whether such power precedes or follows the limitation or gift in default, and whether it is exercisable by deed or by will (*q*); but the exercise of the power divests, either wholly or partially according to the terms of the appointment, the estates limited in default of appointment and creates new estates, and that, too, whether the property is real or personal (*r*).

Effect of exercise of power in divesting estates.

SUB-SECT. 7.—*Costs Thrown on Appointed Funds.*

85. The general rule applied in the administration of estates that the costs should come out of the residue (*s*) is not applied to the case of appointments. The costs of an action relating to an appointed fund are borne rateably by the appointed and the unappointed funds, and not wholly by the unappointed fund (*t*), in the

Costs of action relating to appointed and unappointed funds.

(*o*) *Re Davies' Trusts* (1871), L. R. 13 Eq. 163; *Laing* v. *Cowan* (1857), 24 Beav. 112.

(*p*) *Re Seabrook, Gray* v. *Baddeley*, [1911] 1 Ch. 151; see p. 39, *ante*; *Re Guedalla, Lee* v. *Guedalla's Trustee*, [1905] 2 Ch. 331. As to married women, see titles EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 223; HUSBAND AND WIFE, Vol. XVI., p. 387.

(*q*) *Cunningham* v. *Moody* (1748), 1 Ves. Sen. 174; *Doe* d. *Willis* v. *Martin* (1790), 4 Term Rep. 39, 65; *Heron* v. *Stokes* (1842), 2 Dr. & War. 89; *Lambert* v. *Thwaites* (1866), L. R. 2 Eq. 151. Hence, in the absence of any express provision for its application, the income of a trust fund, after the cesser of a life interest, and pending the exercise of a subsisting power, is distributable amongst the persons entitled in default of appointment (*Re Master's Settlement, Master* v. *Master*, [1911] 1 Ch. 321; see also *Coleman* v. *Seymour* (1749), 1 Ves. Sen. 209; *Haswell* v. *Haswell* (1860), 2 De G. F. & J. 456, 460, 462; *Re Aylwin's Trusts* (1873), L. R. 16 Eq. 585).

(*r*) *Walker* v. *Armstrong* (1855), 21 Beav. 284; varied on appeal on other grounds (1856), 8 De G. M. & G. 531, C. A.; *Re Vizard's Trusts* (1866), L. R. 1 Eq. 667; affirmed 1 Ch. App. 588; *Lee* v. *Olding* (1856), 25 L. J. (CH.) 580; *De Serre* v. *Clarke* (1874), L. R. 18 Eq. 587; but see *Re Frowd's Settlement* (1864), 4 New Rep. 54; *Sweetapple* v. *Horlock* (1879), 11 Ch. D. 745; *Tremayne* v. *Rashleigh*, [1908] 1 Ch. 681; *Re O'Connell, Mawle* v. *Jagoe*, [1903] 2 Ch. 574; *A.-G.* v. *Selborne* (*Earl*), [1902] 1 K. B. 388, C. A.; *Re Maddy's Estate, Maddy* v. *Maddy*, [1901] 2 Ch. 820; *Lovett* v. *Lovett*, [1898] 1 Ch. 82; *Re Dowsett, Dowsett* v. *Beddington*, [1903] A. C. 350; and see *Northumberland* (*Duke*) v. *Inland Revenue Commissioners*, [1911] 2 K. B. 343, 354; reversed, [1911] 2 K. B. 1011, C. A.

(*s*) See title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 347, 350, 351.

(*t*) *Warren* v. *Postlethwaite* (1845), 2 Coll. 108, 116; *Trollope* v. *Routledge* (1847), 1 De G. & Sm. 662; *Moore* v. *Dixon* (1880), 15 Ch. D. 566;

SECT. 13. **Operation of Appointment.**

absence of a direction to the contrary in the will (*u*); and duty and costs of administering the fund are treated in the same way (*a*).

SECT. 14.—*Powers of Revocation.*

Necessity to show intention to revoke, as well as intention to appoint.

86. A power of revocation is not a power of appointment, but is in most cases a power the exercise of which is a condition precedent to the exercise of a power of appointment. It is necessary to show not merely an intention to appoint, but an intention to revoke the existing appointment (*b*). Before 1838 (*c*) it was held that a man, who had power to revoke and limit new uses, and devised all his lands having no others than those subject to the power of revocation, thereby executed the power (*d*); but an appointment, expressed to be made in exercise of every power enabling the appointor, does not extend to property which he cannot appoint without the exercise of a power of revocation, if there be other property to which the words can apply (*e*); and a general devise or bequest since 1838 (*c*) does not, standing alone, show sufficiently an intention to revoke as well as to appoint (*f*).

Effect of failure of gift.

87. If the intention to revoke in all events be clear, it makes no difference that the appointees substituted in place of the original appointees cannot take; but if the appointment is revoked in order to make a gift in favour of another person, and there is no intention to revoke unless for that purpose, the removal of the ground of revocation nullifies the revocation (*g*).

Re Saunders, Saunders v. *Gore*, [1898] 1 Ch. 17, 23, C. A.; *Re Chisholm, Goddard* v. *Brodie*, [1902] 1 Ch. 457.

(*u*) *Davies* v. *Fowler* (1873), L. R. 16 Eq. 308.

(*a*) *Re Lambert's Estate, Stanton* v. *Lambert* (1888), 39 Ch. D. 626; *Re Croft, Deane* v. *Croft*, [1892] 1 Ch. 652; *Re Bourne, Martin* v. *Martin*, [1893] 1 Ch. 188; *Re Shaw, Tucket* v. *Shaw*, [1895] 1 Ch. 343; *Re Orford (Countess), Cartwright* v. *Duc del Balzo*, [1896] 1 Ch. 257; *Re Hill's Settlement Trusts, Hill* v. *Equitable Reversionary Society, Ltd.*, (1896), 75 L. T. 477; but see *Re Wilson, Menteath* v. *Campbell* (1878), 26 W. R. 848. As to the property out of which death duties are payable, see title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., pp. 221, 222, 316, 317.

(*b*) *Pomfret* v. *Perring* (1854), 5 De G. M. & G. 775, C. A.; *Re Wells Trusts, Hardisty* v. *Wells* (1889), 42 Ch. D. 646.

(*c*) *I.e.*, before the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26); see *ibid.* s. 34.

(*d*) *Deg* v. *Deg* (1727), 2 P. Wms. 412, 414.

(*e*) *Pomfret* v. *Perring, supra; Re Thursby's Settlement, Grant* v. *Littledale*, [1910] 2 Ch. 181, C. A.; *Re Hall, Rawlings* v. *Hall* (1903), 19 T. L. R. 420.

(*f*) *Palmer* v. *Newell* (1855), 20 Beav. 32; *Charles* v. *Burke* (1888), 60 L. T. 380; 43 Ch. D. 223, n.; *Nanney* v. *Williams* (1856), 22 Beav. 452; *Re Jones, Greene* v. *Gordon* (1886), 34 Ch. D. 65; *Re Brace, Welch* v. *Coll* [1891] 2 Ch. 671; *Re Gibbes' Settlement, White* v. *Randolf* (1887), 37 Ch. D. 143; *Re Hall, Rawlings* v. *Hall* (1903), 19 T. L. R. 420; *Re Goulding's Settlement, Dobell* v. *Dutton* (1899), 48 W. R. 183; *Re Thursby's Settlement, Grant* v. *Littledale, supra; Re Wallinger's Estate*, [1898] 1 I. R. 139, C. A.

(*g*) *Quinn* v. *Butler* (1868), L. R. 6 Eq. 225; *Onions* v. *Tyrer* (1717) 1 P. Wms. 343; compare the analogous case of the disposition by codicil in favour of persons who in the event cannot take and who differ from the objects named in the will (*Tupper* v. *Tupper* (1855), 1 K. & J. 665); *Duguid* v. *Fraser* (1886), 31 Ch. D. 449; *Re Walker, MacColl* v. *Bruce*

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Powers of Revocation.

88. A deed of appointment containing a power of revocation must be acted on, although there is evidence of a subsequent appointment having been made, the contents of which it is impossible to ascertain (*h*), and if the words of the clause reserving the power of revocation extend by necessary grammatical construction to some only of several appointments made by the same instrument, a subsequent execution of the power does not revoke all the appointments made by such instrument (*i*).

Effect of revocation may be partial only.

89. Powers of revocation and new appointment may be reserved *toties quoties* by instruments executing a power, although such reservation be not expresssly authorised by the instrument creating the power (*k*); but the creator of the power may show that it was his intention that a power of revocation should not be reserved, or that such a power should only be exercisable during a limited period or in a specified manner (*l*). Where the power of appointment is to two or the survivor, the power of revocation may be reserved to the survivor (*m*), but not to one of two joint donees in the lifetime of the other (*n*).

Reservation of power of revocation although not authorised by creator of power.

90. The formalities to accompany the revocation and new appointment need not be the same as those which were made requisite to the original execution (*o*); but the objects of a limited power cannot be altered by the machinery of an appointment to them reserving a power of revocation and new appointment in favour of others; and probably a limited power, exercisable with the consent of A., could not be exercised reserving a power of revocation and appointment without such consent.

Necessity for adherence to original conditions of exercise.

91. A power, once executed, cannot be revoked unless a power of revocation is reserved by the instrument executing the power, although the instrument creating the power authorises revocation expressly (*p*). A power of revocation in an original settlement authorises of itself a limitation of new uses; but a power of revocation in a deed executing a power does not of itself authorise a new appointment (*q*).

Necessity for express reservation of power.

[1908] 1 Ch. 560; *Re Reilly and Brady's Contract*, [1910] 1 I. R. 258; see title WILLS.

(*h*) *Rawlins* v. *Rickards* (1860), 28 Beav. 370; compare *Onions* v. *Tyrer* (1717), 1 P. Wms. 343.

(*i*) *Morgan* v. *Gronow* (1873), L. R. 16 Eq. 1.

(*k*) *Re Gore-Booth's Estate*, [1908] 1 I. R. 387; Sugden, Powers, p. 387.

(*l*) *Piper* v. *Piper* (1834), 3 My. & K. 159, *per* Lord BROUGHAM, L.C., at p. 165; and see *Cooper* v. *Martin* (1867), 3 Ch. App. 47.

(*m*) *Brudenell* v. *Elwes* (1802), 7 Ves. 382; *Dixon* v. *Pyner* (1886), 55 L. J. (CH.) 566; *Re Harding, Rogers* v. *Harding*, [1894] 3 Ch. 315, C. A.

(*n*) *Burnaby* v. *Baillie* (1889), 42 Ch. D. 282.

(*o*) Sugden, Powers, p. 367.

(*p*) *Worrall* v. *Jacob* (1871), 3 Mer. 256; Sugden, Powers, pp. 390, 908; *Hele* v. *Bond* (1717), Prec. Ch. 474; *Teynham* (*Lord*) v. *Webb* (1751), 2 Ves. Sen. 198, 211; *Re Gore-Booth's Estate, supra.* The principle is that a deed once executed cannot be revoked unless it reserves a power of revocation; compare *Re Booker, Booker* v. *Booker* (1886), 34 W. R. 346; *Chadwick* v. *Doleman* (1706), 2 Vern. 528; *Marlborough* (*Duke*) v. *Godolphin* (*Lord*) (1750), 2 Ves. Sen. 61, 76.

(*q*) Sugden, Powers, p. 371; *Witham* v. *Bland* (1674), 3 Swan. 277, n.

SECT. 14. **Powers of Revocation.**

Revival of original power by revocation subsequent to exercise of power.

92. If there is an original power of appointment, and then an execution of that power reserving a power only to revoke, followed by a revocation, the original power remains unaffected; and if, in the first instrument executing the original power, there is reserved a power of revocation and new appointment, such instrument does not constitute a new settlement destructive of the first, nor is the original power thereby exhausted and at an end, but, upon the revocation of such instrument, remains in full force. If there is a power of appointment to be exercised by deed or will, and the first instrument executing the power is a deed which contains the reservation of a power to revoke and to appoint anew by deed, and then there is a simple revocation of this instrument, the original power on such revocation being in full force, there may be a valid execution of it by will as well as by deed (*r*). If the original power of appointment is not a primary power enabling the donee to appoint the uses, but the lands are settled to uses which the donee is enabled to revoke and limit anew, the uses of the original settlement are not revived if the power of revocation and new appointment is exercised and then this second appointment revoked without more (*s*).

SECT. 15.—*Revocation of Appointment.*

By subsequent testamentary document.

93. A general clause in a will revoking all former wills revokes a prior testamentary appointment (*t*); but the mere fact of making a subsequent testamentary paper does not work a total revocation of a prior will, but revokes it only to the extent to which it is inconsistent with it. If, therefore, a limited power is exercised by a will referring to the power and containing other devises, and is followed by another will, declared to be the testator's last will, which gives all his real estate but is not expressed to revoke any previous instrument, the subsequent will has no effect on the appointment made by the prior will (*u*).

(*r*) *Saunders* v. *Evans* (1861), 8 H. L. Cas. 721; *Montagu* v. *Kater* (1853), 8 Exch. 507; *Sheffield* v. *Von Donop* (1848), 7 Hare, 42. These rules do not apply to powers which are executed by will, for a will is by its nature always revocable (*Lisle* v. *Lisle* (1781), 1 Bro. C. C. 533; *Lawrence* v. *Wallis* (1788), 2 Bro. C. C. 319); see the text, *infra*, and title WILLS.

(*s*) *Evans* v. *Saunders*, *Evans* v. *Evans* (1855), 6 De G. M. & G. 654, C. A., *per* TURNER, L.J., at p. 678; *Witham* v. *Bland* (1674), 3 Swan. 277, n.; *Ward* v. *Lenthall* (1667), 1 Sid. 343. An appointment by deed made in entire forgetfulness by the appointor of an earlier appointment to the same person may be set aside on the ground of mistake (*Hood of Avalon* (*Lady*) v. *Mackinnon*, [1909] 1 Ch. 476; see title MISTAKE, Vol. XXI., p. 16).

(*t*) *Sotheran* v. *Dening* (1881), 20 Ch. D. 99, C. A., overruling *In the Goods of Merritt* (1858), 1 Sw. & Tr. 112, and *In the Goods of Joys* (1860), 4 Sw. & Tr. 214; and see *Harvey* v. *Harvey* (1875), 32 L. T. 141; *Re Kingdon*, *Wilkins* v. *Pryer* (1886), 32 Ch. D. 604.

(*u*) Whether before or after the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26); see *Freeman* v. *Freeman* (1854), Kay, 479, *per* WOOD, V.-C., at p. 487; *Pitt* v. *Jackson* (1786), 2 Bro. C. C. 51; *Shiel* v. *O'Brien* (1872), 7 I. R. Eq. 64; *Lemage* v. *Goodban* (1865), L. R. 1 P. & D. 57; *Cadell* v. *Wilcocks*, [1898] P. 21; *Kent* v. *Kent*, [1902] P. 108.

SECT. 15. Revocation of Appointment.

Effect of marriage.

94. Every will made (*a*) by a man or woman is revoked by his or her marriage, except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not, in default of such appointment, pass to his or her heir, customary heir, executor or administrator, or the person entitled, under the Statute of Distribution (*b*), as his or her next of kin (*c*). This statutory exception extends to the case where, in default of appointment, the property goes in the way stated only in the event of certain contingencies happening, and also to the case where, in default of appointment, the property, of which the will disposes, passes under the settlement containing the power, although the same persons would take under such settlement as would have taken in case of intestacy (*d*) under the Statute of Distribution (*b*).

Revocation in general.

95. Subject to the above-mentioned statutory exception, a will under a power is revoked by any act amounting to a revocation in law of a proper will (*e*). If the appointor aliens the property subject to the power, he is to that extent to be taken to revoke his appointment; and a will is even revoked by a subsequent defective execution of the power, if the defect be such as equity can aid, but not by an absolutely invalid appointment (*f*).

Part IV.—Invalid Exercise of Powers.

SECT. 1.—*Excessive Execution.*

Execution good if excess distinguishable.

96. Excess in the execution of powers consists in the transgression of the rule against perpetuities (*g*) or of the scope of the power. Excess with reference to the terms of the power may be either by way of conditions annexed, limitations or modifications added, or power delegated. The same rule applies to all, namely, where there is a complete execution of a power and something added

(*a*) Since the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26).

(*b*) 22 & 23 Car. 2, c. 10; see title DESCENT AND DISTRIBUTION, Vol. XI., pp. 16 *et seq.*

(*c*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 18; *In the Goods of Russell* (1890), 15 P. D. 111; as to the position before the Act, see *Hodsden* v. *Lloyd* (1789), 2 Bro. C. C. 534; *Logan* v. *Bell* (1845), 1 C. B. 872; and *Douglas* v. *Cooper* (1834), 3 My. & K. 378, 381. As to the nature of the grant of probate in such a case, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 170.

(*d*) *In the Goods of Fenwick* (1867), L. R. 1 P. & D. 319; *In the Goods of McVicar* (1869), L. R. 1 P. & D. 671; *In the Goods of Worthington* (1871), 20 W. R. 260.

(*e*) *Reid* v. *Shergold* (1805), 10 Ves. 370; Sudgen, Powers, p. 458. As to revocation of wills, see title WILLS.

(*f*) *Blake* v. *Blake* (1880), 15 Ch. D. 481, *per* JESSEL, M.R., at p. 489; *Cotter* v. *Layer* (1731), 2 P. Wms. 623; *Eilbeck* v. *Wood* (1826), 1 Russ. 564; *Ford* v. *De Pontès* (1861), 30 Beav. 572; *Duguid* v. *Fraser* (1886), 31 Ch. D. 449; *Re Walker, MacColl* v. *Bruce*, [1908] 1 Ch. 560. As to the aid granted in respect of defective appointments, see p. 54, *post.*

(*g*) See title PERPETUITIES, Vol. XXII., pp. 293 *et seq.*

SECT. 1. **Excessive Execution.**

which is improper, the execution is good and the excess bad; where there is not a complete execution, or where the boundaries between the excess and the execution are not distinguishable, the whole appointment fails (*h*): the appointment must be absolute and distinct in order to prevail (*i*). The same rule applies where the estates created are excessive (*j*).

Executory gift over to stranger.

97. If there is a gift over to a stranger (*k*) by way of executory limitation, the original gift, although distinct from such gift over, fails on the occurrence of the event on which the executory gift was

(*h*) *Alexander* v. *Alexander* (1755), 2 Ves. Sen. 640, 644; *Hamilton* v. *Royse* (1804), 2 Sch. & Lef. 315, 332; *Adams* v. *Adams* (1777), Cowp. 651; *McDonald* v. *McDonald* (1875), L. R. 2 Sc. & Div. 482; *Re Farncombe's Trusts* (1878), 9 Ch. D. 652; *Re Cohen, Brookes* v. *Cohen*, [1911] 1 Ch. 37. In the case of excess by way of condition, where the condition is held to be separable the appointment may be valid (*Sadler* v. *Pratt* (1833), 5 Sim. 632; *Palsgrave* v. *Atkinson* (1844), 1 Coll. 190; *Watt* v. *Creyke* (1856), 3 Sm. & G. 362; *Rooke* v. *Rooke* (1862), 2 Drew. & Sm. 38; *Roach* v. *Trood* (1876), 3 Ch. D. 429, C. A.); but otherwise if the condition is inseparable (*Webb* v. *Sadler* (1873), 8 Ch. App. 419; and see *Hay* v. *Watkins* (1843), 3 Dr. & War. 339; *D'Abbadie* v. *Bizoin* (1871), 5 I. R. Eq. 205; *Re Perkins, Perkins* v. *Bagot*, [1893] 1 Ch. 283; *Re Cohen, Brookes* v. *Cohen, supra*). An appointment to an object, subject to a charge for an unauthorised object, is good, but the charge fails (*Re Jeafferson's Trusts* (1866), L. R. 2 Eq. 276; *Dowglass* v. *Waddell* (1886), 17 L. R. Ir. 384). The donee of a limited power may appoint to one object on a contingency within the limits of perpetuity, and to another if that contingency does not happen (*Caulfield* v. *Maguire* (1845), 2 Jo. & Lat. 170; and see *Stroud* v. *Norman* (1854), Kay, 313; *Roberts* v. *Dixwell* (1738), Sugden, Powers, p. 930; *Graham* v. *Angell* (1869), 17 W. R. 702; *Butler* v. *Butler* (1880), 7 L. R. Ir. 401), and, while the contingency is undetermined, the interest on the fund passes under the residuary gift, or, if no such gift, in default of appointment (*Caulfield* v. *Maguire, supra*). Where there is an absolute appointment followed by a qualifying trust, the trust operates only so far as it can take effect, and the rest of the gift remains in the original objects as given to them (*McDonald* v. *McDonald, supra; Churchill* v. *Churchill* (1867), L. R. 5 Eq. 44; *Carver* v. *Bowles* (1831), 2 Russ. & M. 301, 304; *Woolridge* v. *Woolridge* (1859), John. 63; *Kampf* v. *Jones* (1837), 2 Keen, 756; *Harvey* v. *Stracey* (1852), 1 Drew. 73, 137—143; *Stephens* v. *Gadsden* (1855), 20 Beav. 463; *Re Sondes' (Lord) Will* (1854), 2 Sm. & G. 416; *Re Boyd, Nield* v. *Boyd* (1890), 63 L. T. 92; *Dowglass* v. *Waddell, supra; Cooke* v. *Cooke* (1887), 38 Ch. D. 202). An appointment to an object upon trust for strangers would, it is submitted, be void either on the ground that the appointment was indivisible (see *Rucker* v. *Scholefield* (1862), 1 Hem. & M. 36; *Gerrard* v. *Butler* (1855), 20 Beav. 541; *Tomkyns* v. *Blane* (1860), 28 Beav. 422); or on the ground that there was no intention to benefit objects (see *Hamilton* v. *Royse, supra*, at p. 332; *Re Cohen, Brookes* v. *Cohen, supra;* compare *Wilson* v. *Wilson* (1869), 17 W. R. 220; and see *Wallinger* v. *Wallinger* (1869), L. R. 9 Eq. 301; *Re Meredith's Trusts* (1876), 3 Ch. D. 757; *Re Swinburne, Swinburne* v. *Pitt* (1884), 27 Ch. D. 696).

(*i*) *Rucker* v. *Scholefield, supra; Reid* v. *Reid* (1858), 25 Beav. 469.

(*j*) *Hamilton* v. *Royse, supra*, at p. 332. A lease for forty years under a power to lease for twenty-one is good for the twenty-one years (*Campbell* v. *Leach* (1775), Amb. 740; *Alexander* v. *Alexander, supra;* see title LANDLORD AND TENANT, Vol. XVIII., p. 362), but it is otherwise if the execution is bad *ab initio* (*Bangor (Bishop)* v. *Parry*, [1891] 2 Q. B. 277).

(*k*) The word "object" is used to denote a person who is, and the word "stranger" a person who is not, one of the specified persons or class in whose favour the power may be exercised.

limited to take effect, notwithstanding that the gift over, being to a stranger, is void (*l*).

Appointment to stranger with executory appointment over.

98. If there is an appointment to an object (*m*) followed by an appointment to a stranger absolutely, with an executory appointment over in certain events to an object, this executory appointment takes effect if the event on which it is to arise happens, but, if not, it fails (*n*).

Appointment to stranger for life with remainder to object.

99. If the legal estate in land is appointed by deed to a stranger for life, with remainder to an object in fee, the whole appointment fails (*o*). An appointment by will of a particular estate to a stranger, with remainder to an object, is, however, a good appointment in remainder, but the particular estate fails, and during the period for which the particular estate, if valid, would have extended, the subject of the power goes to the persons entitled in default (*p*). These distinctions do not apply to personalty nor to equitable estates in land.

No acceleration.

An appointment by will to an object in remainder, after a particular estate to a stranger, is not accelerated unless a contrary intention appears in the instrument executing the power (*q*).

Appointment in default of execution of delegated power.

100. If the donee attempts to delegate his power, but does not appoint in contravention of the terms of the power and appoints in default of execution of the delegated power to proper objects, this appointment is valid, the words delegating the power being treated as struck out (*r*).

(*l*) *Doe* d. *Blomfield* v. *Eyre* (1848), 5 C. B. 713, Ex. Ch.; *Robinson* v. *Wood* (1858), 27 L. J. (CH.) 726; compare *Gatenby* v. *Morgan* (1876), 1 Q. B. D. 685; and see *Jackson* v. *Noble* (1838), 2 Keen, 590; *Brown* v. *Nisbett* (1750), 1 Cox, Eq. Cas. 13; *Ridgway* v. *Woodhouse* (1844), 7 Beav. 437; *Hurst* v. *Hurst* (1882), 21 Ch. D. 278, C. A.; *Bate* v. *Willats* (1877), 37 L. T. 221; *Jones* v. *Davies* (1880), 28 W. R. 455. If the gift over transgresses the rule against perpetuities it is void and the first gift remains (*Re Brown and Sibly's Contract* (1876), 3 Ch. D. 156).

(*m*) See note (*k*), p. 50, *ante*.

(*n*) *Alexander* v. *Alexander* (1755), 2 Ves. Sen. 640; *Routledge* v. *Dorril* (1794), 2 Ves. 357; *Robinson* v. *Hardcastle* (1788), 2 Bro. C. C. 344; *Long* v. *Ovenden* (1881), 16 Ch. D. 691; see *Williamson* v. *Farwell* (1887), 35 Ch. D. 128; but see *Crompe* v. *Barrow* (1799), 4 Ves. 681; *Hewitt* v. *Dacre* (*Lord*) (1838), 2 Keen, 622. Appointments to a contingent class or to take effect *in futuro* within due limits are good (*Harvey* v. *Stracey* (1852), 1 Drew. 73, 136; *Re Farncombe's Trusts* (1878), 9 Ch. D. 652; *Re Coulman, Munby* v. *Ross* (1885), 30 Ch. D. 186). The appointment of a share of a fund to an object of the power on the happening of a certain event carries with it all intermediate accretions of the share (*Long* v. *Ovenden, supra; Re Lambert, Lambert* v. *Lambert*, [1910] 1 I. R. 280, C. A.).

(*o*) *Brudenell* v. *Elwes* (1801), 1 East, 442.

(*p*) *Crozier* v. *Crozier* (1843), 3 Dr. & War. 353; and see *Alexander* v. *Alexander, supra; Doe* d. *Devonshire* (*Duke*) v. *Cavendish* (*Lord G.*) (1782), 4 Term Rep. 741, n.; *Robinson* v. *Hardcastle, supra; Reid* v. *Reid* (1858), 25 Beav. 469.

(*q*) *Crozier* v. *Crozier, supra; Craven* v. *Brady* (1867), L. R. 4 Eq. 209; affirmed (1869), 4 Ch. App. 296; *Line* v. *Hall* (1873), 43 L. J. (CH.) 107; *Re Finch and Chew's Contract*, [1903] 2 Ch. 486.

(*r*) *Ingram* v. *Ingram* (1740), 2 Atk. 88; *Carr* v. *Atkinson* (1872), L. R. 14 Eq. 397; *Webb* v. *Sadler* (1873), 8 Ch. App. 419; *Slark* v. *Dakyns*

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Appointment partly valid if severable.

101. An appointment to persons, some of whom are objects and some not, is valid, so far as the appointment to objects is concerned, if it is severable, and the appointment to the strangers alone fails (*s*); but, if the appointment be to a class, some of whom are objects and some not, and the appointment is not severable, the whole appointment fails (*t*).

Application of doctrine of *cy-près*.

102. The court in some cases interposes in favour of the general intention and executes the particular intention *cy-près* (*u*). The doctrine of *cy-près* applies to testamentary appointments (*a*), but not to appointments by deed (*b*), nor to appointments of personalty (*c*), nor to appointments of blended realty and personalty (*d*).

If the donee of a power appoints by will to an object for life, with remainder in tail to his first and other sons who are not objects, the court construes this as an estate tail in the appointee (*e*).

Appointments made in substantial accord with the expressed purpose of the power, although not strictly in accordance therewith *modo et formâ*, are good appointments in equity (*f*).

(1874), 10 Ch. App. 35; *Stockbridge* v. *Story* (1871), 19 W. R. 1049; *Williamson* v. *Farwell* (1887), 35 Ch. D. 128.

(*s*) *Bruce* v. *Bruce* (1871), L. R. 11 Eq. 371; *Re Kerr's Trusts* (1877), 4 Ch. D. 600.

(*t*) *Harvey* v. *Stracey* (1852), 1 Drew. 73, 117; *Brown's Trust* (1865), L. R. 1 Eq. 74; *Rucker* v. *Scholefield* (1862), 1 Hem. & M. 36.

(*u*) As to the doctrine of *cy-près*, see title WILLS. As to the application of the doctrine to charitable gifts, see title CHARITIES, Vol. IV., pp. 190 *et seq.*

(*a*) *Stackpoole* v. *Stackpoole* (1843), 4 Dr. & War. 320. The application of the doctrine of *cy-près* ought not to be extended (*Re Mortimer, Gray* v. *Gray*, [1905] 2 Ch. 502, C. A.). The doctrine is considered and explained in *Hampton* v. *Holman* (1877), 5 Ch. D. 183.

(*b*) *Brudenell* v. *Elwes* (1801), 1 East, 442.

(*c*) *Routledge* v. *Dorril* (1794), 2 Ves. 357.

(*d*) *Boughton* v. *James* (1844), 1 Coll. 26, 44.

(*e*) *Pitt* v. *Jackson* (1786), 2 Bro. C. C. 51; *Stackpoole* v. *Stackpoole, supra.* The particular estate must be appointed for an estate of freehold (*Beard* v. *Westcott* (1813), 5 Taunt. 393), and the appointment in remainder to children must be in tail (*Bristow* v. *Warde* (1794), 2 Ves. 336; *Hale* v. *Pew* (1858), 25 Beav. 335; *Humbertson* v. *Humbertson* (1717), 2 Vern. 737). No object intended to be omitted can be included, and no object intended to be included can be omitted, and if the estate to be created *cy-près* will result in either of these consequences, the doctrine cannot be applied (*Monypenny* v. *Dering* (1852), 2 De G. M. & G. 145; *Line* v. *Hale* (1873), 43 L. J. (CH.) 107; 22 W. R. 124; *Re Rising, Rising* v. *Rising*, [1904] 1 Ch. 533; *Re Mortimer, Gray* v. *Gray, supra*; but see *Pitt* v. *Jackson, supra*). The application of the rule is apportioned where necessary (*Vanderplank* v. *King* (1843), 3 Hare, 1).

(*f*) A power to appoint the legal estate in land to a class is well executed in equity by an appointment to trustees for such class (*Thornton* v. *Bright* (1836), 2 My. & Cr. 230; *Cowx* v. *Foster* (1860), 1 John. & H. 30; and see *Hervey* v. *Hervey* (1739), 1 Atk. 561), or on trust for sale and to hold the proceeds for such class (*Crozier* v. *Crozier* (1843), 3 Dr. & War. 353, 371; *Churchman* v. *Harvey* (1757), Amb. 335, 339; *Kenworthy* v. *Bate* (1802), 6 Ves. 793; *Fowler* v. *Cohn* (1856), 21 Beav. 360; and see *D'Abbadie* v. *Bizoin* (1871), 5 I. R. Eq. 205; *Re Swinburne, Swinburne* v. *Pitt* (1884), 27 Ch. D. 696; *Re Paget, Re Mellor, Mellor* v. *Mellor*, [1898] 1 Ch. 290; *Re*

103. Where the donee of a general power over personalty, whether a married woman or not, executes the power and appoints

Persons to give a discharge for the appointed fund.

Redgate, Marsh v. *Redgate*, [1903] 1 Ch. 356; *Re Adams' Trustees' and Frost's Contract*, [1907] 1 Ch. 695). A power to charge to an unlimited amount authorises a life appointment (*Long* v. *Long* (1800), 5 Ves. 445 (execution of rentcharge by creation of a term of years); *Trollope* v. *Linton* (1823), 1 Sim. & St. 477, 485; and see *Roberts* v. *Dixwell* (1738), Sugden, Powers, p. 930; *Thwaytes* v. *Dye* (1688), 2 Vern. 80; *Ricketts* v. *Loftus* (1841), 4 Y. & C. (EX.) 519; *Marnell* v. *Blake* (1816), 4 Dow, 248, H. L.; *Muskerry* v. *Chinnery* (1835), L. & G. *temp.* Sugd. 185, 227; *Dennett* v. *Pass* (1834), 1 Bing. (N. C.) 388); a power to appoint the fee authorises the appointment of a lesser estate (*Bovey* v. *Smith* (1682), 1 Vern. 84; *Crozier* v. *Crozier* (1843), 3 Dr. & War. 353, 370); a power to appoint estates to be purchased with money to arise from the sale of other estates can be exercised by appointing the original estates (*Bullock* v. *Fladgate* (1813), 1 Ves. & B. 471); a power to an executor to raise money for payment of debts authorises a sale for that purpose (*Wareham* v. *Brown* (1690), 2 Vern. 154; *Bateman* v. *Bateman* (1739), 1 Atk. 421; and see *Metcalfe* v. *Hutchinson* (1875), 1 Ch. D. 591); a power to charge a gross sum authorises the appointment of interest thereon (*Roe* v. *Pogson* (1816), 2 Madd. 457); a power to raise a fixed sum by mortgage authorises the raising of the costs of the mortgage (*Armstrong* v. *Armstrong* (1874), L. R. 18 Eq. 541); a power to appoint on such trusts as the donee pleases in favour of a class authorises him to declare a trust for sale and all necessary trusts (*Cowx* v. *Foster* (1860), 1 John. & H. 30; but see *Cox* v. *Cox* (1855), 1 K. & J. 251); a power to appoint a mixed fund of realty and personalty authorises an appointment of realty and personalty to objects separately (*Morgan* d. *Surman* v. *Surman* (1808), 1 Taunt. 289); a power to appoint among a class is well executed by appointing to one for life with remainder to the other objects (*Alloway* v. *Alloway* (1843), 4 Dr. & War. 380, 387; *Wilson* v. *Wilson* (1855), 21 Beav. 25); a power of appointment among children authorises an appointment to one for life with power to dispose of the capital by deed or will (*Bray* v. *Bree* (1834), 2 Cl. & Fin. 453, H. L.; *Jebb* v. *Tugwell* (1855), 7 De G. M. & G. 663, C. A.); and a similar appointment, with power exercisable by will only, is good if the object is *in esse* at the execution of the power (*Phipson* v. *Turner* (1838), 9 Sim. 227; but *secus*, if not *in esse* (*Wollaston* v. *King* (1869), L. R. 8 Eq. 165); a power of appointment of personalty in such proportion as the donee directs authorises an appointment to an object for her separate use (*Alexander* v. *Alexander* (1755), 2 Ves. Sen. 640; *Dickson* v. *Mort* (1850), 8 Hare, 178; *Willis* v. *Kymer* (1877), 7 Ch. D. 181); a power given to a married woman to direct maintenance does not authorise an appointment to the husband for maintenance until the youngest child attains twenty-one (*Lloyd* v. *Lloyd* (1858), 26 Beav. 96; *Hammond* v. *Neame* (1818), 1 Swan. 35; and see *Chester* v. *Chadwick* (1842), 13 Sim. 102; *Re Main's Settlement* (1866), 15 W. R. 216); a power in marriage articles, for the spouses to alter the provisions as they think fit, previous to the execution of the settlement, does not authorise the insertion of a power enabling the husband to make provision for a second wife and children of a second marriage (*Bedford (Duke)* v. *Abercorn (Marquis)* (1836), 1 My. & Cr. 312); a power to advance authorises provision for a child on marriage (*Roper-Curzon* v. *Roper-Curzon* (1871), L. R. 11 Eq. 452; *Lloyd* v. *Cocker* (1860), 27 Beav. 645; see title INFANTS AND CHILDREN, Vol. XVII., p. 93); but a similar power does not authorise an advance to pay the debts of a married daughter's husband (*Talbot* v. *Marshfield* (1868), 3 Ch. App. 622; compare *Re Kershaw's Trusts* (1868), L. R. 6 Eq. 322; *Lowther* v. *Bentinck* (1874), L. R. 19 Eq. 166; *Re Aldridge, Abram* v. *Aldridge* (1886), 55 L. T. 554, C. A.); money advanced to an infant under a power of advancement cannot be recovered back from him (*Lawrie* v. *Bankes* (1857), 4 K. & J. 142; *Re Gosset's Settlement* (1854), 19 Beav. 529, 535; *Re Fox, Wodehouse* v. *Fox*, [1904] 1 Ch. 480); a power to purchase an annuity is well exercised by giving the donee the whole sum (*Messena* v. *Carr* (1870), L. R. 9 Eq. 260); an unlimited

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an executor, the executor is the proper person to receive the fund and can give a good receipt for it (*g*), and the same rule applies to an administrator with the will annexed (*h*); but, when the power is limited, it is a question of construction whether the power authorises a direction to transfer the fund, and, in the case of a fund standing in the name of trustees, an appointment to other trustees in trust for objects does not, of itself, authorise the transfer of the funds from the original trustees, who are the proper persons to distribute it (*i*).

SECT. 2.—*Defective Execution.*

Principle upon which the court acts.

104. Executions of powers which are invalid at law by reason of their failure to comply with all the requisites of the power are aided in equity if there be good consideration (*k*). The principles on which the court acts are as follows:—Whenever a man, having power over an estate, whether a power of ownership or not, in discharge of moral or natural obligations, shows an intention to execute such power, the court operates on the conscience of the heir, or the persons entitled in default of appointment, to make him perfect this intention (*l*); but, to do this, the court must find established the intention to pass the property to the persons to be benefited, the amount of the benefit, and good consideration, and the lack of any one of these is enough to prevent the court from aiding the invalid execution (*m*).

Essential conditions.

power to appoint dividends authorises the appointment of the capital (*Phillips* v. *Brydon* (1858), 26 Beav. 77); a power to appoint among children as the appointor pleases authorises the appointment of capital and income and postponement of payment (*Wilson* v. *Wilson* (1855), 21 Beav. 25); and a general power of appointment enables the appointee to amend and alter the trusts in default of appointment (*Re McAuliffe and Balfour* (1884), 50 L. T. 353); but this does not apply to a special power (*Re Falconer's (William) Trusts, Re Falconer's (Ann) Trusts, Property and Estates Co., Ltd.* v. *Frost*, [1908] 1 Ch. 410).

(*g*) *Re Philbrick's Settlement* (1865), 11 Jur. (N. S.) 558; *Hayes* v. *Oatley* (1872), L. R. 14 Eq. 1; *Re Hoskin's Trusts* (1877), 6 Ch. D. 281, C. A.; and see *Beyfus* v. *Lawley*, [1903] A. C. 411; *Re Guedalla, Lee* v. *Guedalla's Trustee*, [1905] 2 Ch. 331; *Re Hadley, Johnson* v. *Hadley*, [1909] 1 Ch. 20.

(*h*) *Re Peacock's Settlement, Kelcey* v. *Harrison*, [1902] 1 Ch. 552.

(*i*) *Busk* v. *Aldam* (1874), L. R. 19 Eq. 16; *Van Brockdorff* v. *Malcolm* (1885), 30 Ch. D. 172; *Re Tyssen, Knight-Bruce* v. *Butterworth*, [1894] 1 Ch. 56; but see *Scotney* v. *Lomer* (1885), 29 Ch. D. 535; (1886), 31 Ch. D. 380, C. A.

(*k*) Sugden, Powers, p. 532.

(*l*) *Chapman* v. *Gibson* (1791), 3 Bro. C. C. 229; *Lowson* v. *Lowson* (1791), 3 Bro. C. C. 272; *Cotter* v. *Layer* (1731), 2 P. Wms. 623. The intention to pass the property subject to the power being established, the intention to do so by means of the power is not essential (*Carver* v. *Richards* (1859), 27 Beav. 488, 495).

(*m*) *Garth* v. *Townsend* (1869), L. R. 7 Eq. 220; *Kennard* v. *Kennard* (1872), 8 Ch. App. 227. The fact that the donee of the power is a married woman makes no difference (*Dowell* v. *Dew* (1842), 1 Y. & C. Ch. Cas. 345; *Thackwell* v. *Gardiner* (1851), 5 De G. & Sm. 58, 65; *Hopkins* v. *Myall* (1830), 2 Russ. & M. 86). There seems no reason why the defective execution of a joint power by husband and wife should not be aided; but see *Martin* v. *Mitchell* (1820), 2 Jac. & W. 413, 425, 426.

105. Equity relieves only against defects which are not of the essence of the power; anything material to the intention of the creator of the power cannot be defeated (*n*).

Defects not of the essence of the power.

106. The court does not aid non-execution of a power (*o*) unless such non-execution is procured by fraud, and, *semble*, the fraud is that of the person entitled in default of appointment (*p*)

Non-execution.

107. Equity aids the defective execution of a power in favour of purchasers for value (*q*), creditors (*r*), charities (*s*), persons for whom

Parties who may claim relief.

(*n*) See *Cooper* v. *Martin* (1867), 3 Ch. App. 47, 58. Defects in the manner of execution will be aided (*Morse* v. *Martin* (1865), 34 Beav. 500; *Sneed* v. *Sneed* (1747), Amb. 64; *Cooper* v. *Martin*, *supra*; and see *Hallett to Martin* (1883), 24 Ch. D. 624). But a power to be executed by will cannot be executed by deed (*Reid* v. *Shergold* (1805), 10 Ves. 370, 380; and see *Re Walsh's Trusts* (1878), 1 L. R. Ir. 320; *Chism* v. *Lipsett*, [1905] 1 I. R. 60, C. A.; and see p. 18, *ante*); nor will the court aid the execution of a power which would result in a fraud on the power (*Re Kirwan's Trusts* (1883), 25 Ch. D. 373, 380), or aid a breach of trust (*Mortlock* v. *Buller* (1804), 10 Ves. 292, 317; and see *Ord* v. *Noel* (1820), 5 Madd. 438; *Bellringer* v. *Blagrave* (1847), 1 De G. & Sm. 63).

(*o*) *Tollet* v. *Tollet* (1728), 2 P. Wms. 490; *Holmes* v. *Coghill* (1806), 12 Ves. 206; and see *Shannon* v. *Bradstreet* (1803), 1 Sch. & Lef. 52, 62. Rectification is not aiding non-execution (*Johnson* v. *Bragge*, [1901] 1 Ch. 28). The court will not uphold, as a valid execution of a power of sale, an imperfect contract (*Morgan* v. *Milman* (1853), 3 De G. M. & G. 24, C. A.; *Blore* v. *Sutton* (1817), 3 Mer. 237; but see *Stiles* v. *Cowper* (1748), 3 Atk. 692). The court will not aid, although the non-execution came about through accident (*Buckell* v. *Blenkhorn* (1846), 5 Hare, 131, 142), or mistake (*Langslow* v. *Langslow* (1856), 21 Beav. 552; *Carver* v. *Richards* (1859), 27 Beav. 488, 496; *Re Jack*, *Jack* v. *Jack*, [1899] 1 Ch. 374).

(*p*) See *Luttrell* v. *Olmius* (1787), cited in 11 Ves. 638; *Bath and Montague's Case* (1693), 3 Cas. in Ch. 55, 84, 108, 122; *Vane* v. *Fletcher* (1717), 1 P. Wms. 352, 353; but see *Middleton* v. *Middleton* (1819), 1 Jac. & W. 94.

(*q*) To constitute a purchaser for this purpose there must be consideration and an intention to purchase (*Sergeson* v. *Sealey* (1742), 2 Atk. 412; and see *Hughes* v. *Wells* (1852), 9 Hare, 749, 769); and there must be a valid and binding contract (*Morgan* v. *Milman*, *supra*; *Re Battersea Park Acts*, *Re Arnold* (1863), 32 Beav. 591; *Re Dykes' Estate* (1869), L. R. 7 Eq. 337). Where the court supplies a surrender of copyholds it supplies a defective execution of a power (*Chapman* v. *Gibson* (1791), 3 Bro. C. C. 229, 231; *Sayer* v. *Sayer*, *Innes* v. *Sayer* (1849), 7 Hare, 377, 387; but see *Jefferys* v. *Jefferys* (1841), Cr. & Ph. 138). The court will supply a surrender in favour of a mortgagee (*Jennings* v. *Moore* (1708), 2 Vern. 609), and an agreement to grant a lease, entered into before the expiration of an existing lease, where the power only arose on the determination of the existing lease, has been enforced by way of aiding defective execution (*Dowell* v. *Dew* (1842), 1 Y. & C. Ch. Cas. 345; *Long* v. *Rankin* (1822), Sugden, Powers, p. 900; *Campbell* v. *Leach* (1775), Amb. 740). The usual rule as to purchasers for value without notice apply to persons taking estates by means of the execution of powers; see title EQUITY, Vol. XIII., pp. 76 *et seq.*, 84 *et seq.*

(*r*) Where the testator shows an intention to provide for payment of his debts equity will aid a defective execution (*Chapman* v. *Gibson* (1791), 3 Bro. C. C. 229); but the purchaser has a better equity than creditors (*George* v. *Milbanke* (1803), 9 Ves. 190; see *Daubeny* v. *Cockburn* (1816), 1 Mer. 626, 638; but see Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1 (2)). Creditors cannot have appointments to volunteers aided, since the court does not aid volunteers; see Sugden, Powers, p. 540; compare *Holmes* v. *Coghill* (1806), 12 Ves. 206.

(*s*) *Innes* v. *Sayer* (1851), 3 Mac. & G. 606, 620; *A.-G.* v. *Burdet and Smith* (1717), 2 Vern. 755; and see title CHARITIES, Vol. IV., p. 126.

SECT. 2. **Defective Execution.**

the appointor is under a natural or moral obligation to provide (*t*), unless he is under an equal obligation to provide for the persons entitled in default and they are unprovided for (*a*). The person claiming relief on the ground that he comes within any of these classes must stand in that relation to the donee and not the creator of the power (*b*).

Lessees entitled to aid.

108. Lessees are purchasers for value, and accordingly equity aids the defective execution of a lease made under a power so as to bind the remainderman (*c*).

(*t*) *Chapman* v. *Gibson* (1791), 3 Bro. C. C. 229. The defective exercise of a power, even in favour of volunteers, if intended as a provision for a wife or child, is aided (*Hervey* v. *Hervey* (1739), 1 Atk. 560, 568); and the court will not inquire into the quantum of provision in the case of a wife (see *Smith* v. *Baker* (1737), 1 Atk. 385; *Marston* v. *Gowan* (1790), 3 Bro. C. C. 170; *Tollet* v. *Tollet* (1728), 2 P. Wms. 490; *Read and Nashes Case* (1589), 1 Leon. 147; *Wigson* v. *Garret* (1674), T. Raym. 239; *Mestaer* v. *Gillespie* (1805), 11 Ves. 621, 638; *Re Bolton Estates, Russell* v. *Meyrick*, [1903] 2 Ch. 461, C. A.); or in the case of a child (*Jones* v. *Clough* (1751), 2 Ves. Sen. 365; *Lucena* v. *Lucena* (1842), 5 Beav. 249; *Hume* v. *Rundell* (1822), Madd. & G. 331; *Morse* v. *Martin* (1865), 34 Beav. 500; *Chapman* v. *Gibson*, *supra*; *Cotter* v. *Layer* (1731), 2 P. Wms. 623; *Re Walsh's Trusts* (1878), 1 L. R. Ir. 320; *Re Walker, MacColl* v. *Bruce*, [1908] 1 Ch. 560). Equity will not aid in favour of persons as to whom the donee of the power is under no obligation to provide, and no aid will be given to a husband (*Moodie* v. *Reid* (1816), 1 Madd. 516; cited 9 Hare, 769); a grandchild (*Kettle* v. *Townsend* (1690), 1 Salk. 187; *Perry* v. *Whitehead* (1801), 6 Ves. 544); a natural child or cousin (*Blake* v. *Blake* (1817), Beat. 575; *Bramhall* v. *Hall* (1764), 2 Eden, 220; *Tudor* v. *Anson* (1754), 2 Ves. Sen. 582); a nephew or niece (*Marston* v. *Gowan*, *supra*); a volunteer, even although he be the creator of the power (see note to *Watts* v. *Bullas* (1702), 1 P. Wms. 60; *Sergeson* v. *Sealey* (1742), 2 Atk. 412).

(*a*) *Chapman* v. *Gibson*, *supra*; and see *Braddick* v. *Mattock* (1822), Madd. & G. 361; *Smith* v. *Baker*, *supra*; *Morse* v. *Martin*, *supra*; *Lucena* v. *Lucena*, *supra*; *Hume* v. *Rundell*, *supra*; *Re Walsh's Trusts*, *supra*). Equity will aid the defective execution of any power if there is sufficient consideration—*i.e.*, a power of charging (*Wilkie* v. *Holmes* (1752), 1 Sch. & Lef. 60, n.; *Wade* v. *Paget* (1784), 1 Bro. C. C. 363), except powers created by statute (see *Peachey* v. *Somerset* (*Duke*) (1721), 1 Stra. 447; *Keating* v. *Sparrow* (1810), 1 Ball & B. 367; *Griffiths* v. *Vere* (1803), 9 Ves. 127, 134; *Re Brain* (1874), L. R. 18 Eq. 389; *A.-G. of Victoria* v. *Ettershank* (1875), L. R. 6 P. C. 354; and see *Re Bolton Estates, Russell* v. *Meyrick*, *supra*). The power of a tenant in tail under stat. (1540) 32 Hen. 8, c. 28, if not executed in requisite form, cannot be aided (*Darlington* (*Earl*) v. *Pulteney* (1775), 1 Cowp. 260, 267; compare *Luttrell* v. *Olmius* (1787), cited 11 Ves. 638); and see the Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), s. 47; title REAL PROPERTY AND CHATTELS REAL.

(*b*) Sugden, Powers, p. 537; but see *Wilkes* v. *Holmes* (1752), 9 Mod. Rep. 485.

(*c*) *Clark* v. *Smith* (1842), 9 Cl. & Fin. 126, 141, H. L.; and see cases cited in title LANDLORD AND TENANT, Vol. XVIII., p. 364; but there must be a valid and binding contract (*Morgan* v. *Milman* (1853), 3 De G. M. & G. 24, C. A.); and if this is so, trustees, during the minority of a tenant in tail by purchase, with power of leasing, can effectually exercise such power by granting a lease in performance of the deceased tenant for life's contract (*Davis* v. *Harford* (1882), 22 Ch. D. 128). Equity aids where the remainderman after the death of the tenant for life lies by and allows the tenant to expend money on the premises (see title LANDLORD AND TENANT, Vol. XVIII., pp. 360, 361, 364, note (*t*), 376, note (*r*)), but equity does not

If there is a *bonâ fide* contract to grant a lease under, but in excess of, the power, the interest of the tenant for life will be bound to the extent to which he is able to bind it (*d*).

109. Sales, under ordinary powers, of land apart from timber (*e*) or reserving the minerals (*f*) are invalid and cannot be aided.

Sales which cannot be aided.

aid the defective execution where there is no contract binding under the Statute of Frauds (29 Car. 2, c. 3) (*Stiles* v. *Cowper* (1748), 3 Atk. 692; *Shannon* v. *Bradstreet* (1803), 1 Sch. & Lef. 52; *Hope* v. *Cloncurry* (*Lord*) (1874), 8 I. R. Eq. 555; *Kennan* v. *Murphy* (1879), 6 L. R. Ir. 108; (1880), 8 L. R. Ir. 285, C. A.; *A.-G.* v. *Day* (1749), 1 Ves. Sen. 218; but see *Doe* d. *Pulteney* v. *Cavan* (*Lady*) (1794), 5 Term Rep. 567). Where the power was to grant a lease with the usual covenants the court refused to aid a lease containing unusual covenants (*Medwin* v. *Sandham* (1789), 3 Swan. 685). As to what covenants are usual, see title LANDLORD AND TENANT, Vol. XVIII., pp. 388 *et seq.* Where the tenant for life had power to lease with consent, but refused to get the necessary consent, the court would not aid the defective execution (*Lawrenson* v. *Butler* (1802), 1 Sch. & Lef. 13). The lessee has no claim against the estate of the tenant for life, who grants a defective lease under a power, except on express covenants (*Blore* v. *Sutton* (1817), 3 Mer. 237; *Stamford* v. *Omly* (undated), cited 1 Sch. & Lef. 65; *Lock* v. *Furze* (1866), L. R. 1 C. P. 441; *Vernon* v. *Egmont* (*Lord*) (1827), 1 Bli. (N. S.) 554). As to the difference between breach of an implied covenant by the tenant for life from the use of the word "demise" and breach of express covenants after the death of the tenant for life, see *Line* v. *Stephenson* (1838), 4 Bing. (N. C.) 678; affirmed 5 Bing. (N. C.) 183, Ex. Ch.; *Adams* v. *Gibney* (1830), 6 Bing. 656; *Williams* v. *Burrell* (1845), 1 C. B. 402; *Penfold* v. *Abbott* (1862), 32 L. J. (Q. B.) 67; title LANDLORD AND TENANT, Vol. XVIII., pp. 525, 526).

(*d*) *Dyas* v. *Cruise* (1845), 2 Jo. & Lat. 460, explaining *Harnett* v. *Yielding* (1805), 2 Sch. & Lef. 549; *Bolingbroke's* (*Lord*) *Case*, cited in *Lawrenson* v. *Butler*, *supra*, at p. 19, n.; *Graham* v. *Oliver* (1840), 3 Beav. 124, 128; and see *Butler* v. *Powis* (1845), 2 Coll. 156; *Leslie* v. *Crommelin* (1867), 2 I. R. Eq. 134; title LANDLORD AND TENANT, Vol. XVIII., p. 361. As to specific performance of an agreement to grant a future lease, see note (*s*), p. 77, *post*. A purchaser from the tenant for life with notice of the terms of the lease granted by the tenant for life, although not authorised by the power, was held bound specifically to perform his contract (*Taylor* v. *Stibbert* (1794), 2 Ves. 437; *sed quære*, see *Smith* v. *Widlake* (1877), 3 C. P. D. 10, C. A.; Sugden, Powers, pp. 765—767). Defective leases are now aided by the Leases Acts, 1849 (12 & 13 Vict. c. 26) and 1850 (13 & 14 Vict. c. 17); see title LANDLORD AND TENANT, Vol. XVIII., pp. 364, 365; and for cases under these statutes, see *ibid.* Apart from these statutes no acceptance of rent by the remainderman can validate a void lease under a power (*Bowes* v. *East London Water Works Co.* (1821), Jac. 324, 331; *Robson* v. *Flight* (1865), 4 De G. J. & Sm. 608; and see *Hope* v. *Cloncurry* (*Lord*), *supra*; *Lowe* v. *Swift* (1814), 2 Ball & B. 529; *O'Fay* v. *Burke* (1858), 8 I. Ch. R. 225). Any acceptance by the remainderman of rent as such, or any service reserved by the lease, operates as an admission that the lessee is his tenant and is entitled to notice to quit (*Doe* d. *Martin* v. *Watts* (1797), 7 Term Rep. 83; *Doe* d. *Pennington* v. *Taniere* (1848), 12 Q. B. 998; *Doe* d. *Tucker* v. *Morse* (1830), 1 B. & Ad. 365; see title LANDLORD AND TENANT, Vol. XVIII., p. 360).

(*e*) *Cockerell* v. *Cholmeley* (1830), 10 B. & C. 564; *Cholmeley* v. *Paxton* (1825), 3 Bing. 207; but see the Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), s. 13; Settled Estates Act, 1877 (40 & 41 Vict. c. 18). As to sale of land generally, see title SALE OF LAND.

(*f*) *Buckley* v. *Howell* (1861), 29 Beav. 546; *Re Newell and Nevill's Contract*, [1900] 1 Ch. 90; *Re Gladstone*, *Gladstone* v. *Gladstone*, [1900] 2 Ch. 101, C. A.; *Re Rutland's* (*Duke*) *Settled Estates*, *Rutland* (*Duke*) v.

SECT. 3. Fraudulent Appointments.

SECT. 3.—*Fraudulent Appointments.*

Fraud on the power.

110. A person having a limited power must exercise it *bonâ fide* for the end designed; otherwise the execution is a fraud on the power and void. Fraud in this connection does not necessarily imply any moral turpitude (*g*), but is used to cover all cases where the purpose of the appointor is to effect some bye or sinister object, whether such purpose be selfish or, in the appointor's belief, a more beneficial mode of disposition of the property and more consonant with that which he believes would be the real wish of the creator of the power under the circumstances existing at the date of the appointment (*h*).

Grounds upon which exercise may be held fraudulent:

111. In all cases of fraudulent execution, the fraud consists in the exercise of the power for purposes foreign to those for which it

Bristol (*Marquis*), [1900] 2 Ch. 206; and see *Dayrell* v. *Hoare* (1840), 12 Ad. & El. 356, 369; title MINES, MINERALS, AND QUARRIES, Vol. XX., p. 525. As to the power of a trustee or other person having a power of sale, with the consent of the court, to sell, reserving the minerals, unless expressly forbidden by the instrument creating the power of sale, see *ibid.*; title TRUSTS AND TRUSTEES. As to the powers of sale conferred on a mortgagee, see title MORTGAGE, Vol. XXI., p. 256. As to the persons to be served with the petition by which application to the court is made, see cases cited in titles MINES, MINERALS, AND QUARRIES, Vol. XX., p. 525, note (*o*); MORTGAGE, Vol. XXI., p. 256, note (*t*). As to the power of the Court in Lunacy, see Lunacy Regulation Act, 1853 (16 & 17 Vict. c. 70), s. 124; *Re Dicconson* (*a Lunatic*) (1880), 15 Ch. D. 316, C. A.; and see Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 120; Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 17; titles LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 445; SETTLEMENTS.

(*g*) As to fraud, as a ground for relief in equity, and equitable extensions of fraud, see title EQUITY, Vol. XIII., pp. 13 *et seq.* As to fraudulent intent in connection with impeachment of conveyances by creditors or subsequent purchasers, see title FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., pp. 83 *et seq.*, 94 *et seq.* As to fraud in connection with representations, see title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 687 *et seq.*

(*h*) *Aleyn* v. *Belchier* (1758), 1 Eden, 132; *Portland* (*Duke*) v. *Topham* (1864), 11 H. L. Cas. 32; and see *Topham* v. *Portland* (*Duke*) (1869), 5 Ch. App. 40, 59. An appointment in exercise of a joint power, where one of the appointors only has a fraudulent intention, is void; the principle applies to all limited powers, including powers of advancement (*Lawrie* v. *Bank* (1857), 4 K. & J. 142). Where there is an appointment either by one or more instruments to two persons, the appointment to one person, if severable, may be good and the other bad, if the fraudulent intention only affects the latter (*Harrison* v. *Randall* (1852), 9 Hare, 397); and see p. 6 *post*. A person having a power of appointment among a class of which he himself is one can appoint to himself (*Taylor* v. *Allhusen*, [1905] 1 Ch. 529). Where one appointment has not been impeached, another appointment of the same funds made for the purpose of equalising the interests of the objects cannot be avoided (*ibid.*); and the person prejudiced by the fraudulent appointment may give effect to the appointment (*Skelton* v. *Flanagan* (1867), 1 I. R. Eq. 362; *Preston* v. *Preston* (1869), 21 L. T. 346; and see *Roach* v. *Trood* (1876), 3 Ch. D. 429, C. A.; *Cloutte* v. *Storey* [1911] 1 Ch. 18, 32, C. A.). A person making a fraudulent appointment is liable to make good to the trust estate the whole of the loss thereby occasioned, and not merely the profit made by himself (*Re Deane, Bridge* v. *Deane* (1889), 42 Ch. D. 9, 19, C. A.).

was created, and the exercise of the power may be held fraudulent on any of the three following grounds :—

(1) If the execution was made for a corrupt purpose (*i*).

(1) Corrupt purpose.

(*i*) *E.g.*, where the intention is to benefit the appointor himself (*Hinchinbroke* (*Lord*) v. *Seymour* (1784), 1 Bro. C. C. 395 ; *Jackson* v. *Jackson* (1840), 7 Cl. & Fin. 977, H. L. ; *Keily* v. *Keily* (1843), 4 Dr. & War. 38, 55 ; *Sandwich's* (*Lord*) *Case* (undated), cited 4 Dr. & War. 55 ; *Rowley* v. *Rowley* (1854), Kay, 242 ; *Harrison* v. *Randall* (1852), 9 Hare, 397 ; *Wellesley* v. *Mornington* (*Earl*) (1855), 2 K. & J. 143 ; and see *Warde* v. *Dixon* (1858), 28 L. J. (CH.) 315 ; *Gee* v. *Gurney* (1846), 2 Coll. 486 ; *Davies* v. *Huguenin* (1863), 1 Hem. & M. 730 ; *Carroll* v. *Graham* (1865), 11 Jur. (N. S.) 1012 ; *Eland* v. *Baker* (1861), 29 Beav. 137 ; *Henty* v. *Wrey* (1882), 21 Ch. D. 332, C. A. ; *Sutherland* (*Dowager Duchess*) v. *Sutherland* (*Duke*), [1893] 3 Ch. 169 ; *Re De Hoghton, De Hoghton* v. *De Hoghton*, [1896] 2 Ch. 385 ; *Chandler* v. *Bradley*, [1897] 1 Ch. 315 ; *Middlemas* v. *Stevens*, [1901] 1 Ch. 574). A parent on executing an appointment in favour of children cannot bargain with them for the purchase of other expectant shares (*Cuninghame* v. *Anstruther* (1872), L. R. 2 Sc. & Div. 223). There is, however, nothing improper in a sale to a parent by a child of his interest, although the interest depends upon the appointment or absence of appointment by the father (*Barron* v. *Barron* (1838), 2 Jo. Ex. Ir. 798 ; and see *Askham* v. *Barker* (1853), 17 Beav. 37 ; *Folkes* v. *Western* (1804), 9 Ves. 456 ; *Noel* v. *Walsingham* (*Lord*) (1824), 2 Sim. & St. 99 ; *Brownlow* v. *Meath* (*Earl*) (1840), 2 Dr. & Wal. 674) ; but a parent buying a child's share cannot entitle himself to more than the child's share in default of appointment (*Smith* v. *Camelford* (*Lord*) (1795), 2 Ves. 698, 714 ; and see *Langston* v. *Blackmore* (1755), Amb. 289 ; *Conolly* v. *M'Dermott* (1819), Beat. 601 ; Sugden, Law of Property, p. 513). If the donee of a limited power, exercisable by will only, covenants to appoint to an object, an exercise of the power in accordance with the covenant is not fraudulent, but the remedy for a breach of the covenant is damages, and not specific performance (*Coffin* v. *Cooper* (1865), 2 Drew. & Sm. 365 ; *Thacker* v. *Key* (1869), L. R. 8 Eq. 408 ; *Bulteel* v. *Plummer* (1870), 6 Ch. App. 160 ; *Palmer* v. *Locke* (1880), 15 Ch. D. 294, C. A. ; *Re Evered, Molineux* v. *Evered*, [1910] 2 Ch. 147, C. A. ; but see *Re Bradshaw, Bradshaw* v. *Bradshaw*, [1902] 1 Ch. 436) ; and an appointment under a general testamentary power with a covenant not to revoke is a good appointment (*Robinson* v. *Ommaney* (1882), 21 Ch. D. 780 ; affirmed (1883), 23 Ch. D. 285, C. A. ; *Re Parkin, Hill* v. *Schwarz*, [1892] 3 Ch. 510 ; *Beyfus* v. *Lawley*, [1903] A. C. 411). A release by the appointor or a covenant by the appointor not to exercise the power is not open to objection though the effect is to benefit himself (*Smith* v. *Houblon* (1859), 26 Beav. 482 ; *Re Little, Harrison* v. *Harrison* (1889), 40 Ch. D. 418, C. A. ; *Re Radcliffe, Radcliffe* v. *Bewes*, [1892] 1 Ch. 227, C. A. ; *Re Somes, Smith* v. *Somes*, [1896] 1 Ch. 250 ; *Re Evered, Molineux* v. *Evered*, *supra*, at p. 157 ; and see the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 52). As to the necessity of a deed in such a case, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 370. But the appointor's trustee in bankruptcy cannot release a special power (*Re Rose, Rose's* (*E. T.*) *Property* (*Trustee*) v. *Rose*, [1904] 2 Ch. 348 ; see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 145). An appointment, not impeachable in other respects, is not bad simply because the appointor may derive some benefit (*Re Huish's Charity* (1870), L. R. 10 Eq. 5, 9 ; *Wicherley's Case* (1731), Amb. 234, n. ; *Cockcroft* v. *Sutcliffe* (1856), 2 Jur. (N. S.) 323 ; *Pickles* v. *Pickles* (1861), 7 Jur. (N. S.) 1065 ; *Pares* v. *Pares* (1863), 10 Jur. (N. S.) 90 ; and see *Baldwin* v. *Roche* (1842), 5 I. Eq. R. 110 ; *Cooper* v. *Cooper* (1869), 5 Ch. App. 203 ; *Re De Hoghton, De Hoghton* v. *De Hoghton* (No. 2) (1896), 44 W. R. 635) ; and a power of revocation may be exercised though the result is to benefit the person revoking (*Shirley* v. *Fisher* (1882), 47 L. T. 109) ; and an appointment, otherwise good, will not be avoided because, owing to the infancy of the appointee, the appointor, being the infant's parent, may derive some benefit (*Beere* v. *Hoffmister* (1856), 23 Beav. 101 ; and see *Butcher* v.

SECT. 3. **Fraudulent Appointments.**

(2) Antecedent agreement.

(2) If it was made in pursuance of an antecedent agreement by the appointee to benefit persons not objects of the power, even although the agreement in itself is unobjectionable (*k*). An appointment to a child an object of the power, and a contemporaneous settlement by him of the appointed fund, is, however, valid unless it can be shown that the appointment was made in pursuance of a contract inducing the appointment (*l*).

Jackson (1845), 14 Sim. 444; *Hamilton* v. *Kirwan* (1845), 2 Jo. & Lat. 393; *Domville* v. *Lamb* (1853), 1 W. R. 246; *Fearon* v. *Desbrisay* (1851), 14 Beav. 635). The burden of proving the corrupt purpose is on the person who attempts to avoid the appointment, and the wrongful purpose must be proved; motives such as anger and resentment are immaterial (*Campbell* v. *Home* (1842), 1 Y. & C. Ch. Cas. 664; *M'Queen* v. *Farquhar* (1805), 11 Ves. 467; *Pares* v. *Pares* (1863), 10 Jur. (N. S.) 90; *Vane* v. *Dungannon* (*Lord*) (1804), 2 Sch. & Lef. 118, 130; *Topham* v. *Portland* (*Duke*) (1869), 5 Ch. App. 40, 57); but the *onus probandi* may be shifted (see *Jackson* v. *Jackson* (1840), 7 Cl. & Fin. 977, H. L.; *Humphrey* v. *Olver* (1859), 5 Jur. (N. S.) 946; *Topham* v. *Portland* (*Duke*), *supra*, at p. 62). The court does not assist an appointor who is *particeps criminis* (*Palmer* v. *Wheeler* (1811), 2 Ball & B. 18, 29). It is the duty of trustees to see that the funds are not improperly distributed where they have reason to suppose that an appointment dealing with the funds is bad, and if they do part with the funds in these circumstances they are liable (*Harrison* v. *Randall* (1852), 9 Hare, 397; *Mackechnie* v. *Marjoribanks* (1870), 39 L. J. (CH.) 604; and see title TRUSTS AND TRUSTEES). Although trustees must not raise untenable objections (*Campbell* v. *Home*, *supra*; *Patterson* v. *Wooler* (1876), 34 L. T. 415), yet it is their duty to watch transactions between father and children jealously, and the court will support them if their motives are honest (*King* v. *King* (1857), 1 De G. & J. 663, C. A.; *Re Metcalfe's Trusts* (1864), 2 De G. J. & Sm. 122, C. A.; *Firmin* v. *Pulham* (1848), 2 De G. & Sm. 99; *Re Swan* (1864), 2 Hem. & M. 34; *Whitmarsh* v. *Robertson* (1842), 1 Y. & C. Ch. Cas. 715).

(*k*) *E.g.*, where the appointor bargains for some benefit for himself (*Daubeny* v. *Cockburn* (1816), 1 Mer. 626, 644; *Jackson* v. *Jackson*, *supra*; *Duggan* v. *Duggan* (1880), 5 L. R. Ir. 525; affirmed 7 L. R. Ir. 152; and see *Stuart* v. *Castlestuart* (*Lord*) (1858), 8 I. Ch. R. 408; *Farmer* v. *Martin* (1828), 2 Sim. 502; *Arnold* v. *Hardwick* (1835), 7 Sim. 343; *Askham* v. *Barker* (1850), 12 Beav. 499; *Reid* v. *Reid* (1858), 25 Beav. 469), or for some stranger to the power other than himself (*Salmon* v. *Gibbs* (1849), 3 De G. & Sm. 343; *Carver* v. *Richards* (1860), 1 De G. F. & J. 548, C. A.; *Lee* v. *Fernie* (1839), 1 Beav. 483; *Knowles* v. *Morgan* (1910), 54 Sol. Jo. 117; *Evans* v. *Nevill* (1908), *Times*, 11th February).

(*l*) *Thompson* v. *Simpson* (1841), 1 Dr. & War. 459, 487; *Goldsmid* v. *Goldsmid* (1842), 2 Hare, 187; *Birley* v. *Birley* (1858), 25 Beav. 299; *Whitting* v. *Whitting* (1908), 53 Sol. Jo. 100). The fact that the appointor knows that the object intends to dispose of the fund in favour of a stranger to the power does not necessarily vitiate the appointment, but it may have that effect if it can be shown that the appointment would not have been made but for the agreement (*Pryor* v. *Pryor* (1864), 2 De G. J. & Sm. 205, C. A.; *Daniel* v. *Arkwright* (1864), 2 Hem. & M. 95; *Re Foote and Purdon's Estate*, [1910] 1 I. R. 365). The question in each case is the character in which the appointee takes the property; if it is for his absolute benefit the appointment is good, but if this is not the appointor's purpose it is bad (*Langston* v. *Blackmore* (1755), Amb. 289; *Fitzroy* v. *Richmond* (*Duke*) (No. 2) (1859), 27 Beav. 190; *Birley* v. *Birley*, *supra*; *Pryor* v. *Pryor*, *supra*; *Cooper* v. *Cooper* (1869), L. R. 8 Eq. 312; *Roach* v. *Trood* (1876), 3 Ch. D. 429, C. A.; *Re Turner's Settled Estates* (1884), 28 Ch. D. 205, C. A.). A power to appoint among children has been held to be well exercised by appointing to grandchildren with the consent of

(3) If it was made for purposes foreign to the power, although such purposes are not communicated to the appointee before the appointment and although the appointor gets no personal benefit (*m*).

(3) Purposes foreign to power.

112. The intention of the donor of the power must be ascertained from the instrument creating it, and can only be dealt with as expressed therein; and the fact that the appointor is himself the settlor does not alter this rule (*n*).

How intention of donor of power is ascertained.

113. A purchaser for valuable consideration, who has acquired the legal estate without notice, from the appointee under a common law power or a power operating by the Statute of Uses (*o*) by which the legal estate passes, is not affected by the fraudulent execution of the power (*p*); but a purchaser for value without notice, under an equitable power, who does not acquire the legal estate, can only rely on such equitable defences as are open to a purchaser for value without the legal estate, who is subsequent in time against prior equitable titles (*q*).

Position of purchaser for value without notice.

their mother, an object of the power (*White* v. *St. Barbe* (1813), 1 Ves. & B. 399; *Wright* v. *Goff* (1856), 22 Beav. 207; and see *Re Gosset's Settlement* (1854), 19 Beav. 529; *Cuninghame* v. *Anstruther* (1872), L. R. 2 Sc. & Div. 223, 234), and the rule is the same whether the property be in possession or reversion (*Re Gosset's Settlement*, *supra*); and a deed of family arrangement by which the children agree to give some benefit to their parent has been held valid (*Wright* v. *Goff*, *supra*; see *Beddoes* v. *Pugh* (1859), 26 Beav. 407; *Skelton* v. *Flanagan* (1867), 1 I. R. Eq. 362; *Roach* v. *Trood* (1876), 3 Ch. D. 429, C. A.). As to the special considerations applicable to family arrangements, see title FAMILY ARRANGEMENTS, Vol. XIV., pp. 546 *et seq.*

(*m*) *Hay* v. *Watkins* (1843), 3 Dr. & War. 339, 343; *Weir* v. *Chamley* (1850), 1 I. Ch. R. 295; *Wellesley* v. *Mornington* (*Earl*) (1855), 2 K. & J. 143; *Re Marsden's Trust* (1859), 4 Drew. 594; *Topham* v. *Portland* (*Duke*) (1863), 1 De G. J. & Sm. 517, 568, C. A.; affirmed (1864), 11 H. L. Cas. 32; *D'Abbadie* v. *Bizoin* (1871), 5 I. R. Eq. 205 (an appointment as an inducement to reside abroad); *Re Crawshay*, *Crawshay* v. *Crawshay* (1890), 43 Ch. D. 615; *Re Perkins*, *Perkins* v. *Bagot*, [1893] 1 Ch. 283; *Re Cohen*, *Brookes* v. *Cohen*, [1911] 1 Ch. 37; but see *Hodgson* v. *Halford* (1879), 11 Ch. D. 959 (forfeiture on marriage with anyone not a Jew); *Wainwright* v. *Miller*, [1897] 2 Ch. 255).

(*n*) *Lee* v. *Fernie* (1839), 1 Beav. 483; *Topham* v. *Portland* (*Duke*), *supra*; *Hutchins* v. *Hutchins* (1876), 10 I. R. Eq. 453.

(*o*) 27 Hen. 8, c. 10; see p. 3, *ante*.

(*p*) *M'Queen* v. *Farquhar* (1805), 11 Ves. 467; *Rhodes* v. *Cook* (1826), 2 Sim. & St. 488; *Green* v. *Pulsford* (1839), 2 Beav. 70; *Hamilton* v. *Kirwan* (1845), 2 Jo. & Lat. 393; *Cockcroft* v. *Sutcliffe* (1856), 2 Jur. (N. S.) 323; *Re Huish's Charity* (1870), L. R. 10 Eq. 5; *Preston* v. *Preston* (1869), 21 L. T. 346; and see title EQUITY, Vol. XIII., pp. 76 *et seq.*, 81.

(*q*) *Daubeny* v. *Cockburn* (1816), 1 Mer. 626; *Birley* v. *Birley* (1858), 25 Beav. 299; *Askham* v. *Barker* (1853), 17 Beav. 37; *Warde* v. *Dickson* (1858), 5 Jur. (N. S.) 698; *Cloutte* v. *Storey*, [1911] 1 Ch. 18, C. A.; but see *Phillips* v. *Phillips* (1862), 4 De G. F. & J. 208; *Cave* v. *Cave* (1880), 15 Ch. D. 639; and see title EQUITY, Vol. XIII., pp. 79 *et seq.* If the purchaser has notice, the defence will not avail (*Palmer* v. *Wheeler* (1811), 2 Ball & B. 18; *Hall* v. *Montague* (1830), 8 L. J. (O. S.) (CH.) 167; *Skelton* v. *Flanagan*, *supra*). The issue of a marriage cannot support a fraudulent appointment on the ground that they were purchasers for value (*Conolly* v. *MacDermott* (1825), Sugden, Law of Property, p. 515; *Re Nash* (1856), 5 I. Ch. R. 384, P. C.); the purchase must be from an object of the

SECT. 3. **Fraudulent Appointments.**

When appointments can be severed.

114. Appointments cannot be severed, so as to be good to the extent to which they are *bonâ fide* exercises of the power, but bad as to the remainder (*r*), unless (1) some consideration has been given which cannot be restored, or (2) the court can sever the intentions of the appointor and distinguish the good from the bad (*s*).

SECT. 4.—*Election.*

Application of doctrine to appointments.

115. The doctrine of election (*t*) applies to appointments under powers, and the general rule is that where, by the same instrument, there is a direct appointment to strangers to the power and a gift to the persons entitled in default of appointment, the latter are put to their election (*u*).

power, not from the appointor. Payment of consideration by the appointor cannot turn a stranger into an object of the power (*Daubeny* v. *Cockburn* (1816), 1 Mer. 626).

(*r*) *Daubeny* v. *Cockburn*, *supra*; *Farmer* v. *Martin* (1828), 2 Sim. 502; *Askham* v. *Barker* (1850), 12 Beav. 499; *Agassiz* v. *Squire* (1854), 18 Beav. 431; *Topham* v. *Portland* (*Duke*) (1863), 1 De G. & Sm. 517, C. A.

(*s*) *Ranking* v. *Barnes* (1864), 10 Jur. (N. S.) 463; *Harrison* v. *Randall* (1852), 9 Hare, 397. Powers of jointuring are an exception to this rule, and, where a power of this kind has been exercised as the result of a bargain between husband and wife, the jointure has been held good (*Lane* v. *Page* (1754), Amb. 233; *Tyrconnell* (*Lord*) v. *Ancaster* (*Duke*) (1754), Amb. 237; *Aleyn* v. *Belchier* (1758), 1 Eden, 132; *Baldwin* v. *Roche* (1842), 5 I. Eq. R. 110; *Rowley* v. *Rowley* (1854), Kay, 242; *Saunders* v. *Shafto*, [1905] 1 Ch. 126, C. A.; but see *Whelan* v. *Palmer* (1888), 39 Ch. D. 648); and as to powers of jointuring, see titles REAL PROPERTY AND CHATTELS REAL; SETTLEMENTS. Where the subject-matter of the power is in existence and the donee has merely to distribute it, an appointment to one object which is bad does not necessarily vitiate the whole; see *Lane* v. *Page*, *supra*, at p. 233; *Rowley* v. *Rowley*, *supra*; *Harrison* v. *Randall*, *supra*; and see p. 52, *ante*. Where there is a power to raise and distribute a fund among children, if the whole sum is raised and an appointment made as the result of a corrupt bargain, it is all bad, but, if a part only is fraudulently appointed, the remainder is good (*Rowley* v. *Rowley*, *supra*; and as to powers of charging, see p. 82, *post*). Care must be taken to distinguish the proposition in the text, *supra*, and the cases cited thereto, and the cases of absolute appointments with conditions annexed cited at p. 50, *ante*; and see *McDonald* v. *McDonald* (1875), L. R. 2 Sc. & Div. 482, 492; *Re Perkins*, *Perkins* v. *Bagot*, [1893] 1 Ch. 283; *Re Cohen*, *Brookes* v. *Cohen*, [1911] 1 Ch. 37.

(*t*) As to the doctrine of election, see title EQUITY, Vol. XIII., pp. 116 *et seq.*

(*u*) *Whistler* v. *Webster* (1794), 2 Ves. 367; *Blacket* v. *Lamb* (1851) 14 Beav. 482; *Fearon* v. *Fearon* (1852), 3 I. Ch. R. 19; *Ex parte Bernard* (1857), 6 I. Ch. R. 133; *Cooper* v. *Cooper* (1874), L. R. 7 H. L. 53; *White* v. *White* (1882), 22 Ch. D. 555; *King* v. *King* (1884), 13 L. R. Ir. 531; *Re Wheatley*, *Smith* v. *Spence* (1884), 27 Ch. D. 606; *Re Brooksbank*, *Beaucler* v. *James* (1886), 34 Ch. D. 160; *Re Wells' Trusts*, *Hardisty* v. *Wells* (1889) 42 Ch. D. 646; *Pitman* v. *Crum Ewing*, [1911] A. C. 217. To raise a case of election there must be an absolute direct appointment to strangers; a mere condition annexed to an appointment is rejected; see *Carver* v. *Bowles* (1831), 2 Russ. & M. 301; *Blacket* v. *Lamb*, *supra*; *White* v. *White*, *supra*; *King* v. *King*, *supra*; and see p. 63, *post*; and as to excessive execution, see pp. 49 *et seq.*, *ante*. The appointor must assume to dispose of what is not his; if he has not in fact done so, no case of election arises (*Dashwood* v. *Peyton* (1811), 18 Ves. 27, 41; *Langslow* v. *Langslow* (1856) 21 Beav. 552; *Box* v. *Barrett* (1866), L. R. 3 Eq. 244; *Lewis* v. *Lewis* (1876)

SECT. 4.
Election.

No application as between clauses in same instrument.

116. The doctrine of election is to be applied as between a gift under an instrument and a claim dehors that instrument and adverse to it, and is not to be applied as between one clause in an instrument and another clause in the same instrument (*a*); but there may be election between successive appointments in the same instrument (*b*).

Application to successive execution.

117. There is an important exception to the application of the doctrine of election to appointments under powers, which is as follows: where there is an absolute appointment to an object of the power followed by attempts to modify the interest so appointed in a manner which the law will not allow (*c*), the court reads the will as if all the passages in which such attempts are made were swept out of it for all intents and purposes (*d*).

11 I. R. Eq. 340, 343, C. A.; and see *Re Woodleys, Minors* (1892), 29 L. R. Ir. 304, C. A.; *Prescott* v. *Edwards* (1826), 4 L. J. (O. S.) (CH.) 111; *Tomkyns* v. *Blane* (1860), 28 Beav. 422). A case of election arises where there is a revocation of an absolute appointment and a gift to the appointee (*Cooper* v. *Cooper* (1870), 6 Ch. App. 15; (1874), L. R. 7 H. L. 53; and see *Pickersgill* v. *Rodger* (1876), 5 Ch. D. 163), or where the donee of a power improperly delegates it to another and confers gifts by the same instrument on the persons entitled in default (*Ingram* v. *Ingram* (1740), cited 1 Ves. Sen. 259), or where the appointor exceeds a power of revocation and gives benefits to the appointee (*Coutts* v. *Acworth* (1870), L. R. 9 Eq. 519; and see *Re Booker, Booker* v. *Booker* (1886), 34 W. R. 346). As to improper delegation, see p. 15, *ante*.

(*a*) *Wollaston* v. *King* (1869), L. R. 8 Eq. 165; and see *Wallinger* v. *Wallinger* (1869), L. R. 9 Eq. 301; *Warren* v. *Rudall* (1860), 1 John. & H. 1.

(*b*) *England* v. *Lavers* (1866), L. R. 3 Eq. 63; *Re Keon's Estate* (1879), 3 L. R. Ir. 228; and see *Re Tancred's Settlement, Somerville* v. *Tancred, Re Selby, Church* v. *Tancred*, [1903] 1 Ch. 715. All questions of election must depend on the state of circumstances existing at the date of the testator's death (*Cavan (Lady)* v. *Pulteney* (1795), 2 Ves. 544; (1797), 3 Ves. 384; *Grissell* v. *Swinhoe* (1869), L. R. 7 Eq. 291; and see *Cooper* v. *Cooper* (1870), 6 Ch. App. 15, 21; *Re Ashton, Ingram* v. *Papillon*, [1897] 2 Ch. 574).

(*c*) No case for election can arise where the appointment is invalid by reason of its infringing the rule against perpetuities; see titles EQUITY, Vol. XIII., p. 119; PERPETUITIES, Vol. XXII., pp. 293 *et seq.*

(*d*) *Carver* v. *Bowles* (1831), 2 Russ. & M. 301; *Blacket* v. *Lamb* (1851), 14 Beav. 482; *Langslow* v. *Langslow* (1856), 21 Beav. 552; *Woolridge* v. *Woolridge* (1859), John. 63; and see *Bate* v. *Willats* (1877), 37 L. T. 221; *King* v. *King* (1886), 15 I. Ch. R. 479; compare *Moriarty* v. *Martin* (1852), 3 I. Ch. R. 26; and as to excessive execution, see pp. 49 *et seq.*, *ante*.

PART V. Extinguishment and Suspension of Powers.

Part V.—Extinguishment and Suspension of Powers.

Release of collateral powers.

118. Prior to the 1st January, 1882, a power simply collateral (*e*) could not be extinguished or suspended by any act of the donee or of any other person, nor could it be released where it was to be exercised for the benefit of another (*f*); but now (*g*), a person to whom any power, whether coupled with an interest or not, is given may by deed release or contract not to exercise the power, and this provision applies to powers created by instruments coming into operation before or after the 1st January, 1882.

A power coupled with a duty or in the nature of a trust cannot, however, be released (*h*).

Disclaimer of collateral powers.

A power, whether coupled with an interest or not, can be disclaimed, and, on such disclaimer, the power may be exercised by the survivor or survivors to whom the power is given, unless a contrary intention is expressed in the instrument creating the power (*h*). This provision applies to powers created by instruments coming into operation before or after the 1st January, 1882 (*i*).

Suspension or release wholly or *pro tanto*.

119. Prior to the 1st January, 1882, all powers other than collateral powers and powers coupled with a trust or duty, and since that date all powers other than those coupled with a trust or duty, can be suspended or destroyed either wholly or in part by the donee thereof (*j*), and any dealing with an estate by the donee of a power

(*e*) For the definition of collateral power, see p. 4, *ante*.

(*f*) *West* v. *Berney* (1819), 1 Russ. & M. 431; *Willis* v. *Shorral* (1739), 1 Atk. 474; *Digge's Case* (1498), Sugden, Powers, p. 893; but see *Hodkinson* v. *Quinn* (1860), 1 John. & H. 303, where equity interfered to prevent the exercise of an equitable power.

(*g*) By the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 52; and see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 371.

(*h*) *Re Eyre, Eyre* v. *Eyre* (1883), 49 L. T. 259; *Saul* v. *Pattinson* (1886), 34 W. R. 561; *Weller* v. *Ker* (1866), L. R. 1 Sc. & Div. 11; *Dunne's Trusts* (1878), 1 L. R. Ir. 516. The trustee in bankruptcy of the donee of a power cannot release it (*Re Rose, Rose's* (*E. T.*) *Property* (*Trustee*) v. *Rose*, [1904] 2 Ch. 348; [1905] 1 Ch. 94, C. A.; see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 145). The indestructible nature of a power coupled with a trust applies to both personal and real estate (*Chambers* v. *Smith* (1878), 3 App. Cas. 795; *Thacker* v. *Key* (1869), L. R. 8 Eq. 408).

(*i*) Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 6; and see title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 370, 371.

(*j*) Every power reserved by the grantor for his own benefit, whether he has reserved an estate in the land or not, may be released (*Bird* v. *Christopher* (1653), Sty. 389). The rule applies whether the power is present or future (*Albany's Case* (1586), 1 Co. Rep. 110 b), and to personal as well as real estate (*Noel* v. *Henley* (*Lord*) (1825), M'Cle. & Yo. 302); to powers both appendant and in gross (*West* v. *Berney* (1819), 1 Russ. & M. 431, 435); to limited powers (*Smith* v. *Death* (1820), 5 Madd. 371; *King* v. *Melling* (1672), 1 Vent. 225; *Coffin* v. *Cooper* (1865), 2 Drew. & Sm. 365; *Bickley* v. *Guest* (1831), 1 Russ. & M. 440; *Smith* v. *Plummer* (1848), 17 L. J. (CH.) 145); to testamentary powers (*Barton* v. *Briscoe* (1822), Jac. 603; *Horner* v. *Swann* (1823), Turn. & R. 430; *Re Chambers* (1847), 15 L. Eq. R. 518; *Palmer* v. *Locke* (1880), 15 Ch. D. 294, C. A.; and see *Re*

inconsistent with the exercise of that power releases it either wholly or *pro tanto* (*k*). These powers may be released, extinguished, or suspended by express words (*l*) or by implication (*m*).

Exercise of power appendant after its estate has gone.

120. A power appendant may be exercised although the estate to which it was appended be gone, provided only that such exercise does not derogate from the previous grant, whether voluntary or by operation of law, of the donee of the power (*n*).

Radcliffe, Radcliffe v. *Bewes*, [1892] 1 Ch. 227, C. A.; *Re Lyons and Caroll's Contract*, [1896] 1 I. R. 383, 399, C. A.; *Chism* v. *Lipsett*, [1905] 1 I. R. 60, 72, C. A.; *Nottidge* v. *Dering*, *Raban* v. *Dering*, [1910] 1 Ch. 297, C. A.). For a general classification of powers, see pp. 3, 4, *ante*.

(*k*) *Smith* v. *Death* (1820), 5 Madd. 371; *Hurst* v. *Hurst* (1852), 16 Beav. 372; *Davies* v. *Huguenin* (1863), 1 Hem. & M. 730; *Isaac* v. *Hughes* (1870), L. R. 9 Eq. 191; *Green* v. *Green* (1845), 2 Jo. & Lat. 529; *Re Chambers* (1847), 11 I. Eq. R. 518; *Re Hancock, Malcolm* v. *Burford-Hancock*, [1896] 2 Ch. 173, C. A.; *Foakes* v. *Jackson*, [1900] 1 Ch. 807; *Nottidge* v. *Dering*, *Raban* v. *Dering*, [1909] 2 Ch. 648; [1910] 1 Ch. 297, C. A.; *Re Evered, Molineux* v. *Evered*, [1910] 2 Ch. 147, C. A.

(*l*) *Cunynghame* v. *Thurlow* (1832), 1 Russ. & M. 436, n.

(*m*) *Smith* v. *Houblon* (1859), 26 Beav. 482. A recital may amount to a release, but the whole intent of the deed is to be considered (*Boyd* v. *Petrie* (1872), 7 Ch. App. 385; and see title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 459 *et seq.* As to powers of sale in a mortgage, see *Young* v. *Roberts* (1852), 15 Beav. 558; *Curling* v. *Shuttleworth* (1829), 6 Bing. 121; *Cruse* v. *Nowell* (1856), 2 Jur. (N. S.) 536; *Stewart* v. *Donegal* (*Marquis*) (1845), 2 Jo. & Lat. 636; title MORTGAGE, Vol. XXI., p. 172, note (*m*). On a disentailing deed the power of sale may be kept alive (*Harrison* v. *Round* (1852), 2 De G. M. & G. 190; *Re Wright's Trustees and Marshall* (1884), 28 Ch. D. 93). Fines and recoveries, which were abolished by the Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74) (see title REAL PROPERTY AND CHATTELS REAL), destroyed powers (*Tomlinson* v. *Dighton* (1711), 1 P. Wms. 149; *Bickley* v. *Guest* (1831), 1 Russ. & M. 440; *Savile* v. *Blacket* (1722), 1 P. Wms. 777). Married women now have power to release powers over both real and personal estate (*Re Chisholm's Settlement, Re Hemphill's Settlement, Hemphill* v. *Hemphill*, [1901] 2 Ch. 82), though, prior to the abolition of fines and recoveries, a married woman could only release a power by fine or recovery; the restraint on anticipation does not affect her power to release (*Heath* v. *Wickham* (1880), 5 L. R. Ir. 285, C. A.; see *Re Onslow, Plowden* v. *Gayford* (1888), 39 Ch. D. 622; and title HUSBAND AND WIFE, Vol. XVI., p. 388).

(*n*) *Long* v. *Rankin* (1822), Sugden, Powers, p. 895; *Warburton* v. *Farn* (1849), 16 Sim. 625; *Alexander* v. *Mills* (1870), 6 Ch. App. 124; *Re Evans' Estate*, [1897] 1 I. R. 410, C. A.; *Lonsdale* (*Earl*) v. *Lowther*, [1900] 2 Ch. 687; *Re Lambert's Estate*, [1901] 1 I. R. 261, C. A. Bankruptcy does not destroy the power of consenting to a sale (*Holdsworth* v. *Goose* (1861), 29 Beav. 111; *Eisdell* v. *Hammersley* (1862), 31 Beav. 255; and see *Simpson* v. *Bathurst, Shepherd* v. *Bathurst* (1869), 5 Ch. App. 193; *Leigh* (*Lord*) v. *Ashburton* (*Lord*) (1848), 11 Beav. 470; *Leclère* v. *Beaudry* (1873), L. R. 5 P. C. 362; *Re Bedingfield and Herring's Contract*, [1893] 2 Ch. 332); nor to the consent to the exercise of a power of advancement, but in this case the consent of the trustee in bankruptcy is necessary (*Re Cooper, Cooper* v. *Slight* (1884), 27 Ch. D. 565; and see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 145, 146, note (*p*)). A mortgage cannot destroy a power of sale (*Tyrrell* v. *Marsh* (1825), 3 Bing. 31; *Walmesley* v. *Butterworth* (1835), 5 Sweet's Bythewood, 168). A power of appointing new trustees can be exercised after alienation (*Hardaker* v. *Moorhouse* (1884), 26 Ch. D. 417; and see title TRUSTS AND TRUSTEES); likewise a power of appointment, whether general or special, if there is any estate other than the estate aliened out of which it can take effect (*Re Sprague, Miley* v. *Cape* (1880), 43 L. T. 236; *Doe* d. *Ccleman* v. *Britain* (1818), 2 B. & Ald. 93; *Jones* v. *Winwood* (1841), 10 Sim. 150, overruling *Badham* v. *Mee* (1832), 1 My. &

PART V.
Extinguishment and Suspension of Powers.

Power in gross independent of donee's interest.

121. A power in gross is independent of the donee's estate and may be exercised at any time, as well after as during the continuance of his interest (*o*), but the power may be extinguished by necessary implication from the words of the instrument by which it is created (*p*).

Power may be extinguished by acquisition of fee.

122. A power given to the owner of a particular estate, whether appendant or in gross, is extinguished by his acquisition of the fee simple (*q*), but equity interferes to effectuate the intention of the parties in certain cases by making the intent of the person purporting to execute the power bear out the disposition he has affected to make (*r*). A power may co-exist with the fee (*s*).

K. 32; 7 Bing. 695; *Hole* v. *Escott* (1837) 2 Keen, 444; (1838), 4 My. & Cr. 187). Acts of the person entitled in default are immaterial (*Lord* v. *Bunn* (1843), 2 Y. & C. Ch. Cas. 98; *Chambers* v. *Smith* (1878), 3 App. Cas. 795; and see *Re Vizard's Trusts* (1866), 1 Ch. App. 588 (power of advancement); *Noel* v. *Henley* (*Lord*) (1825), M'Cle. & Yo. 302; *Nottidge* v. *Green* (1875), 33 L. T. 220; *Re Cooper, Cooper* v. *Slight* (1884), 27 Ch. D. 565; but see *Whitmarsh* v. *Robertson* (1845), 1 Coll. 570). A discretionary power given to trustees to pay or not to pay income to a legatee determines by the bankruptcy of the legatee, and the income vests in the trustee in bankruptcy, unless the trustees have a discretion in such event to apply or accumulate such portion as is not paid to the legatee to or for the benefit of third persons (*Piercy* v. *Roberts* (1832), 1 My. & K. 4; *Snowdon* v. *Dales* (1834), 6 Sim. 524; *Re Booth, Booth* v. *Booth*, [1894] 2 Ch. 282); and see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 146 *et seq.* If the bankrupt can be excluded altogether, the power is not affected, but so much property as is actually allocated to the bankrupt vests in his trustee in bankruptcy (*Lord* v. *Bunn, supra*; *Holmes* v. *Penney* (1856), 3 K. & J. 90; *Re Coe's Trust* (1858), 4 K. & J. 199; and see *Re Coleman, Henry* v. *Strong* (1888), 39 Ch. D. 443, C. A.). Where the trustee has no power to exclude the bankrupt altogether, the court has directed an inquiry as to the amount proper to be applied for the other objects of the power and has given the residue to the trustee in bankruptcy (*Wallace* v. *Anderson* (1853), 16 Beav. 533; *Page* v. *Way* (1840), 3 Beav. 20; *Kearsley* v. *Woodcock* (1843), 3 Hare, 185; *Carr* v. *Living* (1860), 28 Beav. 644; but see, *contra, Godden* v. *Crowhurst* (1842), 10 Sim. 642; *Re Landon's Trusts* (1871), 40 L. J. (CH.) 370; *Re Ashby, Ex parte Wreford*, [1892] 1 Q. B. 872). A power of sale, which authorises the creation of uses displacing the uses created by the settlement, is paramount to an estate tail created by such settlement (*Roper* v. *Hallifax* (1817), 8 Taunt. 845; *Hill* v. *Pritchard* (1854), Kay, 394; *Harrison* v. *Round* (1852), 2 De G. M. & G. 190; *Re Wright's Trustees and Marshall* (1884), 28 Ch. D. 93).

(*o*) *Parsons* v. *Parsons* (1744), 9 Mod. Rep. 464; *Re Dunne's Trusts* (1880), 5 L. R. Ir. 76, C. A.; *Reresby* v. *Newland* (1723), 2 P. Wms. 93; and see *Sleeman* v. *Magrath* (1858), 8 I. Ch. R. 195, 207, C. A.

(*p*) Sugden, Powers, p. 79; *Haswell* v. *Haswell* (1860), 2 De G. F. & J. 456; but, *secus*, *Wickham* v. *Wing* (1865), 2 Hem. & M. 436; *Re Stone's Estate* (1869), 3 I. R. Eq. 621; *Re Aylwin's Trusts* (1873), L. R. 16 Eq. 585; and see *Re Kelly's Settlement, West* v. *Turner* (1888), 59 L. T. 494.

(*q*) *Cross* v. *Hudson* (1789), 3 Bro. C. C. 31.

(*r*) *Mortlock* v. *Buller* (1804), 10 Ves. 292; *Sing* v. *Leslie* (1864), 2 Hem. & M. 68; and see *Grice* v. *Shaw* (1852), 10 Hare, 76 (where the power of charging had been exercised in favour of an object who became entitled to the fee); and, as to the presumption of merger, see, further, titles EQUITY, Vol. XIII., pp. 147, 148; LANDLORD AND TENANT, Vol. XVIII., pp. 552, 553; MORTGAGE, Vol. XXI., pp. 318 *et seq.*

(*s*) *Maundrell* v. *Maundrell* (1805), 10 Ves. 246. Where a man limits his estate to such uses as he shall appoint, and until such appointment to the use of himself and his heirs, the fee simple continues in the settlor, subject to be divested by an exercise of the power; the same applies to copyholds

Power extinguished by satisfaction of purpose.

123. A power, whether appendant or in gross, is absolutely extinguished when all the purposes for which it was originally created have ceased to exist (*t*), but the object for which the power is given in each case must be considered (*u*), and it is to a great extent a question of intention to be determined by the construction of the instrument creating the power and with due regard to the rule against perpetuities (*x*).

Power not necessarily extinguished by exercise.

124. A power is not necessarily extinguished by having been exercised once (*a*), but may be exercised by different appointments at different times (*b*); some powers, however, are by their nature exhausted by a single effectual execution, for example, a power of sale (*c*).

Effect of dissolution of marriage or judicial separation.

125. Powers contained in a settlement made on a marriage which is subsequently dissolved by the court are not extinguished by

(*Glass* v. *Richardson* (1852), 9 Hare, 698; affirmed 2 De G. M. & G. 658, C. A.); see titles COPYHOLDS, Vol. VIII., p. 109; REAL PROPERTY AND CHATTELS REAL.

(*t*) *Wheate* v. *Hall* (1809), 17 Ves. 80; *Wolley* v. *Jenkins* (1856), 23 Beav, 53; affirmed (1857), 5 W. R. 281.

(*u*) *Trower* v. *Knightley* (1821), Madd. & G. 134; *Wood* v. *White* (1838), 4 My. & Cr. 460.

(*x*) *Lantsbery* v. *Collier* (1856), 2 K. & J. 709; *Taite* v. *Swinstead* (1859), 26 Beav. 525; *Re Brown's Settlement* (1870), L. R. 10 Eq. 349; *Peters* v. *Lewes and East Grinstead Rail. Co.* (1881), 18 Ch. D. 429, C. A.; *Re Cotton's Trustees and London School Board* (1882), 19 Ch. D. 624; *Re Sudeley (Lord) and Baines & Co.*, [1894] 1 Ch. 334; *Re Dyson and Fowke*, [1896] 2 Ch. 720; *Re Jump, Galloway* v. *Hope*, [1903] 1 Ch. 129; *Talbot* v. *Scarisbrick*, [1908] 1 Ch. 812; *Re Horsnaill, Womersley* v. *Horsnaill*, [1909] 1 Ch. 631. As to perpetuities, see title PERPETUITIES, Vol. XXII., pp. 293 *et seq.* A mortgagee, in possession of an estate long enough to give him a statutory title, can still make a title by exercising the power of sale in his mortgage (*Re Alison, Johnson* v. *Mounsey* (1879), 11 Ch. D. 284, C. A.). A power to advance money towards effecting the promotion of a beneficiary in the army was extinguished by the abolition of purchase (*Re Ward's Trusts* (1872), 7 Ch. App. 727). A power of advancement during minority ceases when the object attains twenty-one (*Clarke* v. *Hogg* (1871), 19 W. R. 617; but see *Pride* v. *Fooks* (1840), 2 Beav. 430; *Re Breeds' Will* (1875), 1 Ch. D. 226); and, as to such powers, see titles INFANTS AND CHILDREN, Vol. XVII., pp. 92 *et seq.*, 118, 119; SETTLEMENTS.

(*a*) *E.g.*, a power of jointuring (*Zouch* d. *Woolston* v. *Woolston* (1761), 2 Burr. 1136; *Hervey* v. *Hervey* (1739), 1 Atk. 561); a power of appointment among children (*Cuninghame* v. *Anstruther* (1872), L. R. 2 Sc. & Div. 223; *Doe* d. *Milborne* v. *Milborne* (1788), 2 Term Rep. 721; and see *Wilson* v. *Piggott* (1794), 2 Ves. 351, 354; *Bristow* v. *Warde* (1794), 2 Ves. 336); a power to lend money (*Versturme* v. *Gardiner* (1853), 17 Beav. 338; *Webster* v. *Boddington* (1848), 16 Sim. 177; but see *Brown* v. *Nisbett* (1750), 1 Cox, Eq. Cas. 13; *Krantzche* v. *Robinson* (1882), 11 L. R. Ir. 500; *Harrold* v. *Harrold* (1861), 3 Giff. 192).

(*b*) A power exercisable "at any time" amounts to a power exercisable "from time to time" (*Digges's Case* (1600), 1 Co. Rep. 173 a). Where there is a primary power and in default of execution a secondary power, a partial exercise of the primary power does not prevent the exercise of the secondary power (*Mapleton* v. *Mapleton* (1859), 4 Drew. 515, overruling *Simpson* v. *Paul* (1761), 2 Eden, 34). If the power is alternative—*e.g.*, a power of sale or mortgage—a mortgage does not prevent a subsequent sale subject to the mortgage or after the mortgage has been paid off (*Omerod* v. *Hardman* (1801), 5 Ves. 722; but see *Palk* v. *Clinton* (*Lord*) (1805), 12 Ves. 48).

(*c*) As to powers of sale, see pp. 72 *et seq.*, *post*.

PART V. **Extinguishment and Suspension of Powers.**

such dissolution (*d*), and a judicial separation does not affect the capacity of husband and wife to execute a joint power (*e*). A power to appoint in default of children is exercisable immediately after a divorce where there is no child, notwithstanding the possibility of remarriage of the divorced persons (*f*).

Effect of decree for administration.

126. A decree for administration does not extinguish or suspend powers affecting the property to which the action relates, but powers of management, as distinguished from powers of appointment, can only be exercised thereafter with the leave of the court (*g*).

(*d*) *Fitzgerald* v. *Chapman* (1875), 1 Ch. D. 563; *Burton* v. *Sturgeon* (1876), 2 Ch. D. 318, C. A.; and see *Re Crawford's Settlement, Cooke* v. *Gibson*, [1905] 1 Ch. 11.

(*e*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 26; and see title HUSBAND AND WIFE, Vol. XVI., p. 388.

(*f*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 57. As to the jurisdiction of the court to vary settlements, see title HUSBAND AND WIFE, Vol. XVI., pp. 571 *et seq.*; and, as to settlements generally, see title SETTLEMENTS. The court is very unwilling to interfere with a power of appointment among children (*Davies* v. *Davies and M'Carthy* (1868), 37 L. J. (P. & M.) 17; *Seatle* v. *Seatle* (1860), 30 L. J. (P. M. & A.) 216; and see cases cited in title HUSBAND AND WIFE, Vol. XVI., p. 573, notes (*n*), (*t*), (*a*)), and a power of appointing new trustees (*Hope* v. *Hope* (1874), L. R. 3 P. & D. 226; *Maudslay* v. *Maudslay* (1877), 2 P. D. 256; *Bosville* v. *Bosville* (1888), 13 P. D. 76); and see title HUSBAND AND WIFE, Vol. XVI., p. 574.

(*g*) See *Sillibourne* v. *Newport* (1855), 1 K. & J. 602 (powers of appointment); *Bethell* v. *Abraham* (1873), L. R. 17 Eq. 24 (power to invest); *A.-G.* v. *Clack* (1839), 1 Beav. 467; *Webb* v. *Shaftesbury (Earl)*, *Shaftesbury (Earl)* v. *Arrowsmith* (1802), 7 Ves. 480; *Re Gadd, Eastwood* v. *Clark* (1883), 23 Ch. D. 134, C. A. (power to appoint new trustees); *Cafe* v. *Bent* (1843), 3 Hare, 245 (power to appoint new trustees and invest); *Walker* v. *Smalwood* (1768), Amb. 676 (constructive trustee held to have submitted to sale by the court); *Mitchelson* v. *Piper* (1836), 8 Sim. 64 (payment of debts by executor); *Widdowson* v. *Duck* (1817), 2 Mer. 494 (investment by executors); and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 341. Where the trustees have exercised powers of management without the leave of the court, the court may afterwards sanction such exercise (*Graham* v. *Graham* (1853), 16 Beav. 550; *Brown* v. *Smith* (1878), 10 Ch. D. 377, C. A.; *Re Mansel, Rhodes* v. *Jenkins* (1885), 33 W. R. 727). Executors and trustees can deal with assets after a decree if there is no injunction or receiver (*Berry* v. *Gibbons* (1873), 8 Ch. App. 747; *Re Barrett, Whitaker* v. *Barrett* (1889), 43 Ch. D. 70); and a voluntary payment by the executors to a creditor, after action but before decree, is good (*Re Radcliffe, Deceased, European Assurance Society* v. *Radcliffe* (1878), 7 Ch. D. 733; *Vibart* v. *Coles* (1890), 24 Q. B. D. 364 C. A.). As to payment of a statute-barred debt by an executor, see *Midgley* v. *Midgley*, [1893] 3 Ch. 282; titles EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 341; LIMITATION OF ACTIONS, Vol. XIX., p. 62 A trustee may ask advice of the court after action and before decree, and is allowed his costs of so doing (*Turner* v. *Turner* (1862), 30 Beav. 414 and see R. S. C., Ord. 55). Where there has been no general administration order, the powers of trustees are not affected (*Re Hall, Hall* v. *Ha* (1885), 54 L. J. (CH.) 527); and where an action has been wound up wit liberty to apply, it is not necessary for trustees to apply to the court t exercise their powers (*Re Mansel, Rhodes* v. *Jenkins, supra*). The me institution of an action does not affect powers (*Cafe* v. *Bent, supra*; *Neeves* v. *Burrage* (1849), 14 Q. B. 504; *Adams* v. *Scott* (1859), 7 W. R 213); nor does the issue of a summons under R. S. C., Ord. 55, r. interfere with the exercise of trustees' powers (*ibid.*, r. 12; title EXECUTO AND ADMINISTRATORS, Vol. XIV., p. 335); but payment into court puts a

127. A decree for foreclosure *nisi* does not extinguish the mortgagee's power of sale, but the leave of the court is required for its exercise (*h*).

Effect of foreclosure decree *nisi*.

128. The court cannot exercise or compel trustees to exercise a purely discretionary power given to them, but it can restrain them from exercising the power in an improper manner; and, if there is a duty coupled with the power, the court can compel the trustees to perform their duty (*i*).

Powers conferred on trustees.

Part VI.—Powers in the Nature of Trusts.

129. The distinction between trusts and powers is that, while the court will compel the execution of a trust, it cannot compel the execution of a power; but there are powers which in their nature are fiduciary, in the sense that the donee of the power is a trustee for the exercise of the power, and has an interest extensive enough to allow of its exercise, and in these cases the court does not allow the non-execution of the power to defeat the intention of the donor (*j*).

Distinction between trusts and powers.

end to the exercise of all powers by the trustees (*Re Williams' Settlement* (1858), 4 K. & J. 87; *Re Coe's Trust* (1858), 4 K. & J. 199; *Re Tegg's Trusts* (1866), 15 W. R. 52; but see *Re Landon's Trusts* (1871), 40 L. J. (CH.) 370).

(*h*) *Stevens* v. *Theatres, Ltd.*, [1903] 1 Ch. 857.

(*i*) *Nickisson* v. *Cockill* (1863), 3 De G. J. & Sm. 622; *Gisborne* v. *Gisborne* (1877), 2 App. Cas. 300; *Tempest* v. *Camoys* (*Lord*) (1882), 21 Ch. D. 571, C. A.; *Wilson* v. *Turner* (1883), 22 Ch. D. 521, C. A.; *Re Gadd, Eastwood* v. *Clark* (1883), 23 Ch. D. 134, C. A.; *Re Courtier, Coles* v. *Courtier, Courtier* v. *Coles* (1886), 34 Ch. D. 136; *Re Bryant, Bryant* v. *Hickley*, [1894] 1 Ch. 324; *Re Hilton, Gibbes* v. *Hale-Hinton*, [1909] 2 Ch. 548. The court will not interfere with the execution of powers of appointment if made *bonâ fide* (*Beyfus* v. *Bullock* (1869), L. R. 7 Eq. 391; and see *Costabadie* v. *Costabadie* (1847), 6 Hare, 410; *Re Beloved Wilkes's Charity* (1851), 3 Mac. & G. 440; *Lord* v. *Bunn* (1843), 2 Y. & C. Ch. Cas. 98; *Talbot* v. *Marshfield* (1868), 3 Ch. App. 622; *Camden* (*Marquis*) v. *Murray* (1880), 16 Ch. D. 161). The rule is the same where proceedings are pending (*Ward* v. *Tyrrell* (1858), 25 Beav. 563; *Weir* v. *Chamley* (1850), 1 I. Ch. R. 295). Nor, as a general rule, does the court control powers of maintenance given to trustees (*Sillibourne* v. *Newport* (1855), 1 K. & J. 682; *Brophy* v. *Bellamy* (1873), 8 Ch. App. 798; *Re Lofthouse, an Infant* (1885), 29 Ch. D. 921, C. A.; *Wilson* v. *Turner, supra*; *Re Bryant, Bryant* v. *Hickley, supra*). If the trustees refuse to exercise their discretion (*Hewett* v. *Hewett* (1765), 2 Eden, 332; *White* v. *Grane* (1854), 18 Beav. 571; *Goldsmid* v. *Goldsmid* (1815), 19 Ves. 368), or where the trustees act capriciously (*Re Hodges, Davey* v. *Ward* (1878), 7 Ch. D. 754; *Re Roper's Trusts* (1879), 11 Ch. D. 272), the court will interfere, but it cannot interfere if the discretion given to trustees is absolute (*Gisborne* v. *Gisborne, supra*; *Tabor* v. *Brooks* (1878), 10 Ch. D. 273; but see *Re Brown, Brown* v. *Brown* (1885), 52 L. T. 853). As to powers in the nature of the trusts, see the text, *infra*.

(*j*) *Harding* v. *Glyn* (1739), 1 Atk. 469; 2 White & Tud. L. C., 7th ed., 335; *Maddison* v. *Andrew* (1747), 1 Ves. Sen. 57; *Richardson* v. *Chapman* (1760), 7 Bro. Parl. Cas. 318; *Pierson* v. *Grant* (1787), 2 Bro. C. C. 38, 226;

PART VI. Powers in the Nature of Trusts.

Trust implied in favour of objects of unexercised power.

130. If there is a power to appoint among certain objects, but no gift to those objects and no gift over in default of appointment (*k*), the court implies a trust for or a gift to those objects equally if the power is not exercised (*l*); and the rule is the same whether there is a gift over in default of objects of the power or not (*m*), and although the donee has power to exclude one class entirely, if there is an intention to give the property to the objects (*n*); but there must be a clear intention that the donor intended the power to be in the nature of a trust, and any contrary intention defeats an implied trust (*o*).

Effect of gift over.

Where there is a gift over in default of appointment to the objects of the power or to other persons, the words of the power cannot operate to vest any estate in the objects of it by implication if there is no appointment (*p*).

Brown v. *Higgs* (1803), 8 Ves. 561; *Birch* v. *Wade* (1814), 3 Ves. & B. 198. As to the various kinds of trusts, see titles EQUITY, Vol. XIII., pp. 154 *et seq.*; TRUSTS AND TRUSTEES.

(*k*) A residuary gift is not equivalent to a gift in default (*Re Hall, Sheil* v. *Clark*, [1899] 1 I. R. 308; and see *Re Brierley, Brierley* v. *Brierley* (1894), 43 W. R. 36).

(*l*) *Brown* v. *Higgs* (1799), 4 Ves. 708; (1800) 5 Ves. 495; (1803), 8 Ves. 561; *Forbes* v. *Ball* (1817), 3 Mer. 437; *Birch* v. *Wade, supra; Walsh* v. *Wallinger* (1830), 2 Russ. & M. 78; *Burrough* v. *Philcox, Lacey* v. *Philcox* (1840), 5 My. & Cr. 73; *Salusbury* v. *Denton* (1857), 3 K. & J. 529, 535; *Re White's Trusts* (1860), John. 656; *Re Caplin's Will* (1865), 2 Drew. & Sm. 527; *Butler* v. *Gray* (1869), 5 Ch. App. 26; *Carthew* v. *Euraght* (1872), 20 W. R. 743; and see *Re Phene's Trusts* (1868), L. R. 5 Eq. 346; *Re Hargrove's Trusts* (1873), 8 I. R. Eq. 256; *Ahearne* v. *Ahearne* (1881), 9 L. R. Ir. 144; *Moore* v. *Ffolliot* (1887), 19 L. R. Ir. 499; *Re Brierley* (1894), 43 W. R. 36; *Re Patterson, Dunlop* v. *Greer*, [1899] 1 I. R. 324. A gift over in tail has been implied from a gift to A., B. and C. and their lawful issue, in such proportions as X. should appoint (*Martin* v. *Swannell* (1840), 2 Beav. 249); but a power which is merely permissive is not enough (*Brook* v. *Brook* (1856), 3 Sm. & G. 280).

(*m*) *Witts* v. *Beddington* (1789), cited 5 Ves. 503; *Crozier* v. *Crozier* (1843), 3 Dr. & War. 373; *Acheson* v. *Fair* (1843), 3 Dr. & War. 512; *Fenwick* v. *Greenwell* (1847), 10 Beav. 412; *Roddy* v. *Fitzgerald* (1858), 6 H. L. Cas. 823, 856; *Stolworthy* v. *Sancroft* (1864), 10 Jur. (N. S.) 762; *Butler* v. *Gray* (1869), 5 Ch. App. 26; *Wilson* v. *Duguid* (1883), 24 Ch. D. 244). The same rule applies to charities (*Moggridge* v. *Thackwell* (1803), 7 Ves. 36; *Paice* v. *Canterbury* (*Archbishop*) (1807), 14 Ves. 364; *Miles* v. *Farmer* (1815), 1 Mer. 55; *Salusbury* v. *Denton, supra; Re Pyne, Lilley* v. *A.-G.*, [1903] 1 Ch. 83; and see *Re White, White* v. *White*, [1893] 2 Ch. 41, C. A.; and see title CHARITIES, Vol. IV., pp. 172 *et seq.*, 274.

(*n*) *Longmore* v. *Broom* (1802), 7 Ves. 124; *Jones* v. *Torin* (1833), 6 Sim. 255; *Penny* v. *Turner* (1848), 2 Ph. 493; *Re White's Trusts, supra*; *Carthew* v. *Euraght, supra*; and see *Down* v. *Worrall* (1833), 1 My. & K. 561; *Little* v. *Neil* (1862), 31 L. J. (CH.) 627.

(*o*) *Healy* v. *Donnery* (1853), 3 I. C. L. R. 213; *Re Eddowes* (1861), 1 Drew. & Sm. 395; *Carberry* v. *McCarthy* (1881), 7 L. R. Ir. 328; *Re Weekes' Settlement*, [1897] 1 Ch. 289; and see *Bull* v. *Vardy* (1791), 1 Ves. 270; *Wheeler* v. *Warner* (1823), 1 Sim. & St. 304; *Tweedale* v. *Tweedale* (1878), 7 Ch. D. 633.

(*p*) *Jenkins* v. *Quinchant* (*temp.* Hardwicke), 5 Ves. 596, n.; *Pattison* v. *Pattison* (1855), 19 Beav. 638; *Re Sprague, Miley* v. *Cape* (1880), 43 L. T. 236; *Richardson* v. *Harrison* (1885), 16 Q. B. D. 85, C. A. A gift over to take effect upon an event which does not happen has no effect

Trust implied in favour of members of class pending exercise of power.

131. If the instrument itself gives the property to a class, but gives to a named person a power to appoint in what shares and in what manner the members of the class shall take, the property vests in all the members of the class until the power is exercised, and they all take in default of appointment (*q*), and the fact that the power is exercisable by will only does not postpone the period of vesting (*r*).

Effect of absence of gift to the class.

If the instrument does not contain a gift to any class, but only a power to a third person to appoint as he chooses among a class, those only take by implication in default of appointment who might have taken under an exercise of the power; and the court implies an intention to give the property in default of appointment to those only to whom the donee of the power might have given it (*s*).

Period for ascertaining class.

132. The period for ascertaining the class varies according as the testator has given a prior life interest or not; if he has given such life interest, only those members of the class who survive the life tenant can take by implication in default of appointment (*t*), but, where there is no prior life interest, those persons take who formed members of the class and answered the description at the time when the instrument creating the power came into effect (*a*).

Distribution and manner of disposition.

133. Where there is an implied gift to members of a class in default of appointment which takes effect, the whole class takes equally (*b*). The court adopts any rule laid down by the donor of the power as to the manner of disposition (*c*).

and does not prevent the implication of a grant arising from the power (*Kennedy* v. *Kingston* (1821), 2 Jac. & W. 431).

(*q*) *Doe* d. *Willis* v. *Martin* (1790), 4 Term Rep. 39; *Coleman* v. *Seymour* (1749), 1 Ves. Sen. 209; *Casterton* v. *Sutherland* (1804), 9 Ves. 445; *Lambert* v. *Thwaites* (1866), L. R. 2 Eq. 151; *Bradley* v. *Cartwright* (1867), L. R. 2 C. P. 511; *Wilson* v. *Duguid* (1883), 24 Ch. D. 244; *Re Master's Settlement, Master* v. *Master*, [1911] 1 Ch. 321; and see *Haswell* v. *Haswell* (1860), 2 De G. F. & J. 456, 460, 462; *Re Aylwin's Trust* (1873), L. R. 16 Eq. 585. A vested interest in objects entitled in default can only be divested by a valid exercise of the power (*Vanderzee* v. *Aclom* (1799), 4 Ves. 771, 787).

(*r*) *Heron* v. *Stokes* (1842), 2 Dr. & War. 89; *Brown* v. *Pocock* (1833), 6 Sim. 257. If the power is contingent on the donee leaving children and there is a gift over in default of children, no one can take by implication if no child survives (*Winn* v. *Fenwick* (1849), 11 Beav. 438; *Stolworthy* v. *Sancroft* (1864), 10 Jur. (N. S.) 762; and see *Falkner* v. *Wynford* (*Lord*) (1843), 9 Jur. 1006).

(*s*) *Kennedy* v. *Kingston* (1821), 2 Jac. & W. 431; *Lambert* v. *Thwaites*, *supra*; and see *Walsh* v. *Wallinger* (1830), 2 Russ. & M. 78; *Winn* v. *Fenwick*, *supra*; *Sinnett* v. *Walsh* (1880), 5 L. R. Ir. 27 C. A.; *Re Susanni's Trusts* (1877), 26 W. R. 93.

(*t*) *Finch* v. *Hollingsworth* (1855), 21 Beav. 112. If there is a life interest given to a person other than the donee, only those members who survive the survivor of the donee and the life tenant take (*Penny* v. *Turner* (1848), 2 Ph. 493; *Re White's Trusts* (1860), John. 656; and see *Carthew* v. *Euraght* (1872), 20 W. R. 743).

(*a*) *Longmore* v. *Brown* (1802), 7 Ves. 124; *Cole* v. *Wade* (1807), 16 Ves. 27; *Walter* v. *Maunde* (1815), 19 Ves. 424, 426. The whole interest that might have passed under an exercise of the power passes by implication in default of appointment (*Re Stinson's Estate*, [1910] I. R. 47; *Crozier* v. *Crozier* (1843), 3 Dr. & War. 373).

(*b*) *Doyley* v. *A.-G.* (1735), 4 Vin. Abr. 485; *Salusbury* v. *Denton* (1857), 3 K. & J. 529; and see *Jones* v. *Jones* (1846), 5 Hare, 440.

(*c*) *Gower* v. *Mainwaring* (1750), 2 Ves. Sen. 87; and see *A.-G.* v. *Price*

Part VII.—Particular Powers.

SECT. 1.

SECT. 1.—*Powers of Sale.*

Powers of Sale.

A "usual power."

134. A power of sale is a "usual power" within the meaning of an agreement to make a settlement with all the usual powers (*d*). When no directions are given the power should be inserted (*e*), but it has been held that this is not so when some powers are expressly mentioned and powers of sale are not (*f*). Having regard to the wider powers of sale given by the Settled Land Acts (*g*) it may be doubted if this view would now be followed. The insertion of a power of sale may be authorised by implication (*h*).

Operation as a power of revocation and new appointment.

135. With regard to a power of sale of an estate limited to uses, it is not necessary to express powers of revocation and new appointment; in whatever form the power is given it operates as a power of revocation and new appointment (*i*).

Operation as a conversion.

136. A power of sale, as distinguished from a trust for sale, does not operate as a conversion; to do this the direction to sell must be imperative (*j*), but, when once the power is exercised, the property is converted, unless there is a trust of the proceeds sufficient to reconvert it (*k*).

(1810), 17 Ves. 371; *Mahon* v. *Savage* (1803), 1 Sch. & Lef. 111; *Hewett* v. *Hewett* (1765), 2 Eden, 332. As to what words are necessary to create a precatory trust, see titles EQUITY, Vol. XIII., pp. 154, 155; TRUSTS AND TRUSTEES; WILLS; and see, further, title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 374. As to the form of assurances in favour of charities, see title CHARITIES, Vol. IV., p. 126.

(*d*) *Hill* v. *Hill* (1834), 6 Sim. 136, 145; *Bedford* (*Duke*) v. *Abercorn* (*Marquis*) (1836), 1 My. & Cr. 312; and see *Peake* v. *Penlington* (1813), 2 Ves. & B. 311. As to sales of land generally, see title SALE OF LAND. As to sales by limited owners, see titles SALE OF LAND; SETTLEMENTS.

(*e*) *Turner* v. *Sargent* (1853), 17 Beav. 515; *Wise* v. *Piper* (1880), 13 Ch. D. 848; but see, *contra*, *Wheate* v. *Hall* (1809), 17 Ves. 80; and see *Pearse* v. *Baron* (1821), Jac. 158.

(*f*) *Brewster* v. *Angell* (1820), 1 Jac. & W. 625; *Horne* v. *Barton* (1822), Jac. 437; but see *Tasker* v. *Small* (1834), 6 Sim. 625; (1837), 3 My. & Cr. 63.

(*g*) As to the Settled Land Acts, see, generally, title SETTLEMENTS.

(*h*) *Williams* v. *Carter* (1818), Sugden, Powers, p. 945; *Master* v. *De Croismar* (1848), 11 Beav. 184, 198; *Scott* v. *Steward* (1859), 27 Beav. 367; *Elton* v. *Elton* (No. 2) (1860), 27 Beav. 634; *Tait* v. *Lathbury* (1865), L. R. 1 Eq. 174; and see *Re Gent and Eason's Contract*, [1905] 1 Ch. 386.

(*i*) Sugden, Powers, pp. 837, 838.

(*j*) *Fletcher* v. *Ashburner* (1779), 1 Bro. C. C. 497; 1 White & Tud. L. C., 8th ed., 347; see title EQUITY, Vol. XIII., p. 105. The mere fact that the time of sale is left to the discretion of the trustees does not prevent the trust from being imperative so as to cause conversion (*Doughty* v. *Bull* (1725), 2 P. Wms. 320; *Re Raw, Morris* v. *Griffiths* (1884), 26 Ch. D. 601).

(*k*) *Wheldale* v. *Partridge* (1800), 5 Ves. 388; *Walter* v. *Maunde* (1815), 19 Ves. 424; *De Beauvoir* v. *De Beauvoir* (1852), 3 H. L. Cas. 524; *Lucas* v. *Brandreth* (No. 1) (1860), 28 Beav. 273; *Greenway* v. *Greenway* (1860), 2 De G. F. & J. 128, C. A.; *Re Ibbitson's Estate* (1869), L. R. 7 Eq. 226; *Re Bird, Pitman* v. *Pitman*, [1892] 1 Ch. 279; and see *Re Grange, Chadwick* v. *Grange*, [1907] 1 Ch. 313; affirmed [1907] 2 Ch. 20, C. A.; *Re Walker*,

137. The donees of a power of sale are within the terms of the power if they act without improper motives and in exercise of a reasonable discretion: when they are given the usual power to sell and reinvest in land, they need not have an immediate investment in view (*l*), and if they act *bonâ fide* the court does not interfere with their discretion (*m*).

Discretion of donees of power.

The ordinary power of sale, where the money is to be invested in the purchase of other realty to be conveyed to the same uses as the land sold, does not authorise a sale in consideration of a rent-charge (*n*); and donees of a power of sale cannot give a future option of purchase (*o*), but there is no impropriety in entering into a conditional contract for sale shortly before the power has arisen (*p*).

Transactions outside or within the ordinary power.

A power of sale does not authorise a partition (*q*), but a power of sale may authorise a mortgage (*r*).

Trustees, who have a power of sale at the request and by the direction or with the consent of the tenant for life, have a discretion in complying with or refusing to assent to a request by him, and the court does not control their discretion (*s*); such

Discretion with regard to request of tenant for life.

Macintosh-Walker v. *Walker*, [1908] 2 Ch. 705; *Re Dyson, Challinor* v. *Sykes*, [1910] 1 Ch. 750; *Re Perkins, Brown* v. *Perkins* (1909), 101 L. T. 345; and see title EQUITY, Vol. XIII., pp. 105, 111.

(*l*) *Mortlock* v. *Buller* (1804), 10 Ves. 292, 309; *Marshall* v. *Sladden* (1849), 7 Hare, 428, 438; but see *Sankey* v. *Christian* (1874), 9 I. R. Eq. 259, 302.

(*m*) *Thomas* v. *Williams* (1883), 24 Ch. D. 558; *Re Blake, Jones* v. *Blake* (1885), 29 Ch. D. 913, C. A.; but see *Robinson* v. *Briggs* (1853), 1 Sm. & G. 188; *Marshall* v. *Sladden* (1851), 4 De G. & Sm. 468; 7 Hare, 428 (where the trustees acted improperly). If trustees enter into an improvident bargain the court will not cancel the contract, but will not execute it (*Turner* v. *Harvey* (1821), Jac. 169, 178; and see *Goodwin* v. *Fielding* (1853), 4 De G. M. & G. 90, C. A.). Trustees must try and get the best price at the time of sale (*Downes* v. *Grazebrook* (1817), 3 Mer. 200; *Ord* v. *Noel* (1820), 5 Madd. 438). As to the duties of trustees generally, see title TRUSTS AND TRUSTEES.

(*n*) *Read* v. *Shaw* (1807), Sugden, Powers, p. 953; *Ex parte Gartside* (1837), 6 L. J. (CH.) 266; compare *Re Peyton's Settlement Trust* (1869), L. R. 7 Eq. 463; *Bellot* v. *Littler* (1874), 22 W. R. 836; and see title SETTLEMENTS.

(*o*) *Clay* v. *Rufford* (1852), 5 De G. & Sm. 768; *Oceanic Steam Navigation Co.* v. *Sutherberry* (1880), 16 Ch. D. 236. Trustees may sell leaseholds by means of an underlease (*Judd and Poland and Skelcher's Contract*, [1906] 1 Ch. 684, C. A.).

(*p*) *Major* v. *Ward* (1847), 5 Hare, 598; *Farrar* v. *Farrars, Ltd.* (1888), 40 Ch. D. 395, 412, C. A.; and see *Cookson* v. *Lee* (1854), 23 L. J. (CH.) 473, C. A. Trustees can concur in a sale with the owner of another property; see Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 13, and, prior to this Act, *Re Cooper and Allen's Contract for Sale to Harlech* (1876), 4 Ch. D. 802; *Morris* v. *Debenham* (1876), 2 Ch. D. 540; but this does not extend to a lease (*Tolson* v. *Sheard* (1877), 5 Ch. D. 19, C. A.).

(*q*) See title PARTITION, Vol. XXI., p. 820, note (*a*). A power of sale and exchange authorises an enfranchisement (see *Re Adair's Settled Estates* (1873), L. R. 16 Eq. 124); and see title COPYHOLDS, Vol. VIII., p. 130.

(*r*) See cases cited in title MORTGAGE, Vol. XXI., p. 107, notes (*r*), (*a*); and see *Dimmock* v. *Dimmock* (1885), 52 L. T. 494; *Re Bellinger, Durell* v. *Bellinger*, [1898] 2 Ch. 534; *Walker* v. *Southall, Southall* v. *Walker* (1887), 56 L. T. 882. As to sales by a tenant for life, see title SETTLEMENTS.

(*s*) *Thomas* v. *Dering* (1837), 1 Keen, 729; and, if the trustees disclaim, the court can exercise the power (*Browne* v. *Paull* (1852), 16 Jur. 707;

SECT. 1. Powers of Sale.

a power may be properly exercised by a sale to the tenant for life (*t*).

SECT. 2.—*Powers of Exchange and Partition.*

A "usual power."

138. A power of exchange and partition (*a*) is a "usual power" within the meaning of an agreement to make a settlement with all the usual powers (*b*).

Payment and receipt of money for owelty.

139. Donees of a power of sale and exchange may pay or receive money for owelty of exchange, although not expressly authorised to do so (*c*); but, when the estates are legal and the power of exchange is limited to exchange for land of at least equal value, if that value is not obtained in the exchange, the exchange is void at law, and equity does not interfere (*d*).

SECT. 3.—*Powers of Leasing.*

A "usual power."

140. A power of leasing is a "usual power" within the meaning of an agreement to make a settlement with all the usual powers (*e*), but if leases of a particular term are mentioned the court does not infer from general words that larger powers are intended (*f*).

What lands can be leased.

141. No lands can be leased under a power except such as are subject to the power (*g*). The joining of strange tenements at an

Prentice v. *Prentice* (1853), 10 Hare, Appendix xxii.; and see *Hewett* v. *Hewett* (1765), 2 Eden, 332). As to disclaimer of a power, see p. 64, *ante*. Trustees may adopt as their own a contract entered into by a tenant for life (*Blackwood* v. *Burrowes* (1843), 4 Dr. & War. 441).

(*t*) *Howard* v. *Ducane* (1823), Turn. & R. 81; *Dicconson* v. *Talbot* (1870), 6 Ch. App. 32. But a tenant for life cannot sell to himself (*Farrar* v. *Farrars, Ltd.* (1888), 40 Ch. D. 395, 409, C. A.; and see *Boyce* v. *Edbrooke*, [1903] 1 Ch. 836; *Ellis* v. *Kerr*, [1910] 1 Ch. 529; *Napier* v. *Williams*, [1911] 1 Ch. 361; title SETTLEMENTS).

(*a*) As to exchange, see titles PARTITION, Vol. XXI., p. 833; REAL PROPERTY AND CHATTELS REAL. As to partition generally, see title PARTITION, Vol. XXI., pp. 809 *et seq.* A power of exchange authorises a partition, but only where the land is held in two moieties and no more; see *ibid.*, p. 820.

(*b*) *Hill* v. *Hill* (1834), 6 Sim. 136, 145; *Bedford* (*Duke*) v. *Abercorn* (*Marquis*) (1836), 1 My. & Cr. 312; and see *Peake* v. *Penlington* (1813), 2 Ves. & B. 311.

(*c*) *Bartram* v. *Whichcote* (1834), 6 Sim. 86.

(*d*) *Ferrand* v. *Wilson* (1845), 4 Hare, 344, 385; and see Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 3; Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 9; title PARTITION, Vol. XXI., p. 819.

(*e*) *Hill* v. *Hill*, *supra*; *Bedford* (*Duke*) v. *Abercorn* (*Marquis*), *supra*; *Turner* v. *Sargent* (1853), 17 Beav. 515; *Scott* v. *Steward* (1859), 27 Beav. 367. As to delegation of a power of leasing, see note (*h*), p. 15, *ante*.

(*f*) *Pearse* v. *Baron* (1821), Jac. 158; see *Brewster* v. *Angell* (1820), 1 Jac. & W. 625; and see title LANDLORD AND TENANT, Vol. XVIII., p. 362.

(*g*) *Tolson* v. *Sheard* (1877), 5 Ch. D. 19, C. A.; *King* v. *Bird*, [1909] 1 K. B. 837. As to what mines are within a power to lease lands, or a power to lease lands with the mines, see titles LANDLORD AND TENANT, Vol. XVIII., p. 362; MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 516, 529 *et seq.*; and see *Re Daniels, Deceased, Weeks* v. *Daniels* (1912), 56 Sol. Jo. 519. For definitions of "mine" and "open mine," see title MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 501, 505. As to the

entire rent is fatal to the lease (*h*), unless a rent is reserved according to the quantity or produce, or unless, where the best rent is required, the reservation, although of one rent for lands partly within and partly without the power, is upon an apportionment sufficient to provide the best rent for the lands within the power (*i*).

Powers of trustees.

142. Trustees who have duties to perform in relation to the land have power to lease such land at least from year to year (*k*), and probably for any reasonable period (*l*), but if there is an immediate trust for sale the trustees ought not to let unless a sale is impossible (*m*).

Construction.

143. Where a question arises as to the extent of the power of leasing, the intention of the parties creating the power must in each case govern, and general words may be limited accordingly (*n*).

Period for which lease may be granted.

144. When no period for which leases may be granted is

mode of working mines under a power, see *Jegon* v. *Vivian* (1871), 6 Ch. App. 742. Apart from the provisions of the Settled Land Acts (as to which see, generally, titles MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 531, 532; SETTLEMENTS), the produce of mines, whether royalties or otherwise, belong to the tenant for life (*Daly* v. *Beckett* (1857), 24 Beav. 114, 123; but see *Re Scarth* (1879), 10 Ch. D. 499; and see title MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 515, 530; and the same applies to royalties on brickfields (*Miller* v. *Miller* (1872), L. R. 13 Eq. 283; *Leppington* v. *Freeman* (1891), 40 W. R. 348, C. A.; *Re North, Garton* v. *Cumberland*, [1909] 1 Ch. 625).

(*h*) *Cardigan (Earl)* v. *Montague* (1754), Sugden, Powers, p. 918; *Doe* d. *Bartlett* v. *Rendle* (1814), 3 M. & S. 99; *Doe* d. *Egremont (Lord)* v. *Stephens* (1844), 6 Q. B. 208; and see *Doe* d. *Vaughan* v. *Meyler* (1814), 2 M. & S. 276.

(*i*) *Campbell* v. *Leach* (1775), Amb. 740; *Doe* d. *Douglas* v. *Lock* (1835), 2 Ad. & El. 705, 747; and see *Doe* d. *Shrewsbury (Earl)* v. *Wilson* (1822), 5 B. & Ald. 363; Sugden, Powers, p. 810. Where the "ancient rent" is required, and that rent is reserved as an entire rent for the land within the power and land beyond it, the lease is bad as an execution of the power (*Doe* d. *Bartlett* v. *Rendle, supra*); but if the "ancient rents" are reserved, two parts of the land previously let separately may be let together at one rent (*Doe* d. *Egremont (Earl)* v. *Williams* (1848), 11 Q. B. 688). As to meaning of "ancient rent," see note (*c*), p. 78, *post*.

(*k*) *Re North, Garton* v. *Cumberland*, [1909] 1 Ch. 625; and see *Miller* v. *Miller* (1872), L. R. 13 Eq. 263; *Egmont (Earl)* v. *Smith, Smith* v. *Egmont (Earl)* (1877), 6 Ch. D. 469, 476.

(*l*) *Fitzpatrick* v. *Waring* (1882), 11 L. R. Ir. 35, C. A.; and see title LANDLORD AND TENANT, Vol. XVIII., p. 361.

(*m*) *Drohan* v. *Drohan* (1809), 1 Ball & B. 185; *Evans* v. *Jackson* (1836), 8 Sim. 217; *Wood* v. *Patteson* (1847), 10 Beav. 541; *Re Shaw's Trusts* (1871), L. R. 12 Eq. 124; but see *Naylor* v. *Arnitt* (1830), 1 Russ. & M. 501; *Middleton* v. *Dodswell* (1806), 13 Ves. 266, 268; *Micholls* v. *Corbett* (1866), 34 Beav. 376; affirmed, 3 De G. J. & Sm. 18, C. A.; and see *A.-G.* v. *Owen* (1805), 10 Ves. 555, 560.

(*n*) See Sugden, Powers, pp. 728, 734; *Baggott* v. *Oughton* (1724), 8 Mod. Rep. 250; *Pomery* v. *Partington* (1790), 3 Term Rep. 665; and see *Mountjoy's (Lord) Case* (1589), 5 Co. Rep. 3 b. The court will uphold a lease of premises not before demised, if the intention that the power should so extend is clear (*Waker* v. *Wakeman* (1675), 2 Lev. 150; *Cumberford's Case* (1634), 2 Roll. Abr. 262, pl. 15; *Winter* v. *Loveday* (1697), Com. 37, 41; *Doe* d. *Egremont (Lord)* v. *Stephens, supra*; *Doe* d. *Bartlett* v. *Rendle, supra*.

SECT. 3. **Powers of Leasing.**

mentioned, and apart from the provisions in the Settled Land Acts (*o*), the general rules are as follows :—

When a power is added to a life estate, the presumption is that the power is different from and in excess of that which would have arisen as a mere accessory to the life estate (*p*).

An indefinite power of leasing usually allows of leases for any period, however long: but this rule is subject to the general intention (*q*).

Leases in reversion and leases *in futuro*.

145. A lease in reversion is not a good execution of a power to grant a lease in possession (*r*), and under such power neither a lease

(*o*) See titles LANDLORD AND TENANT, Vol. XVIII., pp. 358 *et seq.*; SETTLEMENTS.

(*p*) *Hele* v. *Green* (1651), 2 Roll. Abr. 261, pl. 10. But the general intention must be gathered from the instrument creating the power (*Vivian* v. *Jegon* (1868), L. R. 3 H. L. 285; see title LANDLORD AND TENANT, Vol. XVIII., p. 363).

(*q*) *Sheehy* v. *Muskerry* (*Lord*) (1848), 1 H. L. Cas. 576; *Re James, James* v. *Gregory* (1895), 64 L. J. (CH.) 686, C. A.; and see *A.-G.* v. *Moses* (1817), 2 Madd. 294; *Re O'Brien's Estate* (1869), 3 I. R. Eq. 77; *Mostyn* v. *Lancaster, Taylor* v. *Mostyn* (1883), 23 Ch. D. 583, C. A. But there is an exception to this rule in the case of charities, and the court considers whether there has been a prudent execution of the trust and, if not, has held the lessee to be a trustee (*A.-G.* v. *Moses, supra*; *A.-G.* v. *Green* (1801), 6 Ves. 452); and, when trustees for charities have granted a lease that is inconsistent with good management, the lease is set aside, unless the person taking under it can show that it was, under the circumstances, a reasonable transaction (*A.-G.* v. *Pilgrim* (1849), 12 Beav. 57; *A.-G.* v. *Hall* (1854), 16 Beav. 388; and see Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 29; *Bangor* (*Bishop*) v. *Parry*, [1891] 2 Q. B. 277; *Rickard* v. *Graham*, [1910] 1 Ch. 722); and see title CHARITIES, Vol. IV., pp. 224 *et seq.* A power to lease for three lives or twenty-one years cannot be exercised by a lease for ninety-nine years determinable upon three lives (*Whitlock's Case* (1609), 8 Co. Rep. 69 b; and see *Roe* d. *Brune* v. *Prideaux* (1808), 10 East, 158; *Long* v. *Rankin* (1822), Sugden, Powers, p. 895, H. L.; *Re Crommelin Estate* (1851), 1 I. C. L. R. 182; *Jenner* v. *Morris* (1861), 7 Jur. (N. S.) 385; and see *Commons* v. *Marshall* (1774), 6 Bro. Parl. Cas. 168). A power to lease for twenty-one years authorises a lease for any term not exceeding twenty-one (*Isherwood* v. *Oldknow* (1815), 3 M. & S. 382); and a power to lease for any term not exceeding twenty-one years authorises a lease determinable, within that period, at the option of the lessor or lessee (*Edwards* v. *Millbank* (1859), 4 Drew. 606; *King* v. *Bird*, [1909] 1 K. B. 837; and see *Sheehy* v. *Muskerry* (*Lord*), *supra*); but it is otherwise if the power requires that the lease be for a term certain not exceeding twenty-one years (*Muskerry* v. *Chinnery* (1835), L. & G. *temp.* Plunk. 182). A lease for lives must be for lives *in esse* and concurrent (*Doe* d. *Wyndham* v. *Halcombe* (1798), 7 Term Rep. 713; *Clark* v. *Smith* (1842), 9 Cl. & Fin. 126, H. L.); but a power to grant leases for two or more lives implies an authority to grant a lease during the life of the survivor (*Alsop* v. *Pine* (1672), 3 Keb. 44; and see the Leases Acts, 1849 (12 & 13 Vict. c. 26), and 1850 (13 & 14 Vict. c. 17); and see, further, title LANDLORD AND TENANT, Vol. XVIII., pp. 362, 364.

(*r*) *Opy* v. *Thomasius* (1665), 1 Lev. 167; and see Sugden, Powers, p. 752. A lease in reversion is either a lease of a reversion on the determination of a prior estate or a lease *in futuro*. There is an important distinction between leases of a reversion and leases *in futuro*. A lease for years may be granted pending a prior subsisting term, provided it be within the limits of the power and gives no beneficial interest during the existing lease (*Read* v. *Nashe* (1589), 1 Leon. 147; *Goodtitle* d. *Clarges* v. *Funucan* (1781), 2 Doug. (K. B.) 565, 572); but so long as there is a subsisting freehold lease *in esse* a second freehold lease cannot be granted (*Roe* d. *Brune* v. *Prideaux* (1808),

in reversion expectant on the determination of an existing lease, nor a lease to commence *in futuro*, can be granted (*s*). A power to grant a lease, without specifying any time for commencement, can only be exercised by granting a lease to commence at once (*t*).

146. A lease granted under a power must be at the best rent (*u*); "Best rent."

10 East, 158, 184; and see *Winter* v. *Loveday* (1697), Com. 37; *Jenner* v. *Morris* (1861), 7 Jur. (N. S.) 385). A lease in reversion is not within the Leases Acts, 1849 (12 & 13 Vict. c. 26) and 1850 (13 & 14 Vict. c. 17); as to which see title LANDLORD AND TENANT, Vol. XVIII., pp. 364, 365.

(*s*) A lease which is made to commence only a day after the deed creating it is as bad as if it were to commence a year after (*Doe* d. *Allan* v. *Calvert* (1802), 2 East, 376). It has, however, been suggested (Farwell, Powers, 2nd ed., p. 593) that a lease to commence at a future time, although void in law as in contravention of a power to grant leases in possession, may be specifically enforced as a good contract in equity to grant a lease, if the lessor be alive and able to grant such a lease at the date when the term purports to commence, and if the provisions of the lease are otherwise proper. In considering particular phrases the court, in a doubtful case, rejects a construction by which a right would be divested or a forfeiture incurred (*Dowling* v. *Foxall* (1809), 1 Ball & B. 193, 196). A lease to take effect "from henceforth" or "from the time of delivery" (*Clayton's Case* (1585), 5 Co. Rep. 1); or "from the day of the date" (*Pugh* v. *Leeds* (*Duke*) (1777), 2 Cowp. 714; and see *Ackland* v. *Lutley* (1839), 9 Ad. & El. 879, 894; *Doe* d. *Cox* v. *Day* (1809), 10 East, 427; *Sidebotham* v. *Holland*, [1895] 1 Q. B. 378, C. A.) is a lease in possession and commences from delivery. In order to support a lease in possession a surrender of an existing lease has been presumed (*Goodtitle* d. *Clarges* v. *Funucan* (1781), 2 Doug. (K. B.) 565, 572; *Nixon* v. *Robinson* (1844), 2 Jo. & Lat. 4; and see *Lefroy* v. *Walsh* (1851), 1 I. C. L. R. 311; *Brinkley* v. *M'Munn* (1893), 32 L. R. Ir. 532); but the acceptance of a lease, purporting to be granted under a power, but void for non-compliance with the terms of the power, is not a surrender of a valid existing lease, for if the surrender is intended for a particular purpose and that purpose fails, the surrender also fails, and the rule is the same whether the surrender be by operation of law or act of the parties (*Davison* d. *Bromley* v. *Stanley* (1768), 4 Burr. 2210; *Wilson* v. *Sewell* (1766), 4 Burr. 1975; *Zouch* d. *Abbot and Hallet* v. *Parsons* (1765), 3 Burr. 1794; *Roe* d. *Berkeley* (*Earl*) v. *York* (*Archbishop*) (1805), 6 East, 86; and see *Doe* d. *Egremont* (*Earl*) v. *Courtenay* (1848), 11 Q. B. 702, 712); and see title LANDLORD AND TENANT, Vol. XVIII., pp. 549, 550. This applies only to a new lease commencing at once, otherwise the new lease is reversionary (*Cavan* (*Countess Dowager*) v. *Doe* d. *Pulteney* (1795), 6 Bro. Parl. Cas. 175; and see *Doe* d. *Allan* v. *Calvert*, *supra*; *Roe* d. *Brune* v. *Prideaux* (1808), 10 East, 158). As to underleases granted by a new lessee during the term he surrenders, see title LANDLORD AND TENANT, Vol. XVIII., p. 552.

(*t*) *Sussex* (*Countess*) v. *Wroth* (1582), Cro. Eliz. 5; *Leslie* v. *Crommelin* (1867), 2 I. R. Eq. 134. It is otherwise if an intention to allow leases in reversion can be gathered from the instrument (*Coventry* (*Earl*) v. *Coventry* (*Countess Dowager*) (1718), Com. 312; Sugden, Powers, p. 753). It seems doubtful whether a power to grant leases in possession and reversion authorises a lease in possession and another in reversion of the same land; see *Winter* v. *Loveday* (1697), Com. 37, 39; *Doe* d. *Sutton* v. *Harvey* (1823), 1 B. & C. 426. Concurrent leases (*i.e.*, leases to commence *in præsenti* but only taking effect after the determination of a subsisting lease; see title LANDLORD AND TENANT, Vol. XVIII., pp. 404 *et seq.*) are not leases in possession; see Shep. Touch., 8th ed., 270; Sugden, Powers, pp. 768, 777; *Goodtitle* d. *Clarges* v. *Funucan*, *supra*; but see *Duckett* v. *Keene*, [1903] 1 I. R. 409, C. A.

(*u*) The criterion of the best rent is whether the lessor has got as much for others as for himself (*Montgomery* v. *Wemyss* (*Earl*) (1817), 5 Dow, 293, 344, H. L.); but the highest rent is not necessarily the best (*Doe* d. *Lawton* v. *Radcliffe* (1808), 10 East, 278; and see *Dyas* v. *Cruise* (1845), 2 Jo. & Lat. 460; *Campbell* v. *Leach* (1775), Amb. 740; *Basset* v. *Basset* (1775),

SECT. 3. **Powers of Leasing.**

this is usually provided in the instrument creating the power. Apart from the Settled Land Acts (*a*), neither do improvements by the tenant, nor does a covenant by the tenant to lay out money in improvements, authorise a lease at less than the best rent (*b*).

"Usual rent."

When the power requires the reservation of the "usual rent," this is equivalent to "best," unless it is used in contradistinction to "best" or "most" (*c*), but whatever rent be reserved, it should be at a uniform rate throughout the term (*d*).

Reservation of rent.

147. The power usually provides that the rent shall be incident to the reversion, but, in order to fulfil this requirement, it is not necessary that the reservation should be expressly to the tenant for life and after his death to the persons entitled in remainder, for the lease has its essence from the instrument out of which the lessor's estate is derived, and it precedes the estate for life and the remainders (*e*). The surest way, however, is to reserve rent yearly during the term and leave the law to make the distribution (*f*).

Amb. 843; *Chandler* v. *Bradley*, [1897] 1 Ch. 315). The best rent must be ascertained and specifically reserved (*Orby* (*Lady*) v. *Mohun* (*Lady*) (1706), 2 Vern. 531), and the best rent is not obtained if the existing lease is surrendered, unless the lease is at a rack-rent; see *Rawlins' Estate* (1865), L. R. 1 Eq. 286; Sugden, Powers, p. 787. The remainderman can distrain for rent reserved on a lease (Co. Litt. 214 a; *Harcourt* v. *Pole* (1591), And. 273).

(*a*) As to which see title LANDLORD AND TENANT, Vol. XVIII., pp. 358 *et seq.*; and see *ibid.*, p. 363.

(*b*) *Roe* d. *Berkeley* (*Earl*) v. *York* (*Archbishop*) (1805), 6 East, 86; *Doe* d. *Griffiths* v. *Lloyd* (1799), 3 Esp. 78; but see *Shannon* v. *Bradstreet* (1803), 1 Sch. & Lef. 52; *Doe* d. *Bromley* v. *Bettison* (1810), 12 East, 305; *Price* v. *Assheton* (1834), 1 Y. & C. (EX.) 82; *Doe* d. *Rogers* v. *Rogers* (1833), 5 B. & Ad. 755; *Re Bolton's Lease* (1872), L. R. 5 Exch. 82. A power which required the reservation of a fixed rent and a heriot, and a condition for re-entry on breach of covenant, was not well exercised by a lease which reserved a much larger rent, but reserved neither heriot nor condition for re-entry (*Doe* d. *Egremont* (*Lord*) v. *Hellings* (1842), 6 Jur. 821; *Doe* d. *Egremont* (*Earl*) v. *Grazebrook* (1843), 4 Q. B. 406).

(*c*) *Doe* d. *Newnham* v. *Creed* (1815), 4 M. & S. 371. Where the power requires the reservation of "ancient rent," this refers to the rent reserved at the time of the creation of the power, or the term last before it, when no lease was then in being (*Roe* d. *Brune* v. *Rawlings* (1806), 7 East, 279; *Doe* d. *Douglas* v. *Lock* (1835), 2 Ad. & El. 705; *Doe* d. *Egremont* (*Earl*) v. *Grazebrook*, *supra*; *Doe* d. *Biddulph* v. *Hole* (1850), 15 Q. B. 848). Yearly rent may be reserved and paid yearly, half-yearly, or quarterly (*Rutland* v. *Doe* d. *Wythe* (1843), 10 Cl. & Fin. 419, H. L.; and see *Doe* d. *Shrewsbury* (*Earl*) v. *Wilson* (1822), 5 B. & Ald. 363; *Fryer* v. *Coombs* (1840), 11 Ad. & El. 403; but see *Booth* v. *A'Beckett* (1863), 9 L. T. 68, P. C.). Half-yearly rent must be reserved in equal half-yearly intervals (*Doe* d. *Harries* v. *Morse* (1834), 2 Cr. & M. 247); but it may be made payable in advance (*Rutland* v. *Doe* d. *Wythe*, *supra*; and see *Isherwood* v. *Oldknow* (1815), 3 M. & S. 382; *Doe* d. *Hopkinson* v. *Ferrand* (1851), 15 Jur. 1061; *Doe* d. *Shrewsbury* (*Earl*) v. *Wilson*, *supra*). As to the nature and reservation of rent generally, see title LANDLORD AND TENANT, Vol. XVIII., pp. 464 *et seq.*

(*d*) *Doe* d. *Sutton* v. *Harvey* (1823), 1 B. & C. 426; and see *Mountjoy's* (*Lord*) *Case* (1589), 5 Co. Rep. 3 b; *Re Knight, Ex parte Voisey* (1882), 21 Ch. D. 442, 458, C. A.; *Re Aldam's Settled Estate*, [1902] 2 Ch. 46, 59, C. A.

(*e*) *Whitlock's Case* (1609), 8 Co. Rep. 69 b; *Isherwood* v. *Oldknow*, *supra*.

(*f*) *Whitlock's Case*, *supra*; *Greenaway* v. *Hart* (1854), 14 C. B. 340; *Rogers* v. *Humphreys* (1835), 4 Ad. & El. 299; and see *Tankerville* (*Lord*) v. *Wingfield* (1772), 7 Price, 342, n.; *Clere's Case* (1599), 6 Co. Rep. 17 b; *Robertson* v. *Walker* (1875), 23 W. R. 224; but see *Yellowly* v. *Gower*

Right of re-entry.

148. The right to re-enter for the non-payment of rent and non-performance of covenants (*g*) entered into by the lessee follows the same rule and passes to the persons entitled to the reversion (*h*). When the power is silent as to the condition for re-entry for non-payment of rent, reasonable time and reasonable circumstances may be introduced into the clause conferring the right of re-entry (*i*), and, although express mention in the power of a time prevents further time being allowed, reasonable qualifications may be inserted (*j*).

"Usual" reservations and exceptions.

149. If a power requires leases to contain the usual reservations and exceptions, the distinction between exceptions and reservations must be noted (*k*).

"Usual" covenants.

Powers frequently require the insertion of usual covenants: if the power authorises leases at rack-rents, the usual covenants are those which are usual between lessor and lessee, but, if the power authorises beneficial leases, the word "usual" is construed with reference to its bearing on the relative rights of the tenant for life and remainderman, and the lease in existence at the time of the creation of the power is taken as the guide (*l*).

(1855), 11 Exch. 274; and, as to the incidence of rent, see, further, title LANDLORD AND TENANT, Vol. XVIII., p. 468.

(*g*) A proviso for re-entry for non-payment of rent is, but on breach of any other covenant is not, a "usual" clause (*Hodgkinson* v. *Crowe* (1875), 10 Ch. App. 622; and see *Re Anderton and Milner's Contract* (1890), 45 Ch. D. 476). As to relief against forfeiture, see title LANDLORD AND TENANT, Vol. XVIII., pp. 539 *et seq.*

(*h*) *Hotley* v. *Scot* (1773), 3 Bli. 331, n.; *Basset* v. *Basset* (1775), Amb. 843; *Maundrell* v. *Maundrell* (1805), 10 Ves. 246; *Greenaway* v. *Hart* (1854), 14 C. B. 340; see title LANDLORD AND TENANT, Vol. XVIII., pp. 534 *et seq.*, 596.

(*i*) *Smith* v. *Jersey* (*Earl*) (1821), 3 Bli. 290, H. L.; *Doe* d. *Shrewsbury* (*Earl*) v. *Wilson* (1822), 5 B. & Ald. 363; and see *Doe* d. *Wythe* v. *Rutland* (1837), 2 M. & W. 661.

(*j*) *Tankerville* (*Lord*) v. *Wingfield* (1772), 7 Price, 343, n.; and see *Doe* d. *Douglas* v. *Lock* (1835), 2 Ad. & El. 705; *Doe* d. *Egremont* (*Lord*) v. *Burrough* (1844), 6 Q. B. 229.

(*k*) As to the nature of exceptions and reservations, see title LANDLORD AND TENANT, Vol. XVIII., pp. 427 *et seq.* As to the liability for waste, see *ibid.*, pp. 496 *et seq.* As to powers requiring the execution of a counterpart, see *ibid.*, p. 396.

(*l*) The following have been held to be usual covenants:—To pay rent (*Taylor* d. *Atkyns* v. *Horde* (1757), 1 Burr. 59, 125); to keep premises in repair (*Doe* d. *Dymoke* v. *Withers* (1831), 2 B. & Ad. 896, 903); to allow the lessor to enter and view the state of repairs (*Blakesley* v. *Whieldon* (1841), 1 Hare, 176, 181); and, by the lessor, a covenant for quiet enjoyment (*Hall* v. *City of London Brewery Co.* (1862), 2 B. & S. 737). A covenant that "in case of fire the lessor shall rebuild or the lessee may quit" is not usual (*Doe* d. *Ellis and Medwin* v. *Sandham* (1787), 1 Term Rep. 705; and see *Medwin* v. *Sandham* (1789), 3 Swan. 685; but see the Leases Act, 1849 (12 & 13 Vict. c. 26); title LANDLORD AND TENANT, Vol. XVIII., p. 390); nor is a covenant not to assign without a licence usual (*Henderson* v. *Hay* (1792), 3 Bro. C. C. 632; *Hampshire* v. *Wickens* (1878), 7 Ch. D. 555; *Re Davis and Cavey* (1888), 40 Ch. D. 601; *Re Lander and Bagley's Contract*, [1892] 3 Ch. 41; and see the Conveyancing and Law of Property Act, 1892 (55 & 56 Vict. c. 13), s. 3; title LANDLORD AND TENANT, Vol. XVIII., pp. 389, 579); and, generally, as to usual and unusual covenants, see title LANDLORD AND TENANT, Vol. XVIII., pp. 388 *et seq.*, 563 *et seq.*, 571. A lease not within the Leases Acts, 1849 (12 & 13 Vict.

SECT. 4. Powers of Jointuring.

SECT. 4.—*Powers of Jointuring.*

Definition.

150. A jointure is *primâ facie* an estate for life given to the wife to take effect immediately upon the death of the husband (*m*).

Not a "usual power."

Construction of power.

151. The power to jointure is not a "usual power" within the meaning of an agreement to make a settlement with all the usual powers (*n*). The power, though a burden on the estate, is construed liberally, and equity aids a defective execution of the power (*o*). The question whether a particular power can be exercised in favour of a second wife depends on the construction of the power in question (*p*), but it is not usual to restrict it to one wife (*q*).

Enforcement of covenant.

152. The right to exercise the power is usually made contingent upon the donee coming into possession, but, if the donee covenants to exercise the power even before that event happens and afterwards comes into possession, the court will aid the covenantee if the donee fails to appoint (*r*) or is prevented from so doing by incapacity (*s*).

c. 26) and 1850 (13 & 14 Vict. c. 17) (see title LANDLORD AND TENANT, Vol. XVIII., pp. 364, 365; and see note (*r*), p. 76, *ante*), is invalidated, not merely by the omission of proper covenants, but by the insertion of improper covenants, and equity will not aid (*Doe* d. *Bromley* v. *Bettison* (1810), 12 East, 305). As to the liability to repair, and as to damages for non-repair, see titles LANDLORD AND TENANT, Vol. XVIII., pp. 496 *et seq.*, 512. As to leases by persons under a disability, see *ibid.*, pp. 348 *et seq.* As to settled land generally, see title SETTLEMENTS. As to persons entitled to damages, see *Re Lacon's Settlement, Lacon* v. *Lacon*, [1911] 2 Ch. 171, C. A.; *Re Pyke, Birnstingl* v. *Birnstingl*, [1912] 1 Ch. 770.

(*m*) *Re De Hoghton, De Hoghton* v. *De Hoghton*, [1896] 2 Ch. 385; but see *Jamieson* v. *Trevelyan* (1854), 10 Exch. 269, where, on the construction of a particular will, the court held that a power to jointure allowed the creation of a jointure during the life of the husband. As to jointure generally, see titles REAL PROPERTY AND CHATTELS REAL; SETTLEMENTS.

(*n*) *Hill* v. *Hill* (1834), 6 Sim. 136, 145; *Wright* v. *Wright*, [1904] 1 I. R. 360; but see *Higginson* v. *Barneby* (1826), 2 Sim. & St. 516; *Sackville-West* v. *Holmesdale* (1870), 4 H. L. Cas. 543. As to the effect of an express power to jointure upon the insertion of a power to charge, see note (*n*), p. 82, *post*.

(*o*) *Coventry* (*Countess Dowager*) v. *Coventry* (*Earl*) (1724), 2 P. Wms. 222; *Tollet* v. *Tollet* (1728), 2 P. Wms. 489; *Mills* v. *Mills* (1845), 8 I. Eq. R. 192; see title EQUITY, Vol. XIII., p. 74. Equity cannot, however, aid the non-execution of the power (*Tomkin* v. *Sandys* (1719), cited 2 P. Wms. 227); and see p. 55, *ante*.

(*p*) *Re Burrowes' Estate* (1868), 2 I. R. Eq. 468; *Dillon* v. *Dillon* (1847), 11 I. Eq. R. 423; *Re Creagh's Estate* (1890), 25 L. R. Ir. 128; and see *Mills* v. *Mills*, *supra*; see *Re Hancock, Malcolm* v. *Burford-Hancock*, [1896] 2 Ch. 173, C. A.

(*q*) *Hervey* v. *Hervey* (1739), 1 Atk. 561; *Zouch* d. *Woolston* v. *Woolston* (1761), 2 Burr. 1136; *Maultby* v. *Maultby* (1852), 2 I. Ch. R. 32; *Barron* v. *Constabile* (1858), 7 I. Ch. R. 467; *Mason* v. *Mason* (1870), 5 I. R. Eq. 288; *Bevan* v. *Bevan* (1883), 13 L. R. Ir. 53; *Marlborough* (*Lily, Duchess*) v. *Marlborough* (*Duke*), [1901] 1 Ch. 165, C. A.; but see *Allanson* v. *Clitherow* (1747), 1 Ves. Sen. 24.

(*r*) *Holingshead* v. *Holingshead* (1708), cited 1 Stra. 604; *Alford* v. *Alford* (1709), cited 1 Stra. 604; *Coventry* (*Countess Dowager*) v. *Coventry* (*Earl*), *supra*; *Jackson* v. *Jackson* (1793), 4 Bro. C. C. 462; *Shannon* v. *Bradstreet* (1803), 1 Sch. & Lef. 52, 63; *Re Lambert's Estate*, [1901] 1 I. R. 261, 268, C. A.; *Charlton* v. *Charlton*, [1906] 2 Ch. 523; and see *Johnson* v. *Touchet* (1867), 16 W. R. 71.

(*s*) *Affleck* v. *Affleck* (1857), 3 Sm. & G. 394. If the donee never comes

Such a covenant to exercise the power may be enforced by action for specific performance, and, if the donee refuses to execute the deed in accordance with the decree, the court will declare him a trustee of the estates subject to the power and will appoint someone to execute the appointment for him (*t*). A recital in a deed may amount to a covenant, but the court is unwilling so to construe a recital (*a*).

Exoneration of jointure from "deductions."

153. A power to give a jointure "without any deductions" will enable the appointor to exonerate the jointress from succession duty (*b*), legacy duty (*c*), and estate duty (*d*). The cases as to income tax are conflicting and fall under two heads (*e*): (1) where the jointure is given first and is followed by a direction that it shall be free from all deductions in respect of any taxes; (2) where the jointure is directed to be paid without any deduction, or free from legacy duty and other deductions. In the first class of cases the term "taxes" includes income tax (*f*); in the second class income tax is not a "deduction" (*g*).

into possession, the contingency on which the power is dependent has not happened and equity cannot aid, and the power cannot be accelerated by collusion between the donee and the previous life tenant (*Truell* v. *Tysson* (1856), 21 Beav. 437).

(*t*) *Wellesley* v. *Wellesley, Ex parte Mornington* (1853), 4 De G. M. & G. 537, C. A. If the donee covenants that the jointure is of a given value, his estate is liable to make good the deficiency (*Probert* v. *Morgan* (1739), 1 Atk. 440), unless the court is satisfied that the covenant was entered into by mistake of all the parties (*Londonderry* (*Lady*) v. *Wayne* (1763), Amb. 424); and see title MISTAKE, Vol. XXI., p. 24.

(*a*) *Borrowes* v. *Borrowes* (1872), 6 I. R. Eq. 368. As to recitals operating as covenants generally, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 463. If the husband appoints a jointure in consideration of his wife's fortune, no claim can be made by him until he has exercised the power (*Mitford* v. *Mitford* (1803), 9 Ves. 87); and consider title HUSBAND AND WIFE, Vol. XVI., p. 335.

(*b*) *Floyer* v. *Banks* (1863), 3 De G. J. & Sm. 306; *Peareth* v. *Marriott* (1882), 22 Ch. D. 182, C. A.; and see title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., p. 281, note (*l*).

(*c*) *Haynes* v. *Haynes* (1853), 3 De G. M. & G. 590, C. A.; *Re Robins, Nelson* v. *Robins* (1888), 58 L. T. 382; *Re Currie, Bjorkman* v. *Kimberley* (1888), 36 W. R. 752; *Re Saunders, Saunders* v. *Gore*, [1898] 1 Ch. 17, C. A.; but see *Banks* v. *Braithwaite* (1862), 32 L. J. (CH.) 35; and see title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., p. 240, note (*s*).

(*d*) *Re Parker-Jervis, Salt* v. *Locker*, [1898] 2 Ch. 643; *Re Maryon-Wilson, Wilson* v. *Maryon-Wilson*, [1900] 1 Ch. 565, C. A.; *Re Chisholm, Goddard* v. *Brodie*, [1902] 1 Ch. 457; *Re Coxwell's Trusts, Kinloch-Cooke* v. *Public Trustee*, [1910] 1 Ch. 63; and see title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., p. 222, note (*h*).

(*e*) *Gleadow* v. *Leetham* (1882), 22 Ch. D. 269.

(*f*) *Festing* v. *Taylor* (1862), 3 B. & S. 217; *Lovat* (*Lord*) v. *Leeds* (*Duchess*) (No. 1) (1862), 2 Drew. & Sm. 62; *Re Bannerman's Estate, Bannerman* v. *Young* (1882), 21 Ch. D. 105; *Re Buckle, Williams* v. *Marston*, [1894] 1 Ch. 286, C. A.

(*g*) *Lethbridge* v. *Thurlow* (1851), 15 Beav. 334; *Abadam* v. *Abadam* (1864), 33 Beav. 475; *Sadler* v. *Rickards* (1858), 4 K. & J. 302; and see *Turner* v. *Mullineux* (1861), 1 John. & H. 334; *Lansdowne* (*Marchioness*) v. *Lansdowne* (*Marquis*) (1820), 2 Bli. 60, H. L. Formerly it was common to give power to appoint lands not exceeding a certain value by way of jointure, but the modern practice is to appoint a rentcharge not

SECT. 4. **Powers of Jointuring.**

Where lands of a given value are to be settled, the taxes from which the jointure is free are to be ascertained at the time of the execution of the power (*h*).

Jointure arises *de die in diem.*

154. A jointure arises out of the rents and profits from land *de die in diem*, and a power cannot be properly exercised by appointing a sum to be paid immediately upon the appointor's death (*i*).

Settlement of wife's property in proportion to jointure.

155. Where there is power to appoint a jointure in proportion to the amount of the fortune brought in by the wife, the transaction must be fair and the wife's future property brought in and not paid to her separate use; but it is not necessary that it should actually be paid to and spent by the husband (*k*).

When dower is barred.

156. Appointments under a power to jointure "for or in the name or in lieu of jointure" do not bar dower (*l*), but it is otherwise if it is "for a competent jointure and provision of maintenance." The principle is that the wife cannot have both dower and something expressly given in lieu of jointure (*m*).

SECT. 5.—*Powers of Charging Portions.*

Not a "usual power."

157. A power to charge portions is not a "usual power" within the meaning of an agreement to make a settlement with all the usual powers (*n*).

exceeding a certain amount; the older form did not authorise an appointment free from taxes (*Hervey* v. *Hervey* (1739), 1 Atk. 561; *Londonderry* (*Lady*) v. *Wayne* (1763), Amb. 424). In the modern forms an appointment of a sum not exceeding a "clear" yearly value exonerates the jointress from all outgoings (*Tyrconnell* (*Lord*) v. *Ancaster* (*Duke*) (1754), Amb. 237, 240), including land tax (*Bradbury* v. *Wright* (1781), 2 Doug. (K. B.) 624; and see *Trevor* v. *Trevor* (1842), 13 Sim. 108; (1847) 1 H. L. Cas. 239).

(*h*) *Tyrconnell* (*Lord*) v. *Ancaster* (*Duke*), *supra*; *Trevor* v. *Trevor* (1842), 13 Sim. 108, 136; but see *Londonderry* (*Lady*) v. *Wayne*, *supra*, at p. 427.

(*i*) *Purcell* v. *Purcell* (1842), 2 Dr. & War. 217. A sale may be ordered to raise the amount of arrears of a jointure rentcharge, although charged on rent and profits (*Hambro* v. *Hambro*, [1894] 2 Ch. 564, 568).

(*k*) *Tyrconnell* (*Lord*) v. *Ancaster* (*Duke*), *supra*, at p. 238. A power to appoint a jointure of such amount as A. thinks expedient in proportion to the wife's fortune authorises an appointment although the wife brings no fortune (*Re Molton* (1852), 2 I. C. L. R. 634; and see *Tankerville* (*Earl*) v. *Coke* (1729), Mos. 146; *Edgeworth* v. *Edgeworth* (1829), Beat. 328).

(*l*) *Killen* v. *Campbell* (1848), 10 I. Eq. R. 461; *Dyke* v. *Rendall* (1852), 2 De G. M. & G. 209; *Pennefather* v. *Pennefather* (1872), 6 I. R. Eq. 171. As to dower, see title REAL PROPERTY AND CHATTELS REAL.

(*m*) *Zouch* d. *Woolston* v. *Woolston* (1761), 2 Burr. 1136, 1144. Adultery of the wife does not forfeit a jointure (*Sidney* v. *Sidney* (1734), 3 P. Wms. 269; *Re Walker* (*Anne*) (1835), L. & G. *temp.* Sugd. 299, 326; *Fearon* v. *Aylesford* (*Earl*) (1884), 14 Q. B. D. 792, C. A.); but the power may be so worded as to make it necessary that the person claiming answers the description of the appointor's wife at his death; see *Bullmore* v. *Wynter* (1883), 22 Ch. D. 619; *Re Morrieson*, *Hitchins* v. *Morrieson* (1888), 40 Ch. D. 30; *Re Coley*, *Hollinshead* v. *Coley*, [1903] 2 Ch. 102, C. A. As to the effect of a separation deed, see title HUSBAND AND WIFE, Vol. XVI., p. 448.

(*n*) *Higginson* v. *Barneby* (1826), 2 Sim. & St. 516. The express mention of the power to jointure (see p. 80, *ante*) may negative the insertion of a power to charge; see *Pearson* v. *Baron* (1821), Jac. 158; *Sackville-West* v.

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When the power may arise.

158. The question whether there is power to charge portions or not necessarily arises on executory instruments and turns on the construction of the particular document, but a mere covenant to settle an estate on the issue of the marriage excludes the power. Such a covenant can only be performed by limiting the estate to the sons successively in tail, with remainder to the daughters as tenants in common in tail, with cross remainders between them, or by limiting the estate to sons and daughters alike as tenants in common in tail, with cross remainders between them (*o*).

Charges authorised by the power.

159. A power of charging lands with portions authorises a charge on any part thereof, and a power of charging indefinitely may be exercised by a sale (*p*). An unlimited charge on rents and profits is a charge upon *corpus* (*q*), and such a charge authorises a sale or mortgage to raise the portions and the costs (*r*).

Holmesdale (*Viscount*) (1870), L. R. 4 H. L. 543, 577. As to the powers of limited owners of property to create mortgages, see title MORTGAGES, Vol. XXI., pp. 97 *et seq.*

(*o*) *Grier* v. *Grier* (1872), L. R. 5 H. L. 688, 708; and see *Bedford* (*Duke*) v. *Abercorn* (*Marquis*) (1836), 1 My. & Cr. 312; *Savage* v. *Carroll* (1810), 1 Ball & B. 265. *Primâ facie* "children" or "issue" in a marriage settlement means children or issue of that marriage, and a power therein to charge cannot be exercised in favour of children of a second marriage (*Dafforne* v. *Goodman* (1699), 2 Vern. 362; *Hart* v. *Middlehurst* (1746), 3 Atk. 371; and see *Re Woodleys, Minors* (1892), 29 L. R. Ir. 304, C. A.). A power of advancement is a usual power (see *Mayn* v. *Mayn* (1869), L. R. 5 Eq. 150), and such a power is inconsistent with a joint tenancy among the children (*Taggart* v. *Taggart* (1803), 1 Sch. & Lef. 84, 88; *L'Estrange* v. *L'Estrange*, [1902] 1 I. R. 467, C. A.). As to powers of advancement, see title INFANTS AND CHILDREN, Vol. XVII., pp. 92 *et seq.* Where portions are given to children by a person *in loco parentis*, and no provision is made for maintenance, interest on their portions, whether vested or not, is allowed (*Re Greaves' Settled Estates, Jones* v. *Greaves*, [1900] 2 Ch. 683; see title INFANTS AND CHILDREN, Vol. XVII., p. 119). As to the proper provision to be inserted for vesting of portions, see *Holmesdale* (*Viscount*) v. *West* (1871), L. R. 12 Eq. 280. As to settlements generally, see title SETTLEMENTS.

(*p*) *Long* v. *Long* (1800), 5 Ves. 445. When the testator directs a particular mode of raising the portions, they cannot be raised in any other way (*Ivy* v. *Gilbert* (1722), 2 P. Wms. 13; *Bennett* v. *Wyndham* (1857), 23 Beav. 521).

(*q*) *Phillips* v. *Gutteridge* (1862), 3 De G. J. & Sm. 332; and see *Pearson* v. *Helliwell* (1874), L. R. 18 Eq. 411.

(*r*) *Green* v. *Belchier* (1738), 1 Atk. 505; *Michell* v. *Michell* (1842), 4 Beav. 549; *Armstrong* v. *Armstrong* (1874), L. R. 18 Eq. 541; *Metcalfe* v. *Hutchinson* (1875), 1 Ch. D. 591. The costs are payable out of the estate, and not out of the portion (*Michell* v. *Michell, supra*); but they do not include the costs of dealings with the portions (*Stewart* v. *Donegal* (*Marquis*) (1845), 2 Jo. & Lat. 636). The expression "rents and profits" does not confine the power to mere annual rents, but the trustee may raise the portion by sale or mortgage (*Trafford* v. *Ashton* (1718), 1 P. Wms. 415; *Shrewsbury* (*Countess*) v. *Shrewsbury* (*Earl*) (1790), 1 Ves. 227, 234; *Allan* v. *Backhouse* (1813), 2 Ves. & B. 65; *Bootle* v. *Blundell* (1818), 1 Mer. 193, 233). In considering whether to raise the charge by sale or mortgage, the court has regard to the wishes of those who are immediately interested (*Metcalfe* v. *Hutchinson, supra*). Any intention expressed by the person who creates the charge that it shall apply to annual rents and profits only prevents the charge from being raised by sale or mortgage of the inheritance (*Stanhope* v. *Thacker* (1716), Prec. Ch. 435; *Ivy* v. *Gilbert*

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Powers of Charging Portions.

Period at which charges are to be raised.

160. The period at which portions are to be raised depends on the construction of the deed (*s*). The general rule is that, if the interests are vested, or the contingencies have happened on which the portions are to be paid, and the portions are required, they must be raised, although the only means of so doing may be by sale or mortgage of a reversionary term (*t*); but a power of revocation suspends the payment of portions (*a*).

Implied power to charge interest.

161. A power to charge an estate with a gross sum implies a power to charge it with interest (*b*). The rate of interest fixed

(1722), 2 P. Wms. 13; *Mills* v. *Bank* (1724), 3 P. Wms. 1; *Evelyn* v. *Evelyn* (1732), 2 P. Wms. 659; *Codrington* v. *Foley* (*Lord*) (1801), 6 Ves. 364; *Wilson* v. *Halliley* (1830), 1 Russ. & M. 590; *Foster* v. *Smith* (1845), 1 Ph. 629; *Earle* v. *Bellingham* (No. 1) (1857), 24 Beav. 445; *Tewart* v. *Lawson* (1874), L. R. 18 Eq. 490; *Re Green, Baldock* v. *Green* (1888), 40 Ch. D. 610); and there may be cases of a continuing charge although the *corpus* is not charged (*Booth* v. *Coulton* (1870), 5 Ch. App. 684; and see *Re Taylor's Estate Act, Taylor* v. *Taylor* (1874), L. R. 17 Eq. 324; *Michell* v. *Wilton* (1875), L. R. 20 Eq. 269; and see *Re Boden, Boden* v. *Boden*, [1907] 1 Ch. 132; *Re Howarth, Howarth* v. *Makinson*, [1909] 2 Ch. 19, C. A.; *Re Watkins' Settlement, Wills* v. *Spence*, [1911] 1 Ch. 1, C. A.). Where the ordinary profits of a term are not sufficient to raise the portions charged, timber may be felled and open mines worked (*Offley* v. *Offley* (1691), Prec. Ch. 26; and see *Marker* v. *Kekewich* (1851), 3 Mac. & G. 311; *Re Bute* (*Marquis*), *Bute* (*Marquis*) v. *Ryder* (1884), 27 Ch. D. 196); and, as to the powers, duties, and liabilities of trustees generally, see titles SETTLEMENTS; TRUSTS AND TRUSTEES.

(*s*) *Hebblethwaite* v. *Cartwright* (1734), Cas. *temp.* Talb. 32.

(*t*) *Codrington* v. *Foley* (*Lord*), *supra*; *Massy* v. *Lloyd* (1863), 10 H. L. Cas. 248; and see *Henty* v. *Grey* (1882), 21 Ch. D. 332, 359, C. A.; and see note (*n*), p. 87, *post*. Where there is a limitation to a parent for life and a term to raise portions for children at twenty-one, the donee can appoint that the portions be raised at once, although the term be reversionary and the settlement contains a maintenance clause (*Smyth* v. *Foley* (1838), 3 Y. & C. (EX.) 142; *Michell* v. *Michell* (1842), 4 Beav. 549; *Keily* v. *Keily* (1843), 4 Dr. & War. 38; and see *Evelyn* v. *Evelyn*, *supra*; *Okeden* v. *Okeden* (1732), 1 Atk. 550; *Hall* v. *Carter* (1742), 2 Atk. 354; *Wynter* v. *Bold* (1823), 1 Sim. & St. 507; *Whaley* v. *Morgan* (1839), 2 Dr. & Wal. 330).

(*a*) *Reresby* v. *Newland* (1723), 2 P. Wms. 93. There is some doubt whether the whole sum for portions is raiseable as soon as part becomes payable, but it seems probable that this is so (*Gillibrand* v. *Goold* (1833), 5 Sim. 149; *Leech* v. *Leech* (1842), 2 Dr. & War. 568; *Marsh* v. *Keith* (1861), 29 Beav. 625; *Knapp* v. *Knapp* (1871), L. R. 12 Eq. 238; *Peareth* v. *Greenwood* (1880), 28 W. R. 417; but see, *contra*, *Hays* v. *Bailey* (1813), cited 2 Dr. & War. 576; *Dickenson* v. *Dickenson* (1789), 3 Bro. C. C. 19; *Edgeworth* v. *Edgeworth* (1829), Beat. 328; *Sheppard* v. *Wilson* (1845), 4 Hare, 392). A portionist entitled to a portion of an entire charge, and also entitled to a portion of the estate subject to the charge, is not entitled to have the charge apportioned to the various shares of the estate in order to clear his share (*Otway-Cave* v. *Otway* (1866), L. R. 2 Eq. 725).

(*b*) *Kilmurry* (*Lord*) v. *Geery* (1713), 2 Salk. 538; *Trafford* v. *Ashton* (1718), 1 P. Wms. 415, 419; *Boycot* v. *Cotton* (1738), 1 Atk. 552; *Hall* v. *Carter*, *supra*; *Lewis* v. *Freke* (1794), 2 Ves. 507; *Roe* v. *Pogson* (1816), 2 Madd. 457; *Simpson* v. *O'Sullivan* (1843), 3 Dr. & War. 446; *Balfour* v. *Cooper* (1883), 23 Ch. D. 472, C. A.; *Re Drax, Savile* v. *Drax*, [1903] 1 Ch. 781, C. A.; and see title MORTGAGE, Vol. XXI., p. 115, note (*k*). It was formerly held that, if the person entitled to charge or give interest fixed the rate, the court could not control the discretion (*Lewis* v. *Freke*, *supra*); but this was while the laws against usury were in force, so that the rate was by law limited to 5 per cent.; see

by the courts is 4 per cent. in England (*c*) and 5 per cent. in Ireland (*d*).

Liability of life tenant for interest.

162. The tenant for life is bound to keep down interest on the charges on the estate although he has an absolute power of appointment (*e*), and even if the charge extends only to part of the estate he is bound to keep down the interest out of the whole (*f*).

Sugden, Powers, p. 697, and *Sitwell* v. *Bernard* (1801), 6 Ves. 520. It is the better opinion that a person who has the right to direct the raising of the charge cannot charge interest on it beyond 4 per cent.; see *Balfour* v. *Cooper* (1883), 23 Ch. D. 472, C. A.; and, as to rates of interest generally, see title MONEY AND MONEY-LENDING, Vol. XXI., pp. 42, 43. The interest must be paid annually, and not be directed to accumulate (*Boycot* v. *Cotton* (1738), 1 Atk. 552, and the person who has maintained a child in whose favour a charge is made is entitled to the interest, because it is given for the child's main tenance (*Boycot* v. *Cotton, supra*; see *Re Greaves' Settled Estates, Jones* v. *Greaves*, [1900] 2 Ch. 683; and see note (*o*), p. 83, *ante*). If, by the terms of the power, the portion is not to be raised during the life of the tenant for life, no interest accrues until after his death (*Churchman* v. *Harvey* (1757), Amb. 335; *Reynolds* v. *Meyrick* (1758), 1 Eden, 48; *Lyddon* v. *Lyddon* (1808), 14 Ves. 558; *Massy* v. *Lloyd* (1863), 10 H. L. Cas. 248), and, if the charge is to be paid out of annual rents and profits, it will not carry interest (*Evelyn* v. *Evelyn* (1732), 2 P. Wms. 659, 666). As to the expression "rents and profits," see note (*r*), p. 83, *ante*.

(*c*) *Sitwell* v. *Bernard, supra*; *Lewis* v. *Freke* (1794), 2 Ves. 507; *Balfour* v. *Cooper, supra*.

(*d*) *Leslie* v. *Leslie* (1835), L. & G. *temp.* Sugd. 1; *Young* v. *Waterpark (Lord)* (1842), 13 Sim. 199; *Simpson* v. *O'Sullivan* (1843), 3 Dr. & War. 446; *Purcell* v. *Purcell* (1842), 2 Dr. & War. 217; *Whitbread* v. *Smith* (1854), 3 De G. M. & G. 727, 741, C. A.; *Marshall* v. *Crowther* (1874), 2 Ch. D. 199.

(*e*) This applies to an infant tenant in tail (*Burges* v. *Mawbey* (1823), Turn. & R. 167). Upon failure of the tenant for life to keep down interest on charges, he has to bear the costs of a receiver, if one be appointed (*Shore* v. *Shore* (1859), 4 Drew. 501).

(*f*) *Re Hotchkys, Freke* v. *Calmady* (1886), 32 Ch. D. 408, C. A.; *Frewen* v. *Law Life Assurance Society*, [1896] 2 Ch. 511; *Honywood* v. *Honywood*, [1902] 1 Ch. 347; and as to the liabilities of a tenant for life generally, see title SETTLEMENTS. If the rents are insufficient to keep down the interest, subsequent rents arising during the life of the tenant for life must be applied to pay arrears accruing during his life (*Revel* v. *Watkinson* (1748), 1 Ves. Sen. 93; *Tracy* v. *Hereford* (1786), 2 Bro. C. C. 128; *Caulfield* v. *Maguire* (1845), 2 Jo. & Lat. 141), even though the charge has been paid off during his life (*Honywood* v. *Honywood, supra*); and this applies to interest on unpaid instalments under the Finance Act, 1894 (57 & 58 Vict. c. 30) (*Re Howe's (Earl) Settled Estates, Howe (Earl)* v. *Kingscote*, [1903] 2 Ch. 69, C. A.); but a tenant for life is not bound to defray arrears of interest accrued during the life of his predecessor (*Caulfield* v. *Maguire, supra*; *Sharshaw* v. *Gibbs* (1854), Kay, 333); and if he does pay such arrears he is entitled to be recouped out of the inheritance (*Kirwan* v. *Kennedy* (1870), 4 I. R. Eq. 499), but not so if he pays them by mistake (*ibid.*). Every tenant for life is liable, for the time of his own tenancy, to the extent of the rents and profits received by him, and, in order to liquidate arrears accruing during his life, he must furnish all rents if necessary (*Coote* v. *O'Reilly* (1844), 1 Jo. & Lat. 455, 461; *Waring* v. *Coventry* (1834), 2 My. & K. 406; *Sharshaw* v. *Gibbs, supra*; *Makings* v. *Makings* (1860), 1 De G. F. & J. 355; *Kensington* v. *Bouverie* (1859), 7 H. L. Cas. 557, 587; *Howlin* v. *Sheppard* (1872), 6 I. R. Eq. 39, 253; *Scholefield* v. *Lockwood* (1863), 4 De G. J. & Sm. 22, 31). The estate of a deceased tenant for life who has received rents and not kept down the interest on charges is liable, to the extent of rents received by him, to recoup the inheritance (*Baldwin* v. *Baldwin* (1856), 6 I. Ch. R. 156; *Re*

SECT. 5. Powers of Charging Portions.

Right of life tenant to benefit of paid-off charge.

163. A tenant for life who pays off a charge is in general entitled to be a creditor on the estate for the amount he has paid off, although he has taken no assignment of the charge (*g*), and the presumption that the charge is intended to be kept alive is not rebutted by the fact that the tenant for life is the parent of the remainderman (*h*).

Multiplied charges.

164. Referential trusts and powers are *primâ facie* not to be read as multiplying charges (*i*), but this does not apply where the estate on which the incumbrance is charged is increased proportionately (*k*): a power to charge, without regard to any event which may happen except only the event of children being born, cannot be controlled if it ever comes into existence (*l*).

Extinguishment of charge and vesting of portions.

165. If a charge is created under a power and the person in whose favour the power is exercised dies before the age at which it becomes payable, the charge sinks into the estate (*m*); but, if the charge is called into existence, and the intention is clear that it is to be a charge in any event, it will remain for the benefit of the

Whyte (1857), 7 I. Ch. R. 61, n.; *Re Fitzgerald's Estate* (1867), 1 I. R. Eq. 453; *Re Gore* (1874), 9 I. R. Eq. 83); but the obligation upon him exists only as between himself and the remainderman, and cannot be enforced against him by an incumbrancer (*Re Morley, Morley* v. *Saunders* (1869), L. R. 8 Eq. 594).

(*g*) *Jones* v. *Morgan* (1783), 1 Bro. C. C. 206; *Shrewsbury* (*Countess*) v. *Shrewsbury* (*Earl*) (1790), 1 Ves. 227; *Redington* v. *Redington* (1809), 1 Ball & B. 131; *Lindsay* v. *Wicklow* (*Earl*) (1873), 7 I. R. Eq. 192, 204; *Re Godley's Estate*, [1896] 1 I. R. 45; *Conolly* v. *Barter*, [1904] 1 I. R. 130, C. A.; and see *Re Pride, Shackell* v. *Colnett*, [1891] 2 Ch. 135; *Gifford* (*Lord*) v. *Fitzhardinge* (*Lord*), [1899] 2 Ch. 32. As to the presumption of merger of charges generally, see title MORTGAGE, Vol. XXI., pp. 318 *et seq.* And charges affecting the inheritance include succession duty (*Cuddon* v. *Cuddon* (1876), 4 Ch. D. 583); but a tenant for life is bound to pay the duty on his own succession, including the costs of rendering proper accounts (*Cowley* (*Earl*) v. *Wellesley* (1866), L. R. 1 Eq. 656; see title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., p. 296, note (*k*)). A tenant for life who pays expenses incurred under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 257, has a charge for such expenses (*Re Smith's Settled Estates*, [1901] 1 Ch. 689; *Re Pizzi, Scrivener* v. *Aldridge*, [1907] 1 Ch. 67); and see title MORTGAGE, Vol. XXI., pp. 99, 100, note (*l*). If a tenant for life with power of charging makes a charge, his general personal estate is not liable to exonerate the land, and if he pays it off he becomes an incumbrancer (*Re Norfolk* (*Duchess Dowager*), *Ex parte Digby* (*Earl*) (1821), Jac. 235; *Jenkinson* v. *Harcourt* (1854), Kay, 688); but a tenant for life who pays interest in excess of income cannot make himself an incumbrancer for the excess, without express notice to the remainderman of his intention (*Kensington* v. *Bouverie* (1859), 7 H. L. Cas. 557).

(*h*) *Burrell* v. *Egremont* (*Earl*) (1844), 7 Beav. 205; *Morley* v. *Morley* (1855), 5 De G. M. & G. 610; *Re Harvey, Harvey* v. *Hobday*, [1896] 1 Ch. 137, C. A.

(*i*) *Hindle* v. *Taylor* (1855), 5 De G. M. & G. 577; *Baskett* v. *Lodge* (1856), 23 Beav. 138; *Trew* v. *Perpetual Trustee Co.*, [1895] A. C. 264, P. C.

(*k*) *Cooper* v. *Macdonald* (1873), L. R. 16 Eq. 258; but see *Re Berners, Berners* v. *Calvert* (1892), 41 W. R. 188. A power of charging given to one person by reference to another power given to another person is free from all contingencies which are personal to the latter (*Harrington* (*Earl*) v. *Harrington* (*Countess Dowager*) (1868), L. R. 3 H. L. 295).

(*l*) *Knapp* v. *Knapp* (1871), L. R. 12 Eq. 238.

(*m*) *Boycot* v. *Cotton* (1738), 1 Atk. 552, 555; *Hubert* v. *Parsons* (1751), 2 Ves. Sen. 261; and see *Prowse* v. *Abingdon* (1738), 1 Atk. 482.

next of kin or residuary legatee. If the language is ambiguous, the power should not be read so as to authorise the vesting of portions before they are wanted: if the portions are not vested in the lifetime of the appointees, they sink into the inheritance; if they are vested, they are raiseable although the appointees die under twenty-one or unmarried (*n*).

Part VIII.—Priority of Powers and of Appointments.

General rule as to priority.

166. As a general rule, where there are several appointments made by the same instrument in exercise of the same power, they all rank equally, but where there are several appointments made by different instruments, they rank according to date (*o*).

Mode of determining priority.

167. To determine the priority of appointments made under different and distinct powers, the estates created must be referred to the instrument creating the power, and the general rule is that estates authorised to be created under powers, take effect as if they had been inserted in the original instrument creating the power (*p*).

(*n*) *Fosberry* v. *Smith* (1856), 5 I. Ch. R. 321; and see *Simmons* v. *Pitt* (1873), 8 Ch. App. 978; *Henty* v. *Wrey* (1882), 21 Ch. D. 332, 359, C. A.; *Re De Hoghton, De Hoghton* v. *De Hoghton*, [1896] 2 Ch. 385. Although portions may be, in a sense, vested, they ought not to be raised till they are required; see *Davies* v. *Huguenin* (1863), 1 Hem. & M. 730; *Remnant* v. *Hood* (1860), 2 De G. F. & J. 396, C. A.; and see note (*t*), p. 84, *ante*. As to double portions, see titles EQUITY, Vol. XIII., pp. 130 *et seq.*; SETTLEMENTS; WILLS.

(*o*) *Bulteel* v. *Plumer* (1870), 6 Ch. App. 160; *Wilson* v. *Kenrick* (1885), 31 Ch. D. 658; *Re Annaly's (Lord) Estate* (1889), 23 L. R. Ir. 481.

(*p*) Co. Litt. 272 a, Butler's note, vii., 2; *Uxbridge (Earl)* v. *Bayly* (1792), 1 Ves. 499, 509; *Braybrooke (Lord)* v. *A.-G.* (1861), 9 H. L. Cas. 150; *A.-G.* v. *Selborne (Earl)*, [1902] 1 K. B. 388, 394, C. A.; *Re Bolton Estates Act*, 1863, [1904] 2 Ch. 289. The question of priority in each case must depend on the intention of the donor and the nature of the power; see *Beale* v. *Beale* (1714), 1 P. Wms. 244 (where a power of jointuring was held to have priority over a power to charge); and see *Stackhouse* v. *Barnston* (1805), 10 Ves. 453; *Mosley* v. *Mosley* (1800), 5 Ves. 248, 253 (where charges created by a power in a settlement had priority over charges created by the settlement); *Bevan* v. *Bevan* (1883), 13 L. R. Ir. 53 (where portions had priority over a jointure); and see *Simpson* v. *O'Sullivan* (1840), 7 Cl. & Fin. 550, H. L.; *Bailey* v. *Tennant* (1856), 11 Exch. 776; *Re Annaly's (Lord) Estate, supra*; *Re Creagh's Estate* (1890), 25 L. R. Ir. 128. Where there was a joint power to A. and B. to appoint, with power to B. to appoint after the death of A. and a covenant by B. during the life of A. to appoint in favour of certain persons, and then a subsequent joint appointment by A. and B., the covenant was held to have priority over the joint appointment (*Re Lambert's Estate*, [1901] 1 I. R. 261, C. A.). The doctrine of marshalling as applied in *Averall* v. *Wade* (1835), L. & G. *temp.* Sugd. 252 (see title EQUITY, Vol. XIII., p. 143), applies to the case of a man who reserves a power to himself as well as to the case of a man who retains an estate for himself (*Re Barker's Estate* (1879), 3 L. R. Ir. 395; *M'Carthy* v. *M'Cartie* (No. 2), [1904] 1 I. R. 100, C. A.).

PART VIII. Priority of Powers and of Appointments.

168. A jointure takes effect immediately upon the death of the husband, and as a general rule overrides all other powers and estates in the same settlement, unless it is otherwise provided by the appointment or by the instrument creating the power (*q*).

Nature of priority of particular powers.

Powers of sale (*r*), exchange, and partition (*s*) override all estates created by the settlement, unless there is a contrary intention expressed in the settlement, but are subject to any estates created under paramount powers (*t*).

Powers of leasing (*u*), being administrative, have precedence over all other powers and estates arising thereunder, although there is no clause marshalling the powers (*t*).

(*q*) *Hall* v. *Carter* (1742), 2 Atk. 354; *Sandys* v. *Sandys* (1721), 1 P. Wms. 707; *Reynolds* v. *Meyrick* (1758), 1 Eden, 48. It is otherwise if portions are appointed under a power in a former settlement (*Re Nash* (1856), 5 I. Ch. R. 384, P. C.); and if a jointure is intended by the creator of the power to take effect merely as one of several rentcharges, it has no precedence (*Coore* v. *Todd* (1857), 7 De G. M. & G. 520). As to powers of jointuring, see pp. 80 *et seq.*, *ante*.

(*r*) As to such powers, see pp. 72 *et seq.*, *ante*.

(*s*) As to such powers, see p. 74, *ante*.

(*t*) *Yelland* v. *Ficlis* (1604), Moore (K. B.), 788; *Taylor* v. *Stibbert* (1794), 2 Ves. 437; *Isherwood* v. *Oldknow* (1815), 3 M. & S. 382, 405; *Doe* d. *Courtail* v. *Thomas* (1829), 9 B. & C. 288; *Skeeles* v. *Shearley* (1836), 8 Sim. 153, 158; *Wortham* v. *Pemberton*, *Newenham* v. *Pemberton* (1847), 1 De G. & Sm. 644, 659; *Lewis* v. *Rees* (1856), 3 K. & J. 132, 149.

(*u*) As to such powers, see pp. 74 *et seq.*, *ante*.

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NOTE.—*Questions of mere practice and procedure are, in principle, outside the scope of this Work, and the following title, although it contains a comprehensive statement of the subject, in so far as it is not dealt with under other titles, does not enter into such an exhaustive treatment as is to be found in the Yearly Practice of the Supreme Court. For particular points of procedure in relation to various subjects and for the practice and procedure in tribunals other than the Supreme Court of Judicature, the reader is referred to the headings specified in the following list of cross-references.*—EDITORS.

For Abatement of Proceedings - *See title* ACTION; BANKRUPTCY AND INSOLVENCY; BUILDING SOCIETIES; CHARITIES; COMPANIES; COMPULSORY PURCHASE OF LAND AND COMPENSATION; CONFLICT OF LAWS; COPYHOLDS; COPYRIGHT AND LITERARY PROPERTY; CRIMINAL LAW AND PROCEDURE; CROWN PRACTICE; ELECTIONS; EXECUTION; EXECUTORS AND ADMINISTRATORS; FRIENDLY SOCIETIES; HUSBAND AND WIFE; LITERARY AND SCIENTIFIC INSTITUTIONS; LUNATICS AND PERSONS OF UNSOUND MIND; MORTGAGE; RECEIVERS; TRUSTS AND TRUSTEES.

Action, Nature and Forms of - - - - ,, ACTION.

Action on Bonds - - ,, BONDS.

Administration of Assets - ,, BANKRUPTCY AND INSOLVENCY; EXECUTORS AND ADMINISTRATORS; INFANTS AND CHILDREN; LUNATICS AND PERSONS OF UNSOUND MIND; WILLS.

Admiralty Jurisdiction and Practice - - - ,, ACTION; ADMIRALTY; CONFLICT OF LAWS; CONSTITUTIONAL LAW; COURTS; CRIMINAL LAW AND PROCEDURE; DEPENDENCIES AND COLONIES; DISCOVERY, INSPECTION, AND INTERROGATORIES; DISTRESS; EVIDENCE; LIMITATION OF ACTIONS; PRIZE LAW AND JURISDICTION; SHIPPING AND NAVIGATION.

Appeals to the Court of Criminal Appeal - - ,, COURTS; CRIMINAL LAW AND PROCEDURE; MAGISTRATES.

Appeals to the Divisional Courts - - - - ,, ADMIRALTY; AGRICULTURE; ARBITRATION; BANKRUPTCY AND INSOLVENCY; CHARITIES; COMPANIES; COUNTY COURTS; COURTS; CROWN PRACTICE; ELECTIONS; ESTATE AND OTHER DEATH DUTIES; FRIENDLY SOCIETIES; INJUNCTION; INTERPLEADER; INTOXICATING LIQUORS; MAGISTRATES; MASTER AND SERVANT; MAYOR'S COURT, LONDON; MEDICINE AND PHARMACY; SHIPPING AND NAVIGATION.

For Appeals to the House of Lords	*See title*	ARBITRATION; BANKRUPTCY AND INSOLVENCY; COURTS; CROWN PRACTICE; INCOME TAX; MASTER AND SERVANT; PARLIAMENT; SHIPPING AND NAVIGATION.
Appeals to the Privy Council	,,	ADMIRALTY; CONSTITUTIONAL LAW; COURTS; DEPENDENCIES AND COLONIES; ECCLESIASTICAL LAW; EDUCATION; PRIZE LAW AND JURISDICTION.
Appeals to Quarter Sessions	,,	ANIMALS; BASTARDY; BURIAL AND CREMATION; COMPANIES; COURTS; FRIENDLY SOCIETIES; GAS; HIGHWAYS, STREETS, AND BRIDGES; INDUSTRIAL, PROVIDENT, AND SIMILAR SOCIETIES; INTOXICATING LIQUORS; LUNATICS AND PERSONS OF UNSOUND MIND; MAGISTRATES; METROPOLIS; NUISANCE; POOR LAW; RATES AND RATING; THEATRES AND OTHER PLACES OF ENTERTAINMENT.
Arbitration	,,	AGRICULTURE; ALLOTMENTS; ARBITRATION; BUILDING CONTRACTS, ENGINEERS AND ARCHITECTS; BUILDING SOCIETIES; COMPANIES; COMPULSORY PURCHASE OF LAND AND COMPENSATION; COPYHOLDS; ELECTRIC LIGHTING AND POWER; EXPLOSIVES; FRIENDLY SOCIETIES; GAS; MASTER AND SERVANT; MINES, MINERALS, AND QUARRIES.
Arrest under the Debtors Act	,,	CONSTITUTIONAL LAW; EQUITY; MALICIOUS PROSECUTION AND PROCEDURE.
Attachment and Committal	,,	ARBITRATION; BANKRUPTCY AND INSOLVENCY; COMPANIES; CONTEMPT OF COURT, ATTACHMENT, AND COMMITTAL; CORPORATIONS; COUNTY COURTS; CROWN PRACTICE; DISCOVERY, INSPECTION, AND INTERROGATORIES; ESTATE AND OTHER DEATH DUTIES; EVIDENCE; EXECUTION; EXECUTORS AND ADMINISTRATORS; HUSBAND AND WIFE; INTERPLEADER; LUNATICS AND PERSONS OF UNSOUND MIND; RECEIVERS; SOLICITORS.
Attachment of Debt	,,	BANKERS AND BANKING; BANKRUPTCY AND INSOLVENCY; CHOSES IN ACTION; EXECUTION; HUSBAND AND WIFE.
Audience in Court	,,	BARRISTERS; COMPANIES; COUNTY COURTS; COURTS; ECCLESIASTICAL LAW; SOLICITORS.
Authority of Counsel to Compromise an Action	,,	BARRISTERS.
Authority of Solicitor to Institute, Defend, or Compromise an Action	,,	AGENCY; SOLICITORS.

For Bailiffs - - - -	*See title*	COUNTY COURTS; SHERIFFS AND BAILIFFS.
Bankers' Books -	,,	BANKERS AND BANKING; DISCOVERY, INSPECTION, AND INTERROGATORIES; EVIDENCE; NEGLIGENCE.
Bankruptcy, Trustee in, Proceedings by and against -	,,	BANKRUPTCY AND INSOLVENCY; FRAUDULENT AND VOIDABLE CONVEYANCES; LUNATICS AND PERSONS OF UNSOUND MIND.
Bonds - - - - -	,,	ADMIRALTY; BONDS; EXECUTORS AND ADMINISTRATORS; HUSBAND AND WIFE; LIMITATION OF ACTIONS; LUNATICS AND PERSONS OF UNSOUND MIND; REVENUE; SHIPPING AND NAVIGATION.
Certiorari - - -	,,	BASTARDY; COUNTY COURTS; COURTS; CRIMINAL LAW AND PROCEDURE; CROWN PRACTICE; HUSBAND AND WIFE; MAGISTRATES; MAYOR'S COURT, LONDON; RATES AND RATING.
Champerty - - -	,,	ACTION; CONTRACT.
Charging Order - -	,,	COMPANIES; HUSBAND AND WIFE; LUNATICS AND PERSONS OF UNSOUND MIND; RECEIVERS.
Charities - - - -	,,	CHARITIES.
Choses in Action - -	,,	BANKRUPTCY AND INSOLVENCY; BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS; BONDS; CHOSES IN ACTION; COMPANIES; CONTRACT; COPYRIGHT AND LITERARY PROPERTY; DAMAGES; ECCLESIASTICAL LAW; EXECUTORS AND ADMINISTRATORS; INJUNCTION; MORTGAGE; PERSONAL PROPERTY; RECEIVERS.
Circuits - - - -	,,	COURTS.
Clergymen - - -	,,	BURIAL AND CREMATION; CONSTITUTIONAL LAW; ECCLESIASTICAL LAW; EXECUTION; HUSBAND AND WIFE.
Cognovit - - - -	,,	DEEDS AND OTHER INSTRUMENTS.
Colonial Appeals - -	,,	COURTS; DEPENDENCIES AND COLONIES; PRIZE LAW AND JURISDICTION.
Commissions - - -	,,	ADMIRALTY; COURTS; EVIDENCE; LUNATICS AND PERSONS OF UNSOUND MIND.
Companies, Proceedings by and against - - -	,,	COMPANIES.
Contempt of Court - -	,,	CONTEMPT OF COURT, ATTACHMENT, AND COMMITTAL; COUNTY COURTS; DEPENDENCIES AND COLONIES; ECCLESIASTICAL LAW; ELECTIONS; HUSBAND AND WIFE; INJUNCTION; PRISONS; SOLICITORS.
Convicts - - - -	,,	CRIMINAL LAW AND PROCEDURE; PRISONS.
Counterclaim - - -	,,	PLEADING; SET-OFF AND COUNTERCLAIM.
County Courts - - -	,,	COUNTY COURTS; COURTS.
Courts - - - -	,,	COURTS.
Criminal Law and Procedure - - - -	,,	CRIMINAL LAW AND PROCEDURE.

For Crown and Executive	*See title*	CONSTITUTIONAL LAW.
Crown Office	,,	CROWN PRACTICE.
Crown Practice	,,	CROWN PRACTICE.
Damages in General	,,	DAMAGES.
Default	,,	JUDGMENTS AND ORDERS; PLEADING.
Demand of Copy Warrant	,,	ACTION; CRIMINAL LAW AND PROCEDURE; MALICIOUS PROSECUTION AND PROCEDURE; POLICE.
Detinue	,,	TROVER AND DETINUE.
Discovery	,,	ADMIRALTY; BANKRUPTCY AND INSOLVENCY; BOUNDARIES, FENCES, AND PARTY WALLS; BUILDING SOCIETIES; COMPANIES; DISCOVERY, INSPECTION, AND INTERROGATORIES; EXECUTORS AND ADMINISTRATORS; HUSBAND AND WIFE; INDUSTRIAL, PROVIDENT, AND SIMILAR SOCIETIES; INSURANCE; INTERPLEADER; LIBEL AND SLANDER; LUNATICS AND PERSONS OF UNSOUND MIND; PARTNERSHIP; RECEIVERS.
Distringas	,,	COMPANIES; EXECUTION; HUSBAND AND WIFE.
Divorce	,,	HUSBAND AND WIFE.
Ecclesiastical Courts	,,	COURTS; ECCLESIASTICAL LAW.
Ejectment	,,	ACTION; COUNTY COURTS; EXECUTION; JUDGMENTS AND ORDERS; LANDLORD AND TENANT; MORTGAGE.
English Information	,,	CROWN PRACTICE.
Equitable Defences	,,	EQUITY; PLEADING.
Evidence	,,	ADMIRALTY; ARBITRATION; BANKRUPTCY AND INSOLVENCY; BOUNDARIES, FENCES, AND PARTY WALLS; COMPANIES; CONFLICT OF LAWS; CRIMINAL LAW AND PROCEDURE; CUSTOM AND USAGES; EASEMENTS AND PROFITS À PRENDRE; ELECTIONS; EVIDENCE; GUARANTEE; HUSBAND AND WIFE; INJUNCTION; INSURANCE; INTERPLEADER; JUDGMENTS AND ORDERS; LIBEL AND SLANDER; LUNATICS AND PERSONS OF UNSOUND MIND; MAGISTRATES; MALICIOUS PROSECUTION AND PROCEDURE; NEGLIGENCE; NUISANCE; SHIPPING AND NAVIGATION; WILLS.
Execution	,,	EXECUTION.
Extension of Judgments	,,	CONFLICT OF LAWS.
Firms, Proceedings by and against	,,	PARTNERSHIP.
Foreign Judgments	,,	CONFLICT OF LAWS.
Friendly Societies, Proceedings by and against	,,	COMPANIES; FRIENDLY SOCIETIES.
Garnishee	,,	EXECUTION.
Guardians ad litem	,,	ACTION; COURTS; INFANTS AND CHILDREN; LUNATICS AND PERSONS OF UNSOUND MIND.
Habeas Corpus	,,	CROWN PRACTICE; EXTRADITION AND FUGITIVE OFFENDERS; MAGISTRATES; PRISONS.

For Husband and Wife, Proceedings between	*See title*	HUSBAND AND WIFE.
Imprisonment for Debt	,,	BANKRUPTCY AND INSOLVENCY; PRISONS.
Infants, Proceedings by and against	,,	COMPANIES; COUNTY COURTS; INFANTS AND CHILDREN.
Inferior Courts	,,	ADMIRALTY; COUNTY COURTS; COURTS; MAGISTRATES; MAYOR'S COURT, LONDON.
Information	,,	CRIMINAL LAW AND PROCEDURE; CROWN PRACTICE; MAGISTRATES.
Injunction	,,	EQUITY; INJUNCTION.
Inspection	,,	BANKERS AND BANKING; DISCOVERY, INSPECTION, AND INTERROGATORIES; ELECTIONS; EVIDENCE.
Interpleader	,,	AUCTION AND AUCTIONEERS; BAILMENT; EXECUTION; INTERPLEADER; SHERIFFS AND BAILIFFS.
Interrogatories	,,	ADMIRALTY; BAILMENT; BANKRUPTCY AND INSOLVENCY; BARRISTERS; COMPANIES; COPYRIGHT AND LITERARY PROPERTY; CORPORATIONS; CROWN PRACTICE; ELECTIONS; EVIDENCE; EXECUTORS AND ADMINISTRATORS; HUSBAND AND WIFE; LUNATICS AND PERSONS OF UNSOUND MIND.
Judgments	,,	JUDGMENTS AND ORDERS.
Judicial Commissioners	,,	COURTS; ESTATE AND OTHER DEATH DUTIES; INCOME TAX; LAND TAX; PRIZE LAW AND JURISDICTION; RAILWAYS AND CANALS; REVENUE; SEWERS AND DRAINS; TRAMWAYS AND LIGHT RAILWAYS.
Judicial Committee of the Privy Council	,,	COURTS.
Judicial Trustee	,,	TRUSTS AND TRUSTEES.
Juries	,,	COMPULSORY PURCHASE OF LAND AND COMPENSATION; CORONERS; COUNTY COURTS; CRIMINAL LAW AND PROCEDURE; HUSBAND AND WIFE; JURIES; MAGISTRATES.
Jurisdiction	,,	ADMIRALTY; ARBITRATION; BANKRUPTCY AND INSOLVENCY; COMPANIES; COUNTY COURTS; COURTS; CROWN PRACTICE; DEPENDENCIES AND COLONIES; EXTRADITION AND FUGITIVE OFFENDERS; INTOXICATING LIQUORS; MAGISTRATES; MAYOR'S COURT, LONDON; PARLIAMENT; PRIZE LAW AND JURISDICTION; SHIPPING AND NAVIGATION.
Latin Information	,,	CROWN PRACTICE.
Limitation of Action	,,	LIMITATION OF ACTIONS; PUBLIC AUTHORITIES AND PUBLIC OFFICERS.
Lunatics, Proceedings by and against	,,	LUNATICS AND PERSONS OF UNSOUND MIND.
Maintenance	,,	ACTION.

For Malicious Abuse of Civil Proceedings - - -	*See title*	MALICIOUS PROSECUTION AND PROCEDURE.
Malicious Procurement of Issue of Search Warrant	,,	MALICIOUS PROSECUTION AND PROCEDURE.
Malicious Prosecution -	,,	MALICIOUS PROSECUTION AND PROCEDURE.
Mandamus - - - -	,,	COUNTY COURTS; CROWN PRACTICE; HUSBAND AND WIFE; MAGISTRATES.
Married Women, Proceedings by and against -	,,	BANKRUPTCY AND INSOLVENCY; CRIMINAL LAW AND PROCEDURE; HUSBAND AND WIFE; LIBEL AND SLANDER.
Mayor's Court - - -	,,	MAYOR'S COURT, LONDON.
Ne exeat regno - - -	,,	CONSTITUTIONAL LAW; EQUITY; MALICIOUS PROSECUTION AND PROCEDURE.
Next Friend - - -	,,	ACTION; INFANTS AND CHILDREN; LUNATICS AND PERSONS OF UNSOUND MIND.
Notaries - - - -	,,	NOTARIES.
Notice of Action - -	,,	ACTION; ADMIRALTY.
Official Referees - -	,,	ARBITRATION; COURTS; DAMAGES.
Official Solicitor - -	,,	COURTS.
Orders in General - -	,,	JUDGMENTS AND ORDERS.
Parties in Particular Proceedings - - -	,,	ACTION; AGENCY; BANKRUPTCY AND INSOLVENCY; BUILDING SOCIETIES; CHARITIES; CLUBS; COMMONS AND RIGHTS OF COMMON; COMPANIES; CONSTITUTIONAL LAW; CORPORATIONS; ECCLESIASTICAL LAW; ELECTIONS; EXECUTORS AND ADMINISTRATORS; FRIENDLY SOCIETIES; HUSBAND AND WIFE; INDUSTRIAL, PROVIDENT, AND SIMILAR SOCIETIES; INFANTS AND CHILDREN; INSURANCE; INTERPLEADER; LITERARY AND SCIENTIFIC INSTITUTIONS; LOAN SOCIETIES; LOCAL GOVERNMENT; LUNATICS AND PERSONS OF UNSOUND MIND; MASTER AND SERVANT; MISREPRESENTATION AND FRAUD; MONEY AND MONEY-LENDING; PARTNERSHIP; PATENTS AND INVENTIONS; POLICE; POOR LAW; POST OFFICE; PRISONS; PUBLIC AUTHORITIES AND PUBLIC OFFICERS; ROYAL FORCES; SHERIFFS AND BAILIFFS; SHIPPING AND NAVIGATION; SOLICITORS; STOCK EXCHANGE; TRADE AND TRADE UNIONS; TRUSTS AND TRUSTEES.
Partition - - -	,,	PARTITION.
Partners - - -	,,	PARTNERSHIP.
Pay Office - - -	,,	COURTS.
Personal Representatives, Actions by and against -	,,	COUNTY COURTS; EXECUTORS AND ADMINISTRATORS.

For Petition of Right - - *See title* CONSTITUTIONAL LAW; CROWN PRACTICE.

Pleading - - - - ,, ADMIRALTY; BARRISTERS; CROWN PRACTICE; DAMAGES; DEEDS AND OTHER INSTRUMENTS; DISCOVERY, INSPECTION, AND INTERROGATORIES; ECCLESIASTICAL LAW; ESTOPPEL; EVIDENCE; GUARANTEE; HIGHWAYS, STREETS, AND BRIDGES; HUSBAND AND WIFE; INFANTS AND CHILDREN; INTERPLEADER; LIBEL AND SLANDER; LIMITATION OF ACTIONS; LITERARY AND SCIENTIFIC INSTITUTIONS; PLEADING.

Pleading, Effect of Default of ,, ADMIRALTY; DAMAGES; JUDGMENTS AND ORDERS; PLEADING.

Practice and Procedure in Particular Matters - ,, ADMIRALTY; ARBITRATION; BANKRUPTCY AND INSOLVENCY; BARRISTERS; BASTARDY; BILLS OF SALE; BONDS; BUILDING SOCIETIES; CHARITIES; COMPANIES; COMPULSORY PURCHASE OF LAND AND COMPENSATION; CONFLICT OF LAWS; CONSTITUTIONAL LAW; CONTEMPT OF COURT, ATTACHMENT, AND COMMITTAL; CONTRACT; COPYRIGHT AND LITERARY PROPERTY; CORONERS; CORPORATIONS; COURTS; CROWN PRACTICE; CUSTOM AND USAGES; DAMAGES; DISCOVERY, INSPECTION, AND INTERROGATORIES; ECCLESIASTICAL LAW; ELECTIONS; ESTATE AND OTHER DEATH DUTIES; EVIDENCE; EXECUTION; EXECUTORS AND ADMINISTRATORS; EXTRADITION AND FUGITIVE OFFENDERS; FERRIES; FISHERIES; FRAUDULENT AND VOIDABLE CONVEYANCES; FRIENDLY SOCIETIES; GUARANTEE; HIGHWAYS, STREETS, AND BRIDGES; HUSBAND AND WIFE; INCOME TAX; INFANTS AND CHILDREN; INHABITED HOUSE DUTY; INJUNCTION; INSURANCE; INTERPLEADER; JUDGMENTS AND ORDERS; JURIES; LAND IMPROVEMENT; LANDLORD AND TENANT; LIBEL AND SLANDER; LIEN; LIMITATION OF ACTIONS LITERARY AND SCIENTIFIC INSTITUTIONS; LOAN SOCIETIES; LUNATICS AND PERSONS OF UNSOUND MIND; MAGISTRATES; MASTER AND SERVANT; MAYOR'S COURT, LONDON; MISREPRESENTATION AND FRAUD; MORTGAGE; NUISANCE; PARLIAMENT; PARTITION; PARTNERSHIP; PATENTS AND INVENTIONS; POOR LAW; PRISONS; RAILWAYS AND CANALS; RATES AND RATING; RECEIVERS; REVENUE; ROYAL FORCES; SALE OF LAND; SOLICITORS; SPECIFIC

For Practice and Procedure in Particular Matters—continued - - - -	*See title*	PERFORMANCE; TRADE MARKS, TRADE NAMES AND DESIGNS; TRESPASS; TROVER AND DETINUE; TRUSTS AND TRUSTEES; WATERS AND WATERCOURSES; WORK AND LABOUR.
Preliminaries to Commencement of Action - -	,,	ACTION.
Preliminary Act - -	,,	ADMIRALTY.
Prisoners - - - -	,,	CRIMINAL LAW AND PROCEDURE; PRISONS.
Probate Practice - -	,,	COURTS; EXECUTORS AND ADMINISTRATORS.
Prohibition - - -	,,	COUNTY COURTS; CROWN PRACTICE; INJUNCTION; MAGISTRATES.
Public Authorities - -	,,	PUBLIC AUTHORITIES AND PUBLIC OFFICERS.
Public Trustee - - -	,,	TRUSTS AND TRUSTEES.
Quare Impedit - - -	,,	CROWN PRACTICE.
Quo Warranto - - -	,,	CORPORATIONS; CROWN PRACTICE.
Receivers - - -	,,	RECEIVERS.
Recovery of Land - -	,,	COUNTY COURTS; LANDLORD AND TENANT; REAL PROPERTY AND CHATTELS REAL.
Referees, Official and Special - - -	,,	ARBITRATION; COURTS.
References by Consent out of Court - - -	,,	ARBITRATION.
References to Referees -	,,	ADMIRALTY; ARBITRATION.
References under Order of Court - - - -	,,	ARBITRATION.
Relief in Ejectment Proceedings - - -	,,	EQUITY; LANDLORD AND TENANT.
Replevin - - - -	,,	COUNTY COURTS; DISTRESS.
Set-off - - - -	,,	BANKRUPTCY AND INSOLVENCY; PLEADING; SET-OFF AND COUNTERCLAIM.
Sheriffs and Bailiffs - -	,,	SHERIFFS AND BAILIFFS.
Solicitors - - -	,,	SOLICITORS.
Statutory Bar, Process to Prevent - - -	,,	LIMITATION OF ACTIONS.
Subpœna - - - -	,,	ADMIRALTY; ARBITRATION; BANKRUPTCY AND INSOLVENCY; CONTEMPT OF COURT; COUNTY COURTS; CROWN PRACTICE; EVIDENCE.
Summary Jurisdiction, Courts of - - -	,,	MAGISTRATES.
Supreme Court of Judicature - - - -	,,	CONSTITUTIONAL LAW; COURTS.
Taxation of Costs - -	,,	PARLIAMENT; SOLICITORS.
Wards of Court - -	,,	INFANTS AND CHILDREN.
Warrant of Attorney -	,,	DEEDS AND OTHER INSTRUMENTS; JUDGMENTS AND ORDERS; MORTGAGE.
Witnesses - - -	,,	ADMIRALTY; CORONERS; COUNTY COURTS; CROWN PRACTICE; DEPENDENCIES AND COLONIES; DISCOVERY, INSPECTION, AND INTERROGATORIES; ELECTIONS; EVIDENCE; HUSBAND AND WIFE; INFANTS AND CHILDREN; LUNATICS AND PERSONS OF UNSOUND MIND.

Part I.—In the High Court of Justice.

SECT. 1.—*An Ordinary Action in the King's Bench or Chancery Division..*

SECT. 1. An Ordinary Action in the King's Bench or Chancery Division.

SUB-SECT. 1.—*Commencement of Action.*

Writ etc.

169. An action in the King's Bench or Chancery Division of the High Court is generally (*a*) commenced by a writ of summons or by an originating summons (*b*).

SUB-SECT. 2.—*Parties.*

(i.) *Necessary and Proper Parties* (*c*).

Parties.

170. In order that an action may be properly constituted, there must be at least two persons, one the plaintiff or the person who sues, and the other the defendant or the person who is sued.

(a) *Plaintiffs.*

Plaintiffs.

171. A person cannot be a plaintiff unless he has a vested interest in the subject-matter of the action (*d*).

Action of contract.

172. In an action founded on contract, the proper plaintiff is the person with whom or on whose behalf the contract was made, or the person in whom the right of such person under the contract is vested (*e*).

If a contract between two persons is intended to secure a benefit to a third person in such circumstances that the third person has a beneficial right as *cestui que trust* under the contract, the third person has a right to sue under the contract or for the enforcement

(*a*) "I read Order 2, rule 1, as meaning that every action is to be commenced by a writ of summons, except where otherwise provided by the Rules" (*Re Fawsitt, Galland* v. *Burton* (1885), 30 Ch. D. 231, C. A., *per* COTTON, L.J., at p. 233).

(*b*) R. S. C., Ord. 2, r. 1. As to the meaning of the term "action" and as to who may be parties to an action, and as to the steps which in certain cases must be taken before commencing an action, see title ACTION, Vol. I., pp. 2 *et seq.*, 17 *et seq.*, 22 *et seq.* As to proceedings by the Crown, see title CROWN PRACTICE, Vol. X., pp. 1 *et seq.*

(*c*) As to the distinction between necessary and proper parties, see *Massey* v. *Heynes* (1888), 21 Q. B. D. 330, C. A.; *Merry* v. *Pownall*, [1898] 1 Ch. 306, 312; and the cases cited in note (*k*), p. 120, *post*; see also as to joinder of necessary parties, pp. 104, 105, *post.*

(*d*) *Fulham* v. *McCarthy* (1848), 1 H. L. Cas. 703; see *Spain* (*King*) v. *Machado* (1827), 4 Russ. 225; *Padwick* v. *Platt* (1849), 11 Beav. 503; *Pearce* v. *Watkins* (1852), 16 Jur. 832; *Clowes* v. *Hilliard* (1876), 4 Ch. D. 413; *Viola* v. *Hickman* (1912), 47 L. J. 257. A person who sues on behalf of others is interested within the meaning of the rule as laid down in the text, *supra* (*The Charlotte*, [1908] P. 206, C. A.; see *Catt* v. *Wood*, [1908] 2 K. B. 458, 473, C. A.). As to an action on behalf of an infant, see title INFANTS AND CHILDREN, Vol. XVII., pp. 133 *et seq.* As to an action by a lunatic, see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 462. As to an action for a declaratory judgment, see title JUDGMENTS AND ORDERS, Vol. XVIII, pp. 183, 184.

(*e*) Lush's Practice, 3rd ed., Vol. I., p. 7. As to assignment, see title CHOSES IN ACTION, Vol. IV., pp. 365 *et seq.*, 367 *et seq.* As to the effect of the death of the person entitled, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 224, 225; as to the effect of bankruptcy, see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 161.

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of the contract (*f*). But, except where there is such a beneficial right, an agreement by one person with another for the benefit of a third person gives the third person no right to sue (*g*).

If the promise, in respect of the breach of which an action is brought, was made jointly to several co-contractors, all the persons to whom the promise was made should join in suing (*h*).

Action of tort.

173. In an action of tort the proper plaintiff is the person who has sustained the injury, that is, the person whose rights have been infringed by the wrongdoer, or the person in whom the right to sue is vested (*i*). Where several persons are injured by a joint tort, it is not necessary that all who are injured should join as plaintiffs; any one of the persons injured may sue without joining the others (*k*).

Interference with public right or performance of public duty.

174. In an action to restrain interference with a public right, or to compel the performance of a public duty, the Attorney-General (*l*)

(*f*) *Gandy* v. *Gandy* (1883), 30 Ch. D. 57, C. A.; *Touche* v. *Metropolitan Railway Warehousing Co.* (1871), 6 Ch. App. 671; *Re Flavell, Murray* v. *Flavell* (1883), 25 Ch. D. 89, C. A.; *Gregory* v. *Williams* (1817), 3 Mer. 582; see *Re D'Angibau, Andrews* v. *Andrews* (1880), 15 Ch. D. 228, 242, C. A. As to specific performance generally, see title SPECIFIC PERFORMANCE.

(*g*) *Re Empress Engineering Co.* (1880), 16 Ch. D. 125, C. A.; *Colyear* v. *Mulgrave (Countess)* (1836), 2 Keen, 81; *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.*, [1902] 1 Ch. 146, C. A.; *Tweddle* v. *Atkinson* (1861), 1 B. & S. 393. As to actions by and against principal and agents, see title AGENCY, Vol. I., pp. 206, 208. As to actions by consignors and consignees, see title CARRIERS, Vol. IV., p. 94.

(*h*) See *Kendall* v. *Hamilton* (1879), 4 App. Cas. 504, 543; but see p. 105, *post*. If a co-contractor refuses to be joined as plaintiff after tender made of an indemnity against costs, he may be made a defendant and the action may proceed (*Cullen* v. *Knowles*, [1898] 2 Q. B. 380; see *Wilson* v. *Church* (1878), 9 Ch. D. 552). One of several tenants in common of a reversion expectant on the determination of a lease can sue for breach of a covenant in the lease without joining the other tenants in common (*Roberts* v. *Holland*, [1893] 1 Q. B. 665); and see title LANDLORD AND TENANT, Vol. XVIII., pp. 343, 344.

(*i*) As to a master suing for an injury to his servant, see title MASTER AND SERVANT, Vol. XX., p. 275. As to injuries to property, see titles TRESPASS; TROVER AND DETINUE. As to tort generally, see title TORT.

(*k*) *Roberts* v. *Holland*, [1893] 1 Q. B. 665; *Sheehan* v. *Great Eastern Rail. Co.* (1880), 16 Ch. D. 59; *Lauri* v. *Renad*, [1892] 3 Ch. 402, 412, C. A.

(*l*) As to the Attorney-General, see title CONSTITUTIONAL LAW, Vol. VII., pp. 71—76. As to the nature of some of his rights and duties and of the proceedings in which he may be a party, see titles ACTION, Vol. I., pp. 9, 23; BARRISTERS, Vol. II., pp. 411, 414, 416; BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., p. 118; CHARITIES, Vol. IV., pp. 189, 312, 313, 316, 318—328, 333—335, 353; CONSTITUTIONAL LAW, Vol. VI., pp. 411, 412; CORPORATIONS, Vol. VIII., p. 400; COUNTY COURTS, Vol. VIII., pp. 640—643; COURTS, Vol. IX., p. 112; CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 292, 329, note (*v*); CROWN PRACTICE, Vol. X., pp. 10, 20, 21, 31, note (*p*), 32, 35, 37, 38, 135, 162, 164, 181, 189, 204, 205, 207, 209; ELECTIONS, Vol. XII., pp. 462, 469, 519; FRIENDLY SOCIETIES, Vol. XV., p. 191; HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 158, 239, 246; INJUNCTION, Vol. XVII., pp. 227—229, 234, 235, 271, 285; LIBEL AND SLANDER, Vol. XVIII., p. 740; LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 423; MAGISTRATES, Vol. XIX., pp. 557, 661; MINES, MINERALS, AND QUARRIES, Vol. XX., p. 602; NUISANCE, Vol. XXI., pp. 550 *et seq.*; PARLIAMENT, Vol. XXI., p. 659, note (*e*); REVENUE; WATERS AND WATERCOURSES.

is a necessary party (*m*), except (1) where the interference with the public right is at the same time a special interference with some private right (*n*), and (2) where the special damage is suffered over and above that suffered by the general public, though no special private right is also interfered with (*o*). In both of these excepted cases a plaintiff may sue without joining the Attorney-General. Where the Attorney-General is a necessary party the action is generally brought by him at the relation of the person or body who seeks to enforce the performance of the public duty or restrain the interference with the public right, such person or body being liable for costs (*p*). Leave must be obtained from the Attorney-General before the action is brought (*q*).

Recovery of land.

175. In an action for the recovery of land the proper plaintiff is the person in whom the legal estate is vested and who is entitled to possession of the land (*r*).

Equitable right.

176. In an action founded on an equitable right the proper plaintiff is the person who is interested in the relief which is claimed in the action (*s*).

(b) *Defendants.*

Defendants.

177. No person can be a defendant unless the plaintiff claims damages from him, or some relief or the enforcement of a right against him (*t*).

(*m*) *Watson* v. *Hythe Corporation* (1906), 22 T. L. R. 245; *Devonport Corporation* v. *Tozer*, [1903] 1 Ch. 759, C. A.; *Boyce* v. *Paddington Borough Council*, [1903] 2 Ch. 556, C. A.; *Tottenham Urban District Council* v. *Williamson & Sons*, [1896] 2 Q. B. 353, C. A.; *A.-G.* v. *Pontypridd Waterworks Co.*, [1908] 1 Ch. 388. The Attorney-General has no right to sue when the right which has been infringed is enjoyed by only a limited section of the public (*A.-G. and Spalding Rural Council* v. *Garner*, [1907] 2 K. B. 480).

(*n*) *Lyon* v. *Fishmongers' Co.* (1876), 1 App. Cas. 662; *Fritz* v. *Hobson* (1880), 14 Ch. D. 542; *Prestney* v. *Colchester Corporation and A.-G.* (1882), 21 Ch. D. 111; *A.-G.* v. *Logan*, [1891] 2 Q. B. 100; *Bedford (Duke)* v. *Ellis*, [1901] A. C. 1; *Marriott* v. *East Grinstead Gas and Water Co.*, [1909] 1 Ch. 70; compare *Jones* v. *Llanrwst Urban Council*, [1911] 1 Ch. 393.

(*o*) *Iveson* v. *Moore* (1699), 1 Ld. Raym. 486; *Benjamin* v. *Storr* (1874), L. R. 9 C. P. 400; *Winterbottom* v. *Derby (Lord)* (1867), L. R. 2 Exch. 316; *Boyce* v. *Paddington Borough Council*, [1903] 1 Ch. 109, *per* BUCKLEY, J., at p. 114. The London County Council may, without joining the Attorney-General, maintain an action against persons who interfere with the control or management of matters within its control or management (*London County Council* v. *South Metropolitan Gas Co.*, [1904] 1 Ch. 76, 86, C. A.).

(*p*) *A.-G.* v. *Scott*, [1905] 2 K. B. 160, C. A.; *A.-G. and Spalding Rural Council* v. *Garner*, *supra*, at p. 485; see also *Re Cardwell*, *A.-G.* v. *Day* (1912), 106 L. T. 753. The action is styled thus:—"The Attorney-General at the relation of . . . "; and the relator is not joined as a co-plaintiff unless he has a separate cause of action or there are special circumstances; see *A.-G.* v. *Barker* (1900), 83 L. T. 245. Claims by the Attorney-General and by the relator which are inconsistent with one another cannot be joined (*A.-G.* v. *Durham (Earl)* (1882), 46 L. T. 16).

(*q*) Application is made at the Law Officers' Department, Royal Courts of Justice.

(*r*) Cole, Law and Practice in Ejectment, pp. 66, 73; and see, further, title LANDLORD AND TENANT, Vol. XVIII., pp. 558, 559; REAL PROPERTY AND CHATTELS REAL.

(*s*) See Calvert, Parties to Suits in Equity, p. 109. As to the nature of equitable relief, see title EQUITY, Vol. XIII., pp. 1 *et seq.*

(*t*) *Deutsche National Bank* v. *Paul*, [1898] 1 Ch. 283; see *Wilson* v. *Church*

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Action of contract.

178. The proper defendant in an action of contract is the person who made the promise for the breach of which the action is brought, or the party who is liable for the contracts of such person or to whom the liability under the contract has passed (*u*).

When two or more persons are jointly liable under a contract, they should all be joined as co-defendants, and a defendant who is thus jointly liable, and who has been sued without such persons being joined, is entitled on application to have the action stayed until the other persons liable are joined as co-defendants (*v*).

Action of tort.

179. The proper defendant in an action of tort is the wrongdoer, or the person who is liable for the acts of the wrongdoer, or to whom the liability for the injury has passed (*x*).

If several persons jointly commit a tort, they may all be sued jointly for such tort, or any one or more of them may be sued separately, and if one of several wrongdoers is thus sued the plaintiff cannot be obliged to join any of the others as co-defendant (*a*).

Recovery of land.

180. In an action brought for the recovery of land, all the persons who are in possession should in general be joined as defendants (*b*).

Equitable right.

181. The proper defendant in an action brought to enforce an equitable right is the person against whom the relief claimed in the action is sought (*c*). In such action all persons whose presence before the court is necessary to enable it to give the relief sought should be made defendants (*d*).

(1878), 9 Ch. D. 552; *Mathias* v. *Yetts* (1882), 46 L. T. 497, 502, C. A.; *A.-G.* v. *Bermondsey Vestry* (1883), 23 Ch. D. 60, C. A.; *Burstall* v. *Beyfus* (1884), 26 Ch. D. 35, C. A.; *Moser* v. *Marsden*, [1892] 1 Ch. 487, C. A.; see *Vavasseur* v. *Krupp* (1878), 9 Ch. D. 351, C. A. As to an action for a merely declaratory judgment, see R. S. C., Ord. 25, r. 5; *West* v. *Gwynne*, [1911] 2 Ch. 1, C. A.; title JUDGMENTS AND ORDERS, Vol. XVIII., pp. 183, 184. As to such an action against the Attorney-General as representing the Crown, see *Dyson* v. *A.-G.*, [1911] 1 K. B. 410, C. A.

(*u*) As to joining a person as defendant who refuses to join as plaintiff, see note (*h*), p. 100, *ante*; p. 106, *post*.

(*v*) *Kendall* v. *Hamilton* (1879), 4 App. Cas. 504; *Pilley* v. *Robinson* (1888), 20 Q. B. D. 155; *Fardell Traction Haulage Co.* v. *Basset* (1898), 15 T. L. R. 204, C. A.; *Jones* v. *Hughes*, [1905] 1 Ch. 180, C. A.; *Young* v. *Cuthbert*, [1906] 1 Ch. 451; *Hammond* v. *Schofield*, [1891] 1 Q. B. 453. As to the effect when a co-defendant cannot be served, see *Wilson* v. *Balcarres Brook Steamship Co.*, [1893] 1 Q. B. 422, C. A. If the liability is joint and several, the persons liable can be sued separately (R. S. C., Ord. 16, r. 6). As to joinder of defendants by third party procedure, see pp. 162 *et seq.*, *post*.

(*x*) See titles AGENCY, Vol. I., pp. 211, 214; EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 312; HUSBAND AND WIFE, Vol. XVI., p. 436; MASTER AND SERVANT, Vol. XX., p. 248; NEGLIGENCE, Vol. XXI., p. 471; TORT.

(*a*) Bullen and Leake, Precedents of Pleading, 3rd ed., p. 708. As to the effect of judgment against one joint tortfeasor sued separately, see *Brinsmead* v. *Harrison* (1872), L. R. 7 C. P. 547; *The Seacombe, The Devonshire*, [1912] P. 21, C. A.; and see, further, titles LIBEL AND SLANDER, Vol. XVIII., p. 616, note (*a*); TORT.

(*b*) *Doe* d. *Darlington* (*Lord*) v. *Cock* (1825), 4 B. & C. 259; but see *Geen* v. *Herring*, [1905] 1 K. B. 152, C. A.

(*c*) *Deutsche National Bank* v. *Paul*, [1898] 1 Ch. 283.

(*d*) See Calvert, Parties to Suits in Equity, pp. 3, 67.

(ii.) *Representative Parties.*

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Representative parties.

182. Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorised by the court or a judge to defend, in such cause or matter, on behalf of or for the benefit of all persons so interested (*e*).

The court or a judge (*f*) has power to appoint one or more persons to represent an heir-at-law, customary heir, next of kin, or class, when it is not known or is difficult to ascertain who is or are such heir, next of kin, or class (*g*), and the judgment of the court or judge in the presence of the persons so appointed is binding upon the person or persons so represented (*h*).

If a deceased person who was interested in a matter has no legal personal representative, the court or a judge may appoint someone to represent his estate for all the purposes of the matter (*i*).

(*e*) R. S. C., Ord. 16, r. 9. It is not necessary that the persons suing should have or claim a beneficial proprietary right (*Bedford (Duke)* v. *Ellis*, [1901] A. C. 1 (disapproving *Temperton* v. *Russell*, [1893] 1 Q. B. 435); *Taff Vale Railway* v. *Amalgamated Society of Railway Servants*, [1901] A. C. 426, 443); *Mercer* v. *Denne*, [1905] 2 Ch. 538, C. A.; *London (City) Commissioners of Sewers* v. *Gellatly* (1876), 3 Ch. D. 610; and R. S. C., Ord. 16). For instances of plaintiffs suing on behalf of numerous persons having the same interest, see *De Hart* v. *Stevenson* (1876), 1 Q. B. D. 313; *Prestney* v. *Colchester Corporation and A.-G.* (1882), 21 Ch. D. 111; *Harrison* v. *Abergavenny (Marquis)* (1887), 3 T. L. R. 324; *Bedford (Duke)* v. *Ellis*, *supra*; *Wolff* v. *Van Boolen* (1906), 94 L. T. 502. As to the meaning of "persons having the same interest," see *Markt & Co., Ltd.* v. *Knight Steamship Co., Ltd.*, *Sale and Frazar* v. *Knight Steamship Co., Ltd.*, [1910] 2 K. B. 1021, C. A. It is not now necessary that a creditor who desires administration of the real estate of a person who died after the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), came into operation should sue on behalf of all the creditors (*Re James*, *James* v. *Jones*, [1911] 2 Ch. 348; and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 336). Defendants may be sued as representatives of a numerous class, but are not authorised to defend on behalf of all persons so interested, unless an order is made to that effect (*Fraser* v. *Cooper*, *Hall & Co.* (1882), 21 Ch. D. 718). For instances of an order made authorising defendants to defend on behalf of others, see *Wood* v. *McCarthy*, [1893] 1 Q. B. 775; *Tendring Union Guardians* v. *Dowton* (1890), 45 Ch. D. 583, 584. The order may be made even against the will of such defendants (*Wood* v. *McCarthy*, *supra*). As to the indorsement on a writ in the case of representative parties, see p. 110, *post*.

(*f*) In the Rules of the Supreme Court the words "court or a judge," which frequently occur, mean, in most cases, a master of the Supreme Court, but in matters in which a master has no jurisdiction (see p. 128, *post*) they mean a judge sitting in chambers or in open court; see *Baker* v. *Oakes* (1877), 2 Q. B. D. 171, 176, C. A.; *Re B.* (*an alleged Lunatic*), [1892] 1 Ch. 459, 463, C. A.; *Hartmont* v. *Foster* (1881), 8 Q. B. D. 82, 84, C. A.

(*g*) R. S. C., Ord. 16, r. 32 (a), (b); see *Re Peppitt's Estate*, *Chester* v. *Phillips* (1876), 4 Ch. D. 230; *Re Pringle*, *Walker* v. *Stewart* (1881), 17 Ch. D. 819; *Tucker* v. *Bennett* (1887), 38 Ch. D. 1, 5, C. A.; *Re Foster*, *Lloyd* v. *Carr* (1890), 45 Ch. D. 629, 630; *Re Andrew's Trust*, *Carter* v. *Andrew*, [1905] 2 Ch. 48, 54; *May* v. *Newton* (1887), 34 Ch. D. 347, 354; *Re Davies*, *Jenkins* v. *Davies* (1891), 64 L. T. 824. An order is not made under this rule appointing someone to represent a class which is necessarily unascertained, *e.g.*, the next of kin of a living person (*Fussell* v. *Dowding* (1884), 27 Ch. D. 237, 240; *Re Whiting's Settlement*, *Whiting* v. *De Rutzen*, [1905] 1 Ch. 96, 100)

(*h*) An order appointing a person to represent a class does not affect one of the class who has an independent interest (*Re Lart*, *Wilkinson* v. *Blades*, [1896] 2 Ch. 788, 793).

(*i*) R. S. C., Ord. 16, r. 46; see *Wingrove* v. *Thompson* (1879), 11 Ch. D. 419; *Re Mabbett*, *Pitman* v. *Holborrow*, [1891] 1 Ch. 710; *Aylward* v. *Lewis*, [1891] 2 Ch. 81.

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In all actions for the prevention of waste or otherwise for the protection of property one person may sue on behalf of himself and all persons having the same interest (*k*).

(iii.) *Joinder of Parties.*

Joinder of plaintiff.

183. All persons may be joined as plaintiffs in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly or severally or in the alternative, where, if such persons brought separate actions, any common question of law or fact would arise (*l*).

Defendants.

184. All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative (*m*).

(*k*) R. S. C., Ord. 16, r. 37.

(*l*) *Ibid.*, r. 1. This rule was altered to its present form in 1896 to meet the decision in *Smurthwaite* v. *Hannay*, [1894] A. C. 494. The cases before the alteration of the rule can no longer be regarded as authorities on the question of joinder of plaintiffs. Plaintiffs who have separate causes of action, and who might sue in separate actions, may join in one action if there is a common ground of action; see *Drincqbier* v. *Wood*, [1899] 1 Ch. 393; *Walters* v. *Green*, [1899] 2 Ch. 696; *Oxford and Cambridge Universities* v. *Gill (George) & Sons*, [1899] 1 Ch. 55; see *Ayscough* v. *Bullar* (1889), 41 Ch. D. 341; *Bedford (Duke)* v. *Ellis*, [1901] A. C. 1; *Stroud* v. *Lawson*, [1898] 2 Q. B. 44. The old rule in Chancery practice that persons who had opposite interests could not join as co-plaintiffs (see *Cholmondeley (Marquis)* v. *Clinton (Lord)* (1821), 4 Bli. 1, 123; *Fulham* v. *McCarthy* (1848), 1 H. L. Cas. 703) no longer holds good (see R. S. C., Ord. 16, r. 1). But the old rule, that plaintiffs must act together, remains; they must all appear by one solicitor and one set of counsel, and cannot sever (*Brown* v. *Sawer* (1841), 3 Beav. 598; see *Re Wright, Kirke* v. *North*, [1895] 2 Ch. 747); nor can any issue between co-plaintiffs be tried in an action (*Fulham* v. *McCarthy*, *supra*). If persons who should join as plaintiffs do not concur in suing or have done any act which precludes them from suing, they should be made defendants (*Wilson* v. *Church* (1878), 9 Ch. D. 552; *Luke* v. *South Kensington Hotel Co.* (1879), 11 Ch. D. 121, C. A.). A co-plaintiff cannot as of right withdraw from an action and have his name struck out; if co-plaintiffs differ, the proper course is to obtain an order to strike out the name of the dissentient and add him as a defendant (*Re Mathews, Oates* v. *Mooney*, [1905] 2 Ch. 460). As to the addition of a necessary infant party, see title INFANTS AND CHILDREN, Vol. XVII., p. 140.

(*m*) R. S. C., Ord. 16, rr. 4, 6. For instances of proper joinder, see *Compania Sansinena de Carnes Congeladas* v. *Houlder Brothers & Co., Ltd.*, [1910] 2 K. B. 354, C. A. (action for damages for unseaworthiness of a ship, where plaintiffs sued the person who contracted to carry the goods and placed them in the ship, and also the owner of the ship); *Bennetts* v. *McIlwraith*, [1896] 2 Q. B. 464, C. A. (action against agents for breach of warranty of authority where the plaintiffs were allowed to sue the alleged principals as co-defendants); see *Massey* v. *Heynes* (1888), 21 Q. B. D. 330, C. A.; *O'Keeffe* v. *Walsh*, [1903] 2 I. R. 681, C. A. (several defendants jointly sued for an illegal conspiracy, although they joined the conspiracy at different times); *Kent Coal Exploration Co.* v. *Martin* (1900), 16 T. L. R. 486, C. A. (cause of action for conspiracy against all the defendants (promoters and directors of a company) joined with cause of action against some of the defendants for breach of duty as directors); *Frankenburg* v. *Great Horseless Carriage Co.*, [1900] 1 Q. B. 504, C. A. (action for damages against directors of a company for misrepresentation, contained in a prospectus, joined with an action against the company for rescission of a contract to take shares); *Dessilla* v. *Schunck & Co. and Fels & Co.*, [1880] W. N. 96 (defendants who had published different libels of the plaintiff, but in the same place, of the same class, and to the same purport); *Tritton* v. *Bankart* (1887), 35 W. R. 474 (action for breach of contract against lessee and sub-lessee); *Shafto* v. *Bolckow, Vaughan & Co.* (1887), 34 Ch. D. 725 (action by copyholders to restrain a person working coal, the lord of the manor being joined as co-defendant); *Child* v. *Stenning* (1877), 5 Ch. D. 695, C. A. (grantor

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185. No cause or matter can be defeated by reason of the misjoinder or nonjoinder of parties. The court or a judge may at any stage of the proceedings order that the names of parties improperly joined be struck out, and that the names of any parties be added who ought to have been joined, or whose presence before the court may be necessary to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter (*n*).

Effect of misjoinder or nonjoinder.

The court or a judge has also power to substitute or add another person as plaintiff where an action has, through a *bonâ fide* mistake, been commenced in a wrong name, or where it is doubtful whether it has been commenced in the name of the right plaintiff (*o*).

Action commenced in wrong name.

of alleged right of way joined as co-defendant with the person who claimed under him); *Honduras Rail. Co.* v. *Tucker* (1877), 2 Ex. D. 301, C. A. (principal and agent sued in the alternative); *Re Lovett. Ambler* v. *Lindsay* (1876), 3 Ch. D. 198 (executors who had not proved joined with executors *de son tort*); *Taylor* v. *Denny, Mott, and Dickson*, [1912] W. N. 186, H. L. (arbitrator). For instances of misjoinder, see *Greenwood* v. *Greenwood* (1909), 100 L. T. 68 (action against the vendee of partnership property, for money due to the plaintiff in respect of the sale, improperly joined with action for breach of duty against an agent, and negligence in selling the business); *Pope* v. *Hawtrey* (1901), 85 L. T. 263, C. A. (action against one defendant for an alleged slander spoken on one occasion, and against another defendant for another slander spoken on another occasion and in respect of an alleged conspiracy to dismiss plaintiff from his employment, improperly joined together); *Taylor* v. *Cambridge Gazette Co., Ltd.* (1899), 43 Sol. Jo. 604 (independent torts); *Thompson* v. *London County Council*, [1899] 1 Q. B. 840 (separate tortfeasors); *Gower* v. *Couldridge*, [1898] 1 Q. B. 348, C. A. (claim for tort against some defendants improperly joined with claim in respect of a different tort against all); *Sadler* v. *Great Western Rail. Co.*, [1896] A. C. 450 (claim for damages against two or more defendants in respect of their separate liability for torts); *Burstall* v. *Beyfus* (1884), 26 Ch. D. 35, C. A. (defendant against whom there is no common cause of action ought not to be joined); *A.-G.* v. *Bermondsey Vestry* (1883), 23 Ch. D. 60, C. A. (in an action against a public body to restrain improper expenditure of public money voted by it, the members of the body who voted for the expenditure are not proper defendants); and see title PLEADING, Vol. XXII., p. 444. As to costs, see *Bullock* v. *London General Omnibus Co.*, [1907] 1 K. B. 264, C. A.; *Mullen* v. *London County Council* (1906), 51 Sol. Jo. 82; *Sanderson* v. *Blyth Theatre Co.*, [1903] 2 K. B. 533, C. A.; *Beaumont* v. *Senior*, [1903] 1 K. B. 282; see also title GUARANTEE, Vol. XV., p. 504 (parties to guarantee).

(*n*) R. S. C., Ord. 16, r. 11. As to necessary and proper parties, see p. 99, *ante*. The application to amend should be made at the earliest possible moment (*Vallance* v. *Birmingham and Midland Land and Investment Corporation* (1876), 2 Ch. D. 369, 372; *Sheehan* v. *Great Eastern Rail. Co.* (1880), 16 Ch. D. 59), either before or at the trial (R. S. C., Ord. 16, r. 12). But the necessary amendment can be made at any time, *e.g.*, after judgment, if damages have still to be assessed (*The Duke of Buccleuch*, [1892] P. 201, 211, 212, C. A.) or the judgment has not been drawn up (*Keith* v. *Butcher* (1884), 25 Ch. D. 750), but not generally after final judgment (*Bullock* v. *London General Omnibus Co.*, [1907] 1 K. B. 264, C. A.; *A.-G. and Spalding Rural Council* v. *Garner*, [1907] 2 K. B. 480, 487; *Hammond* v. *Schofield*, [1891] 1 Q. B. 453; *A.-G.* v. *Birmingham Corporation* (1880), 15 Ch. D. 423, C. A.; *Munster* v. *Cox* (1885), 10 App. Cas. 680; but see *Campbell* v. *Holyland* (1877), 7 Ch. D. 166; *Jacques* v. *Harrison* (1884), 12 Q. B. D. 165, C. A.). A person whose name has been improperly used as plaintiff can obtain an order to strike out his name, notwithstanding that notice of discontinuance has been given (*Gold Reefs of Western Australia, Ltd.* v. *Dawson*, [1897] 1 Ch. 115). An application for alteration of parties should not be made *ex parte* (*Tildesley* v. *Harper* (1876), 3 Ch. D. 277), except under R. S. C., Ord. 17, r. 4. As to costs, see *Lydall* v. *Martinson* (1877), 5 Ch. D. 780; *Bolton* v. *Salmon*, [1891] 2 Ch. 48.

(*o*) R. S. C., Ord. 16, r. 2, which must be read with *ibid.*, r. 11 (*The Duke*

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of Buccleuch, [1892] P. 201, C. A.); see the text, p. 105, *ante*. Instances of the substitution or addition of a plaintiff are as follows:—In *The Duke of Buccleuch*, [1892] P. 201, C. A., which was an action for damages for collision, the name of the agent instead of that of the owner of the cargo was inserted as co-plaintiff; the name of the owner of the cargo was substituted for that of the agent as plaintiff. In *The Charlotte*, [1908] P. 206, C. A., a similar action, the buyers of the goods sued as plaintiffs, but as the court held that they had no cause of action, the sellers were substituted as plaintiffs. In *A.-G.* v. *Pontypridd Waterworks Co.*, [1908] 1 Ch. 388, the Attorney-General was added as plaintiff. In *Hughes* v. *Pump House Hotel Co.* (No. 2), [1902] 2 K. B. 485, C. A., the assignee of a debt was substituted as plaintiff for the assignor. In *Cupples* v. *Strahan* (1892), 29 L. R. Ir. 120, C. A., the owner of the legal estate was added as a plaintiff in an action to restrain the flooding of land. In *Showell* v. *Winkup* (1889), 60 L. T. 389, a company which had acquired the business of the plaintiff company was added as co-plaintiff, in an action to prevent a person who had entered into the plaintiff company's service breaking his agreement. In *Ayscough* v. *Bullar* (1889), 41 Ch. D. 341, the plaintiff was allowed to join as co-plaintiff the owner of a neighbouring house in an action for breach of a covenant to the benefit of which both houses were entitled. In *Hoare & Co.* v. *Baker* (1887), 4 T. L. R. 26, the trustee in bankruptcy of one of the plaintiffs was substituted as plaintiff. In *Emden* v. *Carte* (1881), 17 Ch. D. 768, C. A., the trustee in bankruptcy of the plaintiff was added as a co-plaintiff. In *Dix* v. *Great Western Rail. Co.* (1886), 34 W. R. 712, where a plaintiff, who was entitled to the benefit of a covenant between defendant and the plaintiff and two other joint covenantees, sued alone, the other joint covenantees were added as plaintiffs on the application of the defendant. In *House Property and Investment Co.* v. *H. P. Horse Nail Co.* (1885), 29 Ch. D. 190, new tenants of houses were added as co-plaintiffs in an action brought in respect of a nuisance from noise. In *Duckett* v. *Gover* (1877), 6 Ch. D. 82, in an action in which a shareholder sued in respect of a cause of action on which only the company could sue, the company was added as a plaintiff. In *Long* v. *Crossley* (1879), 13 Ch. D. 388, remaindermen were added as co-plaintiffs with the executors of a deceased tenant for life. In the following cases leave to add or substitute a plaintiff was refused:—In *De Hart* v. *Stevenson* (1876), 1 Q. B. D. 313, which was an action brought by the plaintiff on behalf of himself and the other owners of a ship, the court refused the application of the defendants to add the names of the other owners as plaintiffs. In *Dalton* v. *St. Mary Abbotts, Kensington, Guardians* (1882), 47 L. T. 349, which was an action for a private nuisance, the court refused to allow another owner of property to be substituted as plaintiff. In *Hall* v. *Heward* (1886), 32 Ch. D. 430, C. A., which was an action for the redemption of a mortgage, the heir of the mortgagor not being known, the court refused to delay making a decree till he was ascertained and added as a party. If at the time of the proposed amendment the rights of the plaintiff whom it is desired to add are barred by a Statute of Limitations, the amendment is not made without saving the defendant's rights under the statute (*Hudson* v. *Fernyhough* (1890), 32 Sol. Jo. 228; and compare *Challinor* v. *Roder* (1885), 1 T. L. R. 527); and see title LIMITATION OF ACTIONS, Vol. XIX., pp. 188, 189. A person cannot be added or substituted as plaintiff without his consent in writing, signed by himself personally (*Tryon* v. *National Provident Institution* (1886), 16 Q. B. D. 678; *The Duke of Buccleuch*, *supra*; *Fricker* v. *Van Grutten*, [1896] 2 Ch. 649, C. A.; *Besley* v. *Besley* (1888), 37 Ch. D. 648; *Jackson* v. *Kruger* (1885), 52 L. T. 962). It is a matter for the discretion of the court whether the action should be stayed, in order that the consent of the proposed plaintiff may be obtained, or should be allowed to proceed (*Roberts* v. *Holland*, [1893] 1 Q. B. 665, 669; *Jackson* v. *Kruger*, *supra*). If the person refuses to consent and his presence before the court is necessary, he may be made a defendant; a person can be added or substituted as defendant without his consent (*Cullen* v. *Knowles*, [1898] 2 Q. B. 380; *Van Gelder, Apsimon & Co.* v. *Sowerby Bridge United District Flour Society* (1890), 44 Ch. D. 374, C. A.); and see note (*h*), p. 100, *ante*, note (*l*), p. 104, *ante*. For instances of the adding of defendants, see *Montgomery* v. *Foy, Morgan & Co.*, [1895] 2 Q. B. 321, C. A.; *Howden* v. *Yorkshire Miners' Association*, [1903] 1 K. B. 308, C. A.; *Bennetts* v. *McIlwraith*, [1896] 2 Q. B. 464, C. A.; *Byrne* v. *Brown* (1889), 22 Q. B. D. 657, C. A.; *Wilson* v. *Church* (1878), 9 Ch. D. 552; *Vavasseur* v. *Krupp* (1878), 9 Ch. D. 351, C. A.; *Apollinaris Co.* v. *Wilson* (1886), 3 Ch. D. 632, C. A. For an instance of the

(iv.) *Change of Parties.*

No abatement where cause of action survives.

186. If any party to an action dies (*p*) or becomes bankrupt (*q*), or his estate devolves on another person by operation of law, and the cause of action is one which survives or continues, the action is not abated (*r*), but the court or a judge may, if it is deemed necessary for the complete settlement of all the questions involved, order the personal representative, trustee or other successor in interest to be made a party or served with notice (*s*).

Addition of party.

Order to carry on proceedings.

187. If any change or transmission of interest or liability takes place by reason of death, bankruptcy, or any other event occurring after the commencement of an action or by reason of any person coming into existence after the commencement of the action, and it becomes desirable that any person not already a party should be made a party or that any person should be made a party in another capacity, an order for the carrying on of the proceedings between the continuing parties and such new party may be obtained *ex parte* on application to the court or a judge (*t*).

Effect of assignment.

188. An action does not become defective by the assignment, creation, or devolution of any estate or title *pendente lite*, but may be continued by or against the person to or upon whom the estate or title has come or devolved (*a*).

substitution of one person as defendant for another person, see *Bolingbroke (Lord)* v. *Townsend* (1873), 29 L. T. 430. For instances of refusal to add defendants, see *McCheane* v. *Gyles* (No. 2), [1902] 1 Ch. 911; *Raleigh* v. *Goschen*, [1898] 1 Ch. 73; *Farnham* v. *Milward & Co.*, [1895] 2 Ch. 730; *Robinson* v. *Geisel*, [1894] 2 Q. B. 685, C. A.; *Wilson, Sons & Co.* v. *Balcarres Brook Steamship Co.*, [1893] 1 Q. B. 422, C. A.; *The Germanic*, [1896] P. 84, C. A.; *Moser* v. *Marsden*, [1892] 1 Ch. 487, C. A.; *Harry* v. *Davey* (1876), 2 Ch. D. 721. As to striking out a plaintiff, see *Re Mathews, Oates* v. *Mooney*, [1905] 2 Ch. 460, and a defendant, *Bainbridge* v. *Postmaster-General*, [1906] 1 K. B. 178, C. A.; *Sadler* v. *Great Western Rail. Co.*, [1896] A. C. 450; *Wilson* v. *Church* (1878), 9 Ch. D. 552; *Vallance* v. *Birmingham and Midland Land and Investment Corporation* (1876), 2 Ch. D. 369, 372; *Wymer* v. *Dodds* (1879), 11 Ch. D. 436.

(*p*) See, further, p. 108, *post*.

(*q*) See title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 164.

(*r*) R. S. C., Ord. 17, r. 1.

(*s*) *Ibid.*, r. 2.

(*t*) *Ibid.*, r. 4; and see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 61 *et seq.* The rule also provides for the change of interest etc. on marriage, as to which see title HUSBAND AND WIFE, Vol. XVI., pp. 453, 454. The order may be made at any time, while the action is pending (see *Salt* v. *Cooper* (1880), 16 Ch. D. 544, C. A.), but will not generally be made after final judgment (*A.-G.* v. *Birmingham Corporation* (1880), 15 Ch. D. 423, C. A.; *Jay* v. *Johnstone*, [1893] 1 Q. B. 25, 189, C. A.); although it may be made after judgment, if it is necessary or desirable for the purpose of "working out" the judgment or of appealing from it (*Twycross* v. *Grant* (1878), 4 C. P. D. 40, C. A.; *Blakeway* v. *Patteshall*, [1894] 1 Q. B. 247; *Ranson* v. *Patton* (1881), 17 Ch. D. 767, C. A.; *Collings* v. *Wade*, [1903] 1 I. R. 89; *Re Clements, Ex parte Clements*, [1901] 1 K. B. 260); but if the order is applied for in order to appeal, it will not be granted after the expiration of the time limited for appealing (*Fussell* v. *Dowding* (1884), 27 Ch. D. 241). It is a matter for the discretion of the court whether the order should or should not be made (*ibid.*; *Arnison* v. *Smith* (1889), 40 Ch. D. 567, C. A.). In the Chancery Division the application to add plaintiffs should be by motion or petition of course, and in the case of the death of some of the plaintiffs the consent of the remaining plaintiffs on the record must be obtained (*Pennington* v. *Caley* (1912), 106 L. T. 591).

(*a*) R. S. C., Ord. 17, rr. 1. 3. For instances of an order to add the

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Effect of death.

189. If a party to an action dies and the cause of action survives, the legal personal representative, devisee, or heir of the deceased party may, according to the nature of the action, be added as a party (*b*).

If the party who dies has no legal personal representative, the action may, with the leave of the court or a judge, proceed in the absence of such representative if there are other parties on the same side of the record as the deceased person, or some person may be appointed to represent his estate (*c*).

SUB-SECT. 3.—*Joinder and Separation of Causes of Action.*

Joinder of causes of action.

190. Subject to certain specified exceptions (*d*), a plaintiff may unite in the same action several causes of action (*e*).

assignee of the plaintiff's interest as co-plaintiff, see *Seear* v. *Lawson* (1880), 15 Ch. D. 426, C. A.; *Guy* v. *Churchill* (1888), 40 Ch. D. 481; *Wallis* v. *Smith* (1882), 46 L. T. 473. For instances of the joinder of the assignee as co-defendant, see *Kino* v. *Rudkin* (1877), 6 Ch. D. 160; *Re Parbola, Ltd., Blackburn* v. *Parbola, Ltd.*, [1909] 2 Ch. 437; *Campbell* v. *Holyland* (1877), 7 Ch. D. 166. As to assignment of choses in action, see title CHOSES IN ACTION, Vol. IV., pp. 365 *et seq.* For instances of a change or transmission of interest or liability, see *Peter* v. *Thomas-Peter* (1884), 26 Ch. D. 181; *Re Goold, Goold* v. *Goold* (1884), 51 L. T. 417; *Jamaica Rail. Co.* v. *Colonial Bank*, [1905] 1 Ch. 677, C. A. As to service of an order to continue an action where there has been a change of parties, see R. S. C., Ord. 17, r. 5. As to application to discharge the order, see *ibid.*, rr. 6, 7. As to the procedure where the person entitled fails to proceed, see *ibid.*, r. 8.

(*b*) *Ibid.*, rr. 1, 2, 4. As to when the cause of action survives, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 224, 305, 312. Whether the cause of action survives or not, there is no abatement by reason of the death of either party between the verdict or finding of the issues of fact and the judgment (R. S. C., Ord. 17, r. 1). For instances of orders adding legal personal representatives on the death of the plaintiff, see *Jones* v. *Simes* (1890), 43 Ch. D. 607; *Sellors* v. *Goode* (1892), 30 L. R. Ir. 298; *Peebles* v. *Oswaldtwistle Urban District Council*, [1896] 2 Q. B. 159, C. A.; *Oakey* v. *Dalton* (1887), 35 Ch. D. 700; *Hatchard* v. *Mège* (1887), 18 Q. B. D. 771; *Twycross* v. *Grant* (1878), 4 C. P. D. 40, C. A. As to similar orders on the death of the defendant, see *Costa Rica Rail Co., Ltd.* v. *Forwood*, [1900] 1 Ch. 756; *Sellors* v. *Goode, supra*; *Ramskill* v. *Edwards* (1885), 31 Ch. D. 100; *Johnston* v. *English* (1886), 35 W. R. 29; *Wilson* v. *Brewster* (1884), 28 Sol. Jo. 672; *Collings* v. *Wade*, [1903] 1 I. R. 89. As to adding a remainderman on the death of a tenant for life who was plaintiff, see *Cupples* v. *Strahan* (1892), 29 L. R. Ir. 120, C. A.; *Irving* v. *Pearson* (1868), 18 L. T. 283; *Howard* v. *Howard* (1892), 30 L. R. Ir. 340; *Ferrall* v. *Curran*, [1899] 2 I. R. 470. As to continuing a counterclaim, see *Andrew* v. *Aitken* (1882), 21 Ch. D. 175. For instances where the action cannot be continued by or against personal representatives, see *Jay* v. *Johnstone*, [1893] 1 Q. B. 25, 189, C. A.; *Kirk* v. *Todd* (1882), 21 Ch. D. 484, C. A.; *Phillips* v. *Homfray* (1883), 24 Ch. D. 439, C. A.; *Chapman* v. *Day* (1883), 49 L. T. 436, C. A.; *Davoren* v. *Wootton*, [1900] 1 I. R. 273, C. A.; see *Ashley* v. *Taylor* (1878), 10 Ch. D. 768. As to a foreign executor, see *Morrice* v. *Smart* (1882), 26 Sol. Jo. 752 (correcting *Jameson* v. *Marshall* (1882), 46 L. T. 480). The executor of an executor who has not proved cannot be made a party (*Willcocks* v. *Doughty* (1892), 29 L. R. Ir. 17).

(*c*) R. S. C., Ord. 16, r. 46; see *Crossley* v. *City of Glasgow Life Assurance Co.* (1876), 4 Ch. D. 427; *Webster* v. *British Empire Mutual Life Assurance Co.* (1880), 15 Ch. D. 169, C. A.; *Curtius* v. *Caledonian Fire and Life Insurance Co.* (1881), 19 Ch. D. 534, C. A.; *Hibernian Joint Stock Co.* v. *Fottrell* (1884), 13 L. R. Ir. 335; see p. 103, *ante*.

(*d*) See p. 109, *post*.

(*e*) R. S. C., Ord. 18, r. 1. As to separate trials, see *ibid.*, rr. 8, 9, and *Saccharin Corporation, Ltd.* v. *Wild*, [1903] 1 Ch. 410, C. A. See also R. S. C., Ord. 16, r. 1, and p. 104, *ante*. As to joinder of several causes of action by one plaintiff against one defendant, see *Saccharin Corporation, Ltd.* v. *Wild, supra*;

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191. No cause of action can, unless by the leave of the court or a judge, be joined with an action for the recovery of land, except claims in respect of mesne profits, or arrears of rent, or double value in respect of the premises claimed, or any part thereof, and damages for breach of any contract under which the land or part of it is held, or for any injury to the premises claimed (*f*).

Recovery of land.

SUB-SECT. 4.—*Writ of Summons.*

(i.) *Issue.*

192. A writ of summons (*g*) can only be issued by a plaintiff in person or by his solicitor (*h*). It must be prepared by the plaintiff or his solicitor in a specified form, with such variations as circumstances require (*i*), and presented to the proper officer

Issue of writ.

Form.

Child v. *Stenning* (1877), 5 Ch. D. 695, C. A.; *Bagot* v. *Easton* (1877), 7 Ch. D. 1. As to joining different causes of action against different defendants, see *Thompson* v. *London County Council*, [1899] 1 Q. B. 840; *Sadler* v. *Great Western Rail. Co.*, [1896] A. C. 450; *Gower* v. *Couldridge*, [1898] 1 Q. B. 348, C. A.; *Kent Coal Exploration Co.* v. *Martin* (1900), 16 T. L. R. 486, C. A.; *Pope* v. *Hawtrey* (1901), 85 L. T. 263, C. A.; *Bullock* v. *London General Omnibus Co.*, [1907] 1 K. B. 264, C. A.; *Bennetts* v. *McIlwraith*, [1896] 2 Q. B. 464, C. A.; *Honduras Rail. Co.* v. *Tucker* (1877), 2 Ex. D. 301, C. A.; *Massey* v. *Heynes* (1888), 21 Q. B. D. 330, C. A.; *Sandreson* v. *Blyth Theatre Co.*, [1903] 2 K. B. 533, C. A.; *O'Keeffe* v. *Walsh*, [1903] 2 I. R. 681, C. A. As to joinder of separate causes of action by different plaintiffs, see p. 104, *ante*. As to joinder of claims by plaintiffs jointly with claims by any of them separately against the same defendant, see R. S. C., Ord. 18, r. 6; *Re Wright, Kirke* v. *North*, [1895] 2 Ch. 747, 749; of claims by or against husband and wife with claims by or against either of them separately, see R. S. C., Ord. 18, r. 4; of claims by or against an executor or administrator as such with claims by or against him personally, see R. S. C., Ord. 18, r. 5; of claims by a trustee in bankruptcy with any claim by him in any other capacity, see R. S. C., Ord. 18, r. 3.

(*f*) R. S. C., Ord. 18, r. 2; see title PLEADING, Vol. XXII., p. 444; *Gledhill* v. *Hunter* (1880), 14 Ch. D. 492; *Norwich Corporation* v. *Brown* (1883), 48 L. T. 898; *Tawell* v. *Slate Co.* (1876), 3 Ch. D. 629; *Dunlop* v. *Macedo* (1891), 8 T. L. R. 43; *Southport Tramways Co.* v. *Gandy*, [1897] 2 Q. B. 66, C. A.; *Cook* v. *Enchmarch* (1876), 2 Ch. D. 111; *Kitching* v. *Kitching* (1876), 24 W. R. 901; *Hambling* v. *Wallani*, [1889] W. N. 133; *Allen* v. *Kennet* (1876), 24 W. R. 845; *Foxwell* v. *Van Grutten*, [1897] 1 Ch. 64, C. A.; *Rushbrooke* v. *Farley* (1885), 52 L. T. 572; *Dennis* v. *Crompton*, [1882] W. N. 121; *Brandreth* v. *Shears*, [1883] W. N. 89; *Kendrick* v. *Roberts* (1882), 30 W. R. 365; *Hunt* v. *Worsfold*, [1896] 2 Ch. 224; *Phillips* v. *Phillips* (1900), 44 Sol. Jo. 551; *Compton* v *Preston* (1882), 21 Ch. D. 138; *Clark* v. *Wray* (1885), 31 Ch. D. 68; *Lloyd* v. *Great Western Dairies Co.*, [1907] 2 K. B. 727, C. A.; *Musgrave* v. *Stevens*, [1881] W. N. 163, C. A.; *Re Pilcher, Pilcher* v. *Hinds* (1879), 11 Ch. D. 905, C. A.; *Wilmott* v. *Freehold House Property Co.* (1884), 51 L. T. 552, C. A.; *Moore* v. *Ullcoats Mining Co.*, [1908] W. N. 35; *Re Derbon, Derbon* v. *Colles* (1888), 58 L. T. 519; and see titles LANDLORD AND TENANT, Vol. XVIII., pp. 558, 559; REAL PROPERTY AND CHATTELS REAL.

(*g*) As to old and modern forms of action and obsolete writs, see title ACTION, Vol. I., pp. 31 *et seq.*

(*h*) As to the issue of a writ by the next friend of a person under disability, see titles INFANTS AND CHILDREN, Vol. XVII., pp. 133 *et seq.*; LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 462 *et seq.*

(*i*) R. S. C., Ord. 2, r. 3; App. A, Part I., Forms: Nos. 1, general form; 2, specially indorsed writ; 3, ordinary form for issue from district registry; 4, specially indorsed writ for issue from district registry; see Yearly Practice of the Supreme Court, 1912, pp. 1901—1903. The division in which the action is brought is specified by an entry in the left-hand corner of the writ, *e.g.*, "In the High Court of Justice," and underneath "King's Bench" (or "Chancery")

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for sealing. When sealed by the proper officer it is deemed to be issued (*j*).

A writ of summons may be issued out of the Central Office of the Supreme Court or out of any district registry (*k*).

The issue of the writ is the act of the party, and is not a judicial act (*l*).

(ii.) *Indorsement of Claim.*

Indorsement in general.

193. Every writ of summons must, before it is issued, be indorsed with a statement of the nature of the claim made, or of the relief or remedy required, in the action (*m*).

Representative capacity.

If the plaintiff sues or any defendant is sued in a representative capacity, the indorsement must show in what capacity the plaintiff or defendant sues or is sued (*n*).

Claim for account.

If the plaintiff, in the first instance, desires to have an account taken, the claim for an account must appear on the indorsement (*o*).

Classification.

There are two kinds of indorsement of claim, ordinary indorsement and special indorsement.

Ordinary indorsement.

194. An ordinary indorsement indicates the nature of the claim generally; a fuller statement is given in the statement of claim (*p*).

Division (R. S. C., Ord. 5, r. 5). As to the record of the title of the action, see *ibid.*, Ord. 5, r. 13; Ord. 61, r. 19. As to the description of the parties, see Practice Masters' Rules, r. 5, and *Re Poinons, Sutton* v. *Martin*, [1891] W. N. 139; *Tofield* v. *Roberts*, [1894] W. N. 74. As to the date and testing of the writ, see R. S. C., Ord. 2, r. 8; *McNay* v. *Alt* (1892), 66 L. T. 832; *Pleasants* v. *East Dereham Local Board* (1882), 47 L. T. 439; *Wesson Brothers* v. *Stalker* (1882), 47 L. T. 444. As to alteration of date, see p. 139, *post*.

(*j*) R. S. C., Ord. 5, rr. 10, 11. The plaintiff or his solicitor, on presenting any writ of summons for sealing, must leave with the proper officer a copy of the writ and all the indorsements thereon, and such copy must be signed by or for the solicitor leaving it, or by the plaintiff himself, if he sues in person (R. S. C., Ord. 5, r. 12). The copy is filed by the officer who receives it, and an entry of the filing is made in the cause book, the action being distinguished by the date of the year, a letter, and a number, and, if commenced in a district registry, by the name of the registry (R. S. C., Ord. 5, r. 13).

(*k*) *Ibid.*, Ord. 5, rr. 1, 2. As to district registries, see Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 60—65; title COURTS, Vol. IX., pp. 69, 71; as to the Central Office, see R. S. C., Ord. 61.

(*l*) *Clarke* v. *Bradlaugh* (1881), 8 Q. B. D. 63, 68; *Warne* v. *Lawrence* (1886), 54 L. T. 371; see title PUBLIC AUTHORITIES AND PUBLIC OFFICERS. Leave of the court is required for the issue of a writ for service out of the jurisdiction (R. S. C., Ord. 2, r. 4); see also p. 101, *ante*, p. 112, *post;* as to the preparation of a writ, see R. S. C., Ord. 5, r. 10; as to the fee for sealing (10*s*.), see Order as to Supreme Court Fees, 1884, Yearly Practice of the Supreme Court, 1912, p. 1759.

(*m*) R. S. C., Ord. 2, r. 1; Ord. 3, r. 1.

(*n*) *Ibid.*, Ord. 3, r. 4; see *ibid.*, App. A, Part III., s. 7, Forms, Yearly Practice of the Supreme Court, 1912, p. 1926; *Worraker* v. *Pryer* (1876), 2 Ch. D. 109; *Re Royle, Fryer* v. *Royle* (1877), 5 Ch. D. 540; *Re Tottenham, Tottenham* v. *Tottenham*, [1896] 1 Ch. 628; *Re Blount, Nayler* v. *Blount* (1879), 27 W. R. 865; *Re Greaves, Deceased, Bray* v. *Tofield* (1881), 18 Ch. D. 551, 554; as to representative parties, see p. 103, *ante*.

(*o*) R. S. C., Ord. 3, r. 8; see *ibid.*, App. A, Part III., s. 1, Form; Ord. 15, r. 1.

(*p*) As to forms of ordinary indorsement, see *ibid.*, App. A, Part III. As to the statement of claim, see title PLEADING, Vol. XXII., pp. 440 *et seq.*

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If a plaintiff in a case which does not admit of a special indorsement (*q*) wishes to proceed to trial without pleadings, the indorsement of the writ must contain a statement sufficient to give notice of the nature of his claim and must state that, if the defendant appears, the plaintiff intends to proceed to trial without pleadings (*r*).

Special indorsement.

195. The plaintiff may specially indorse the writ of summons with a statement of his claim or of the remedy or relief to which he claims to be entitled (*s*), when he seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest (*t*), arising in any of the following ways:—

(1) upon a contract, express or implied, for example, on a bill of exchange, promissory note or cheque, or other simple contract debt (*u*);

(2) on a bond or contract under seal for payment of a liquidated amount of money (*v*);

(3) on a statute, where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty;

(4) on a guarantee, whether under seal or not, where the claim

(*q*) As to special indorsement, see the text, *infra*.

(*r*) R. S. C., Ord. 18A, r. 1.

(*s*) As to what is a sufficient statement, see *Fruhauf* v. *Grosvenor* (1892), 67 L. T. 350; *Satchwell* v. *Clarke* (1892), 66 L. T. 641, C. A.; *Bradley* v. *Chamberlyn*, [1893] 1 Q. B. 439; *Bickers* v. *Speight* (1888), 22 Q. B. D. 7; *Hanmer* v. *Clifton*, [1894] 1 Q. B. 238; *Smith* v. *Wilson* (1879), 5 C. P. D., C. A.; *Aston* v. *Hurwitz* (1879), 41 L. T. 521; *Walker* v. *Hicks* (1877), 3 Q. B. D. 8.

(*t*) The interest must be due under a contract or a statute; a claim for interest by way of unliquidated damages cannot be specially indorsed; see *Lawrence & Sons* v. *Willcocks*, [1892] 1 Q. B. 696, C. A.; *Ryley* v. *Master, Sheba Gold Mining Co.* v. *Trubshawe*, [1892] 1 Q. B. 674; *Wilks* v. *Wood*, [1892] 1 Q. B. 684, C. A.; *London and Universal Bank* v. *Clancarty (Earl)*, [1892] 1 Q. B. 689; *Gold Ores Reduction Co.* v. *Parr*, [1892] 2 Q. B. 14; *Hamilton* v. *Brogden* (1890), 60 L. J. (CH.) 88; and see title MONEY AND MONEY-LENDING, Vol. XXI., p. 41.

(*u*) See *Lagos* v. *Grunwaldt*, [1910] 1 K. B. 41, C. A. (money due to a solicitor on a bill of costs); *Workman, Clark & Co., Ltd.* v. *Lloyd Brazileño*, [1908] 1 K. B. 968, C. A. (instalment of money due for building of a steamer); *Dando* v. *Boden*, [1893] 1 Q. B. 318 (amount of dishonoured bill and expenses of noting); *Lawrence & Sons* v. *Willcocks*, *supra* (amount of dishonoured bill, expenses of noting and interest); *Westmoreland Green and Blue Slate Co.* v. *Feilden*, [1891] 3 Ch. 15, C. A. (money due for calls on shares); *Grant* v. *Easton* (1883), 13 Q. B. D. 302, C. A. (action on a foreign judgment); *Norton* v. *Gregory* (1895), 73 L. T. 10, C. A. (action on an order of the Probate Division for the payment of costs); *Bailey* v. *Bailey* (1884), 13 Q. B. D. 855, C. A.; *Pritchett* v. *English and Colonial Syndicate*, [1899] 2 Q. B. 428, C. A. (action will lie for sum due under a garnishee order); compare *Robins* v. *Robins*, [1907] 2 K. B. 13 (an action will not lie upon an order for the payment of alimony); *Ivimey* v. *Ivimey*, [1908] 2 K. B. 260, C. A. (an action will not lie in the King's Bench Division to recover a sum payable for costs under an order of the Divorce Division); compare *Furber* v. *Taylor*, [1900] 2 Q. B. 719, C. A. (an action will not lie on an order of a county court for payment of costs). As to a specially indorsed writ by a mortgagee against a mortgagor when a receiver has been appointed, see *Poulett* v. *Hill*, [1893] 1 Ch. 277, C. A.; *Lynde* v. *Waithman*, [1895] 2 Q. B. 180, C. A.

(*v*) See *Gerrard* v. *Clowes*, [1892] 2 Q. B. 11; *Strickland* v. *Williams*, [1899] 1 Q. B. 382, C. A.; *Tuther* v. *Caralampi* (1888), 21 Q. B. D. 414. As to the difference between liquidated damages and a penalty, see title DAMAGES, Vol. X., p. 328.

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against the principal is in respect of a debt or liquidated demand only;

(5) on a trust;

(6) in actions for the recovery of land, with or without a claim for rent or mesne profits, by a landlord against a tenant, whose term has expired or has been duly determined by notice to quit or has become liable to forfeiture for non-payment of rent, or against persons claiming under such tenant (*a*).

What special indorsement should show.

The statement of claim indorsed on the writ should show what is the plaintiff's cause of action, and should contain sufficient particulars to indicate to the defendant what the claim is (*b*).

Where the writ is specially indorsed (*c*), application may be made by the plaintiff for summary judgment without a trial (*d*).

Claim for costs.

196. Where the plaintiff's claim is for a debt or liquidated demand only, the indorsement, besides stating the nature of the claim, must state the amount claimed for the debt or the demand and for costs, and must further state that upon payment within four days after service further proceedings will be stayed (*e*).

(iii.) *Indorsement of Address.*

Plaintiff suing by solicitor.

197. If a writ of summons is issued out of the Central Office, and the plaintiff is suing by a solicitor, the solicitor must indorse upon the writ (*f*) the address of the plaintiff (*g*) and also his own name

(*a*) R. S. C. Ord. 3, r. 6; and, as to actions for recovery of land, see titles LANDLORD AND TENANT, Vol. XVIII., pp. 558, 559; REAL PROPERTY AND CHATTELS REAL.

(*b*) As to forms of indorsement, see R. S. C., App. C, s. 4. If the indorsement contains a claim which may be specially indorsed, the inclusion in the indorsement of a claim which could not be specially indorsed does not now vitiate the indorsement (*ibid.*, Ord. 14, r. 1 (b)). The special indorsement should be headed "statement of claim" (*Cassidy* v. *M'Aloon* (1893), 32 L. R. Ir. 368, C. A.) and should be signed (*ibid.*; R. S. C., Ord. 19, r. 4). It should not contain the word "delivered," which appears at the end of pleadings (R. S. C., Ord. 19, r. 2; *Veale* v. *Automatic Boiler Feeder Co.* (1887), 18 Q. B. D. 631); see *Ryley* v. *Master, Sheba Gold Mining Co.* v. *Trubshawe*, [1892] 1 Q. B. 674, 681). As to the service of a specially indorsed writ, see *Murray* v. *Stephenson* (1887), 19 Q. B. D. 60; *Anlaby* v. *Praetorius* (1888), 20 Q. B. D. 764, C. A. As to taking objection to the indorsement, see *Robertson* v. *Howard* (1878), 3 C. P. D. 280; *Fawcus* v. *Charlton* (1883), 10 Q. B. D. 516.

(*c*) As to special indorsement, see further title PLEADING, Vol. XXII., p. 440; R. S. C., Ord. 20, r. 1 (a). If the plaintiff do not apply for summary judgment or for directions (see p. 135, *post*), the defendant must deliver a defence within ten days of the time limited for appearance (*Anlaby* v. *Praetorius*, *supra*).

(*d*) See R. S. C., Ord. 14; and see title JUDGMENTS AND ORDERS, Vol. XVIII., pp. 190 *et seq.*

(*e*) R. S. C., Ord. 3, r. 7. If the writ is to be served out of the jurisdiction, the time to be fixed for payment is to be within the time allowed for appearance (*ibid.*). As to the form of the statement, see *ibid.*, App. A, Part. III., s. 3. As to taxation of costs, see *ibid.*, Ord. 3, r. 7; *Hoole* v. *Earnshaw* (1878), 39 L. T. 409, C. A.; *Flatau* v. *Cullen* (1899), 81 L. T. 402. As to taxation of costs generally, see title SOLICITORS.

(*f*) Where notice of the writ is served instead of the writ, the notice must have the same indorsement of address as a writ must have; see R. S. C., Ord. 2, r. 5, App. A, Part I., No. 9; and as to service out of the jurisdiction, see pp. 117 *et seq.*, *post*.

(*g*) R. S. C., Ord. 4, r. 1; see *Dawes* v. *Solomonson* (1838), 6 Scott, 596. The

or firm and place of business (*h*), with an additional address for service of documents, should his own address not be within three miles of the Royal Courts of Justice (*i*).

If a plaintiff is suing in person, and the writ of summons is issued out of the Central Office, he must indorse upon the writ his place of residence and occupation, and also, if his place of residence is more than three miles from the Royal Courts of Justice (*i*), another proper place, not more than three miles from the Courts, to be called his address for service (*k*).

Plaintiff suing in person.

198. If the writ of summons is issued out of a district registry, the solicitor must indorse the address of the plaintiff and his own name or firm and place of business, together with an address for service within the district, if his own place of business is outside the district (*l*); and, if the defendant does not reside within the district, the solicitor must add a further address for service not more than three miles from the Royal Courts of Justice (*m*).

Practice in district registry.

Similar rules obtain where the writ is issued by a plaintiff in person (*l*).

199. If proceedings are commenced otherwise than by writ of summons (*n*), the document by which the proceedings are originated must contain the same indorsement of address as a writ of summons (*o*).

Proceedings not instituted by writ.

(iv.) *Concurrent Writs.*

200. At the time when the original writ of summons is issued, or at any time during twelve months afterwards, the plaintiff may issue one or more concurrent writ or writs (*p*). Each such writ is tested of the same day as the original writ, and is marked with a seal bearing the word "concurrent" and the date of issue of

Concurrent writ.

address must be the residence of the plaintiff and not his place of business, unless he resides there (*Stoy* v. *Rees* (1890), 24 Q. B. D. 748, C. A.; *Re a Solicitor, Karpeles* v. *Friedlander* (1889), 53 J. P. 264; *Re a Solicitor* (1889), 5 T. L. R. 339; and see *Youlton* v. *Hall* (1839), 4 M. & W. 582; compare *Hawkins* v. *Black* (1898), 14 T. L. R. 398).

(*h*) R. S. C., Ord. 4, r. 1; see *Engleheart* v. *Eyre* (1833), 2 Dowl. 143; *Dawes* v. *Solomonson* (1838), 6 Scott, 596; *Smith* v. *Dobbin* (1877), 3 Ex. D. 338, C. A.; *Lloyd* v. *Jones* (1836), 1 M. & W. 549; see *Malley* v. *Shepley* (1892), 68 L. T. 294; *Re Newen, Carruthers* v. *Newen*, [1903] 1 Ch. 812.

(*i*) *Petty* v. *Daniel* (1886), 34 Ch. D. 172, 178. The exact spot from which the three miles are to be measured is "the principal entrance of the Central Hall" (R. S. C., Ord. 4, r. 1).

(*k*) *Ibid.*, r. 2.

(*l*) *Ibid.*, r. 3; see *ibid.*, Ord. 35; *Smith* v. *Dobbin*, *supra*.

(*m*) *Ibid.*, Ord. 4, r. 3; Ord. 5, rr. 3, 4; see *The W. A. Sholten* (1887), 13 P. D. 8; *Smith* v. *Hammond*, [1896] 1 Q. B. 571; *Zuccato* v. *Young* (1890), 38 W. R. 474; *The Helenslea* (1881), 7 P. D. 57; *Clokey* v. *London and North Western Rail. Co.*, [1905] 2 I. R. 251.

(*n*) *I.e.*, by originating summons (R. S. C., Ord. 54, r. 4B; see p. 186, *post*), petition (R. S. C., Ord. 52, r. 16; see p. 188, *post*), notice of motion (R. S. C., Ord. 5, r. 9 (c); see p. 188, *post*), or special case (R. S. C., Ord. 34, r. 8).

(*o*) *Ibid.*, Ord. 4, r. 4; see the text *supra*.

(*p*) R. S. C., Ord. 6, r. 1. As to the issue of a concurrent writ more than twelve months after the issue of the original writ, see title LIMITATION OF ACTIONS, Vol. XVIII., p. 188.

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the concurrent writ (*q*). Each such writ is only in force for the period during which the original writ is in force (*r*).

A writ for service within the jurisdiction may be issued and marked as a concurrent writ with one which is to be served, or notice of which in lieu of service is to be given, out of the jurisdiction (*s*), and *vice versâ* (*t*).

Service of concurrent writ out of jurisdiction.

(v.) *Renewal.*

Renewal.

201. For purposes of service, an original writ of summons is in force for twelve months only from the day of the date of the writ, including such day (*a*). If any defendant named in the writ is not served within this period and efforts have been made to serve him, or if there is any other good reason, the original or concurrent writ of summons may be renewed for six months from the date of such renewal inclusive, and so from time to time during the currency of the renewed writ. A writ so renewed remains in force and is available for all purposes, from the date of the issuing of the original writ of summons (*b*).

Loss of writ.

On proof of the loss of a writ the production of which is necessary, the court or a judge may order a copy which is proved to be correct to be sealed and served in lieu of the original writ (*c*).

(vi.) *Service.*

Service in general.

202. A writ need not be served if the defendant, by his solicitor, undertakes in writing to accept service and enters an appearance (*d*). In any other case the writ must be served within twelve

(*q*) R. S. C., Ord. 6, r. 1; see *Collins* v. *North British and Mercantile Insurance Co.*, [1894] 3 Ch. 228; *Traill* v. *Porter* (1878), 1 L. R. Ir. 60.

(*r*) R. S. C., Ord. 6, r. 1, *i.e.*, for twelve months from the day of the date of the original writ; but, as to renewal, see the text, *infra*.

(*s*) R. S. C., Ord. 6, r. 2. As to service out of the jurisdiction, see p. 117, *post*.

(*t*) R. S. C., Ord. 6, r. 2; see *Smalpage* v. *Tonge* (1886), 17 Q. B. D. 644, C. A.; *Beddington* v. *Beddington* (1876), 1 P. D. 426; *Badische Anilin und Soda Fabrik* v. *Johnson* (*Henry*) *& Co. and Basle Chemical Works, Bindschedler*, [1896] 1 Ch. 25, C. A.; *Burt* v. *Bowen* (1891), 8 T. L. R. 28; *The Duc d'Aumale*, [1903] P. 18, C. A. A concurrent writ for service out of the jurisdiction can only be issued by leave of the court or a judge (R. S. C., Ord. 2, r. 4; and see *ibid.*, Ord. 11, r. 1; and note (*l*), p. 110, *ante*). As to service, see *Ford* v. *Sheppard* (1885), 53 L. T. 564; *Western Suburban and Notting Hill Permanent Benefit Building Society* v. *Rucklidge*, [1905] 2 Ch. 472.

(*a*) R. S. C., Ord. 8, r. 1. *I.e.*, the writ must be served within twelve months, unless it is renewed; for purposes other than service the writ is in force even after the expiration of twelve months; see *Re Kerly, Son and Verden*, [1901] 1 Ch. 467, C. A.

(*b*) R. S. C., Ord. 8, r. 1. The application to renew the writ may be made *ex parte* to a master in chambers. As to sealing the renewed writ, see *ibid.*, App. A, Part I., Form No. 18; *ibid.*, Ord. 8, r. 1. As to application for renewal, see *Re Jones, Eyre* v. *Cox* (1877), 46 L. J. (CH.) 316. As to when the application will only be granted in special circumstances, see title LIMITATION OF ACTIONS, Vol. XIX., p. 188. As to evidence of the renewal of the writ, see R. S. C., Ord. 8, r. 2.

(*c*) *Ibid.*, r. 3. As to the practice before this rule, see *Davies* v. *Garland* (1875), 1 Q. B. D. 250.

(*d*) R. S. C., Ord. 9, r. 1; see *The Anna and Bertha* (1891), 64 L. T. 332; *The Crimdon*, [1900] P. 171; *Re Kerly, Son and Verden, supra*. The writ must be actually delivered to the defendant's solicitor; the usual form

months of its issue, or, if it is renewed, while the renewal is in force (*e*).

There are two kinds of service, personal and substituted (*f*).

(a) *Personal.*

203. In ordinary cases, if there has been no undertaking by a solicitor to accept service, the writ must be served personally on the defendant. Personal service.

A writ is personally served by giving to and leaving with the defendant a copy of the writ and showing him the original, if within a reasonable time he demands to see it (*g*). How effected

A writ may be served at any hour of the day or night, and on any day except Sunday, so long as the original writ or a renewal of it is in force (*h*): When.

A writ may be served at any place within the jurisdiction of the High Court (*i*), and by leave out of the jurisdiction (*k*). Where.

is for the solicitor to indorse the writ with an acceptance of service and an undertaking to appear (*Re Kerly, Son and Verden*, [1901] 1 Ch. 467, 476, C. A.). As to the relation of solicitor and client generally, see title SOLICITORS.

(*e*) See p. 114, *ante*.

(*f*) R. S. C., Ord. 9, r. 2.

(*g*) *Goggs* v. *Huntingtower* (*Lord*) (1884), 12 M. & W. 503; *Jay* v. *Budd*, [1898] 1 Q. B. 12, C. A., *per* COLLINS, L.J., at p. 18; *Worley* v. *Glover* (1730), 2 Stra. 877; *Pigeon* v. *Bruce* (1818), 8 Taunt. 410. If the defendant refuses to take the copy, the person who is serving the writ should inform him what it contains and leave it as nearly in his possession or control as he can, *e.g.*, it is enough if the process-server throws the writ down in the defendant's presence after informing him of its contents (*Thomson* v. *Pheney* (1832), 1 Dowl. 441, 443); but the process-server must do this in the defendant's presence and must be sufficiently near to him to be able to hand him the copy; thus, if the server is outside a house and the defendant is at an upper window of the house and the process-server holds out a copy of the writ to the defendant and tells him that it is a writ against him and throws it down in the presence of the defendant's wife, this is not sufficient service (*Heath* v. *White* (1844), 2 Dow. & L. 40; see *Goggs* v. *Huntingtower* (*Lord*), *supra*; *Banque Russe et Française* v. *Clark*, [1894] W. N. 203; *Frith* v. *Donegal* (*Lord*) (1834), 2 Dowl. 527; *Davies* v. *Morgan* (1832), 2 Cr. & J. 237). As to the demand by the plaintiff to see the original writ, see *Jay* v. *Budd*, *supra*; *Petit* v. *Ambrose* (1817), 6 M. & S. 274; *Westley* v. *Jones* (1821), 5 Moore (C. P.), 162; *Thomas* v. *Pearce* (1824), 2 B. & C. 761; *Phillipson & Son* v. *Emanuel* (1887), 56 L. T. 858; *Hawthorn* v. *Harris* (1875), 23 W. R. 214. An immaterial variance between the copy and the writ does not vitiate the service (*Hanmer* v. *Clifton*, [1894] 1 Q. B. 238). The writ may be served by a plaintiff in person or by anyone authorised on his behalf.

(*h*) *Upton* v. *Mackenzie* (1822), 1 Dow. & Ry. (K. B.) 172; *Priddee* v. *Cooper* (1822), 1 Bing. 66; *Murray* v. *Stephenson* (1887), 19 Q. B. D. 60; Sunday Observance Act, 1677 (29 Car. 2, c. 7.), s. 6; *Taylor* v. *Philips* (1802), 3 East, 155; and see title TIME.

(*i*) *I.e.*, the territorial jurisdiction (*Re Smith* (1876), 1 P. D. 300), which includes England, Wales (stat. (1535—1536) 27 Hen. 8, c. 26), and Berwick-on-Tweed (Yearly Practice of the Supreme Court, 1912, p. 61), as far as low water mark (*B. Harris* v. *The Franconia* (*Owners*) (1877), 2 C. P. D. 173; *R.* v. *Keyn* (1876), 2 Ex. D. 63). Scotland, Ireland, the Isle of Man, and Channel Islands are out of the jurisdiction (Yearly Practice of the Supreme Court, 1912, p. 61). A British warship is always within the jurisdiction (*Fraser* v. *Akers* (1891), 35 Sol. Jo. 477 *Seagrove* v. *Parks*, [1891] 1 Q. B. 551). As to the King's palaces, see *R.* v. *Stobbs* (1790), 3 Term Rep. 735. As to service in court, see *Poule* v. *Gould* (1856), 1 H. & N. 99.

(*k*) As to service out of the jurisdiction, see p. 117, *post*.

SECT. 1.

An Ordinary Action in the King's Bench or Chancery Division.

Who may be served.

204. Any person, whether a British subject or not, who is found at the time within the jurisdiction can be served (*l*), except the King (*m*), a foreign Sovereign (*n*), a foreign ambassador (*o*), or his officer or servant (*p*).

Service by agreement of parties.

205. Any special mode of service not prohibited by the Rules of the Supreme Court (*q*) may, by agreement of parties, be substituted for the prescribed mode of service (*r*).

Special modes of service.

206. In addition to other particular modes of service dealt with elsewhere (*s*), the following are special methods of effecting service:—

A writ against the inhabitants of a hundred or other like district may be served on the high constables or any one of them, or where there is no high constable, on any other acting chief officer of police of the county in which such hundred or district is situate (*t*).

A writ against the inhabitants of any county of any city or town, or the inhabitants of any franchise, liberty, city, town, or place not being a part of a hundred or other like district, may be served on some peace officer of such place (*u*).

In an action to recover land, service of the writ may, in case of vacant possession, when it cannot be otherwise effected, be made by posting a copy of the writ upon the door of the dwelling-house or other conspicuous part of the property (*w*).

(*l*) *Watkins* v. *North American Land and Timber Co.* (1904), 20 T. L. R. 532; *Actiesselskabet Dampskib "Hercules"* v. *Grand Trunk Pacific Railway*, [1912] 1 K. B. 222, C. A.; *Saccharin Corporation, Ltd.* v. *Chemische Fabrik von Heyden Aktiengesellschaft*, [1911] 2 K. B. 516, C. A.; *Allison* v. *Independent Press Cable Association of Australasia, Ltd.* (1911), 28 T. L. R. 128, C. A.

(*m*) See title ACTION, Vol. I., p. 17. As to petitions of right, see title CONSTITUTIONAL LAW, Vol. VI., p. 413.

(*n*) *Mighell* v. *Johore (Sultan)*, [1894] 1 Q. B. 149, C. A.; *The Jassy*, [1906] P. 270; *Statham* v. *Statham and the Gaekwar of Baroda*, [1912] P. 92; see title ACTION, Vol. I., pp. 18, 19.

(*o*) *Magdalena Steam Navigation Co.* v. *Martin* (1859), 2 E. & E. 94; *Gladstone* v. *Musurus Bey* (1862), 1 Hem. & M. 495; *Musurus Bey* v. *Gadban*, [1894] 2 Q. B. 352, C. A.; see title CONSTITUTIONAL LAW, Vol. VI., pp. 430 *et seq.*

(*p*) *Macartney* v. *Garbutt* (1890), 24 Q. B. D. 368; *Taylor* v. *Best* (1854), 14 C. B. 487; see title CONSTITUTIONAL LAW, Vol. VI., p. 432.

(*q*) *British Wagon Co.* v. *Gray*, [1896] 1 Q. B. 35, C. A.

(*r*) *Montgomery* v. *Liebenthal*, [1898] 1 Q. B. 487, C. A.; *Tharsis Sulphur and Copper Co.* v. *Société des Metaux* (1889), 53 L. J. (Q. B.) 435.

(*s*) As to service of writ in particular circumstances, see titles CLUBS, Vol. IV., p. 426; COMPANIES, Vol. V., pp. 14, 20, 83, 671, 678; CORPORATIONS, Vol. VIII., p. 395; CROWN PRACTICE, Vol. X., p. 9; FRIENDLY SOCIETIES, Vol. XV., p. 191; HUSBAND AND WIFE, Vol. XVI., p. 454; INFANTS AND CHILDREN, Vol. XVII., p. 140; LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 464; PARTNERSHIP, Vol. XXII., p. 42; TRADE AND TRADE UNIONS; SHIPPING AND NAVIGATION.

(*t*) R. S. C., Ord. 9, r. 8; see High Constables Act, 1869 (32 & 33 Vict. c. 47), s. 5; *Field* v. *Metropolitan Police (Receiver)*, [1907] 2 K. B. 853.

(*u*) R. S. C., Ord. 9, r. 8. As to the meaning of the term "peace officer," see titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 298; POLICE, Vol. XXII., p. 462.

(*w*) R. S. C., Ord. 9, r. 9; see *Isaacs* v. *Diamond*, [1880] W. N. 75; and see

(b) *Substituted.*

Substituted service.

207. When service of a writ is required and it is made to appear to the court or a judge (*x*) that the plaintiff is from any cause unable to effect prompt personal service, the court or a judge (*x*) may make such order for substituted or other service, or for the substitution for service of notice, by advertisement or otherwise, as may be just (*y*).

(c) *Out of the Jurisdiction.*

Grounds on which leave granted.

208. A writ of summons or notice of a writ of summons may be

titles LANDLORD AND TENANT, Vol. XVIII., pp. 558, 559; REAL PROPERTY AND CHATTELS REAL.

(*x*) As to the meaning of "the court or a judge," see note (*f*), p. 103, *ante*.

(*y*) R. S. C., Ord. 9, r. 2; see *Jay* v. *Budd*, [1898] 1 Q. B. 12, C. A. Substituted service will only be ordered, where ordinary service is legally possible (*Sloman* v. *New Zealand Government* (1876), 1 C. P. D. 563, C. A.; *Field* v. *Bennett* (1886), 56 L. J. (Q. B.) 89; *Fry* v. *Moore* (1889), 23 Q. B. D. 395, C. A; *Wilding* v. *Bean*, [1891] 1 Q. B. 100, C. A; *Worcester Banking Co.* v. *Firbank*, [1894] 1 Q. B. 784, C. A.; *Mighell* v. *Johore* (*Sultan*), [1894] 1 Q. B. 149, C. A.). Substituted service of an ordinary writ cannot be ordered, when the defendant was out of the jurisdiction at the time when the writ was issued, unless he went away to avoid service (*Jay* v. *Budd*, *supra*; *Fry* v. *Moore*, *supra*; *Wilding* v. *Bean*, *supra*; see, further, *O'Connor* v. *Star Newspaper Co.* (1891), 30 L. R. Ir. 1; *Worcester Banking Co.* v. *Firbank*, *supra*; *Clokey* v. *London and North Western Rail. Co.*, [1905] 2 I. R. 251; *Re Urquhart*, *Ex parte Urquhart* (1890), 24 Q. B. D. 723, C. A.; *Trent Cycle Co.* v. *Beattie* (1899), 15 T. L. R. 176, C. A.). As to substituted service of a writ issued for service out of the jurisdiction, see *Western Suburban and Notting Hill Permanent Benefit Building Society* v. *Rucklidge*, [1905] 2 Ch. 472; *Ditton* v. *Borneman* (1886), 3 T. L. R. 3; *Field* v. *Bennett*, *supra*; *De Bernales* v. *New York Herald*, [1893] 2 Q. B. 97, n.; *Worcester Banking Co.* v. *Firbank*, *supra*; *Trübner* v. *Trübner* (1890), 15 P. D. 24; *Seaton* v. *Clarke* (1890), 26 L. R. Ir. 297; *Wray* v. *Wray and D'Almeida*, [1901] P. 132; *Ford* v. *Sheppard* (1885), 53 L. T. 564. As to service out of the jurisdiction, see the text, *infra*. Substituted service means service on some person other than the defendant himself, *e.g.*, on an agent (*Hope* v. *Hope* (1854), 4 De G. M. & G. 328; *Hobhouse* v. *Courtney* (1841), 12 Sim. 140; *Hart* v. *Herwig* (1873), 8 Ch. App. 860); solicitor (*Re Slade*, *Slade* v. *Hulme* (1881), 18 Ch. D. 653; *Cooper* v. *Wood* (1842), 5 Beav. 391; *Sergison* v. *Beavan* (1852), 16 Jur. 1111; *Baille* v. *Blanchet* (1864), 10 L. T. 365; *Waters* v. *Waters* (1875), 34 L. T. 33; *Hope* v. *Carnegie* (1865), L. R. 1 Eq. 126; *Dymond* v. *Croft* (1876), 3 Ch. D. 512, C. A.; but see *The Pommerania* (1879), 4 P. D. 195; *Margrett* v. *Emanuel* (1890), 6 T. L. R. 453; *Odevaine* v. *Odevaine* (1888), 58 L. T. 564); medical officer in charge of lunatic (*Raine* v. *Wilson* (1873), L. R. 16 Eq. 576; *Than* v. *Smith* (1879), 27 W. R. 617; see *Re McLaughlin*, [1905] A. C. 343, P. C.; but see now R. S. C., Ord. 9, r. 5); defendant's wife (*Whitehaven Bank* v. *Thompson*, [1877] W. N. 45; *Mullows* v. *Bannister*, [1882] W. N. 183); brother (*Coulburn* v. *Carshaw* (1883), 32 W. R. 33); partner (*Kinder* v. *Forbes* (1840), 2 Beav. 503; *Leese* v. *Martin* (1871), L. R. 13 Eq. 77; *Worcester Banking Co.* v. *Firbank*, [1894] 1 Q. B. 784, C. A.). As to substituted service on a defendant in prison, see *Bland* v. *Bland* (1875), L. R. 3 P. & D. 233; and as to substituted service by post or advertisement, see *Capes* v. *Brewer* (1875), 24 W. R. 40; *Mellows* v. *Bannister* (1883), 31 W. R. 238; *Cook* v. *Dey* (1876), 2 Ch. D. 218; *Crane* v. *Jullion* (1876), 2 Ch. D. 220; *Rafael* v. *Ongley* (1876), 34 L. T. 124; *Whitley* v. *Honeywell* (1876), 35 L. T. 517; *Hartley* v. *Dilke* (1876), 35 L. T. 706; *Ryland's Glass Engineering Co.* v. *Phœnix Co., Ltd.*, [1911] 2 I. R. 532. Every application for an order for substituted or other service, or for the substitution of notice for service, must be supported by an affidavit setting forth the grounds of the application (R. S. C., Ord. 10, Memorandum adopted by the King's Bench Masters, Yearly Practice of the Supreme Court, 1912, p. 59).

SECT. 1. An Ordinary Action in the King's Bench or Chancery Division.

served out of the jurisdiction by leave of the court or a judge in the following cases (*a*):—

(1) When the whole subject-matter of the action is land situate within the jurisdiction (*b*), or the perpetuation of testimony relating to the title to such land (*c*);

(2) When any act, deed, will, contract, obligation, or liability affecting land or hereditaments within the jurisdiction is sought to be construed, rectified, set aside, or enforced in the action (*d*);

(3) When any relief is sought against any person domiciled or ordinarily resident within the jurisdiction (*e*);

(4) When the action is for the administration of the personal estate of any deceased person domiciled within the jurisdiction at the time of his death, or for the execution, as to property within the jurisdiction, of the trusts of any written instrument of which the person to be served is trustee, and which ought to be executed according to the law of England (*f*);

(5) When the action is founded on any breach or alleged breach, within the jurisdiction, of any contract wherever made, which, according to its terms, ought to be performed within the jurisdiction (*g*); but this provision has no application if

(*a*) R. S. C., Ord. 11, r. 1; see also title CONFLICT OF LAWS, Vol. VI., p. 202, note (*h*); and as to service on foreign corporations, see *ibid*, pp. 181, 182; titles COMPANIES, Vol. V., p. 20; CORPORATIONS, Vol. VIII., p. 395.

(*b*) R. S. C., Ord. 11, r. 1 (a). This refers to actions for recovery of land and of the like kind (*Agnew* v. *Usher* (1884), 14 Q. B. D. 78; affirmed C. A.).

(*c*) R. S. C., May, 1912, rendering obsolete *Slingsby* v. *Slingsby*, [1912] 2 Ch. 21, C. A.

(*d*) R. S. C., Ord. 9, r. 1 (b). This includes an action for breach of covenant to repair (see *Tassell* v. *Hallen*, [1892] 1 Q. B. 321); for compensation for tenant right (*Kay* v. *Sutherland* (1887), 20 Q. B. D. 147); for rent (see *Agnew* v. *Usher*, *supra*); for a declaration that defendants are trustees of land within the jurisdiction (*A.-G.* v. *Drapers' Co.*, [1894] 1 I. R. 185, C. A.); to enforce a charging order on land (*semble*, *Moritz* v. *Stephan* (1888), 58 L. T. 850; see *Kolchmann* v. *Meurice*, [1903] 1 K. B. 534, C. A.). An action for slander of title to land is not within this part of the rule (*Casey* v. *Arnott* (1876), 2 C. P. D. 24; and compare *Bree* v. *Marescaux* (1881), 7 Q. B. D. 434).

(*e*) R. S. C., Ord. 9, r. 1 (c); see *Slingsby* v. *Slingsby*, *supra*; "Person" includes corporation (see R. S. C., Ord. 71, r. 1); see *Hadad* v. *Bruce* (1892), 8 T. L. R. 409; *Harvey* v. *Dougherty* (1887), 56 L. T. 322. As to the meaning of "domiciled," see title CONFLICT OF LAWS, Vol. VI., pp. 182 *et seq.*; of "ordinarily resident," see *Re Williams* (1872), 8 Ch. App. 690; *Re Bowie*, *Ex parte Breull* (1880), 16 Ch. D. 484, C. A.; *New Chile Gold Mining Co.* v. *Blanco* (1888), 4 T. L. R. 346; *Ghikis* v. *Musurus* (1909), 25 T. L. R. 225; and see *Allison* v. *Independent Press Cable Association of Australasia, Ltd.* (1911), 28 T. L. R. 128, C. A.; *Actiesselskabet Dampskib "Hercules"* v. *Grand Trunk Pacific Rail. Co.*, [1912] 1 K. B. 222, C. A.; and title CORPORATIONS, Vol. VIII., p. 395.

(*f*) R. S. C., Ord. 11, r. 1 (d); *Re Eager*, *Eager* v. *Johnstone* (1883), 22 Ch. D. 86, C. A.; *Field* v. *Bennett* (1886), 56 L. J. (Q. B.), 89, 91; *Wood* v. *Middleton*, [1897] 1 Ch. 151; *Re Orr Ewing*, *Orr Ewing* v. *Orr Ewing* (1882), 22 Ch. D. 456, C. A.; *Re Lane*, *Lane* v. *Robin* (1886), 55 L. T. 149; see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 334. The property which is subject to the trusts of the instrument must be actually situated within the jurisdiction (*Winter* v. *Winter*, [1894] 1 Ch. 421).

(*g*) R. S. C., Ord. 11, r. 1 (e). Leave refused, if there is no contract or if the action is not founded on contract; see *M'Stephens* v. *Carnegie* (1880), 49 L. J. (CH.) 397, C. A.; *Nathan* v. *Seitz* (1888), 4 T. L. R. 570; *Russell* v. *Shelton* (1891), 8 T. L. R. 27; *Moritz* v. *Stephan* (1888), 58 L. T. 850; *Kolchmann* v.

the defendant is domiciled or ordinarily resident in Scotland or Ireland (*h*);

(6) When any injunction is sought as to anything to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed, whether damages are or are not also sought (*i*);

Meurice, [1903] 1 K. B. 534, C. A.; *Deutsche National Bank* v. *Paul*, [1898] 1 Ch. 283. It is not necessary that there should be an express provision in the contract that it should be performed within the jurisdiction (*Reynolds* v. *Coleman* (1887), 36 Ch. D. 453, 464, C. A.; *Rein* v. *Stein*, [1892] 1 Q. B. 753, C. A.; *Duval (Charles) & Co., Ltd.* v. *Gans*, [1904] 2 K. B. 685, C. A.; *Crozier, Stephens & Co.* v. *Auerbach*, [1908] 2 K. B. 161, C. A.), but the contract must either expressly or by implication so provide (*Bell* v. *Antwerp, London and Brazil Line*, [1891] 1 Q. B. 103, C. A.; *Hoerler* v. *Hanover Works* (1893), 10 T. L. R. 22, 103, C. A.). It is sufficient, if part of the contract ought to be performed within the jurisdiction, and there is a breach of that part within the jurisdiction (*Rein* v. *Stein*, *supra*; *The Eider*, [1893] P. 119, 126, C. A.). If the proper inference from the contract is that payment is to be made within the jurisdiction, then non-payment is a breach within the jurisdiction (*Thompson* v. *Palmer*, [1893] 2 Q. B. 80, C. A.; *Rein* v. *Stein*, *supra*; *Golden* v. *Darlow* (1891), 8 T. L. R. 57, C. A.; *Duval (Charles) & Co., Ltd.* v. *Gans*, *supra*; *Roby* v. *Snaefell Mining Co., Ltd.* (1887), 20 Q. B. D. 152; *Hassall* v. *Lawrence* (1887), 4 T. L. R. 23). If such an inference cannot be properly drawn from the contract, leave to serve out of the jurisdiction is not granted (*Bell* v. *Antwerp, London and Brazil Line*, *supra*; *Anger* v. *Vasnier* (1902), 18 T. L. R. 596, C. A.). If the contract is to deliver goods and the property passes in England, the failure to deliver is a breach within the jurisdiction (*Nathan* v. *Seitz* (1888), 4 T. L. R. 570); if the property passes abroad, the failure to deliver is not such a breach (*Crozier, Stephens & Co.* v. *Auerbach*, *supra*; *Wancke* v. *Wingren* (1889), 58 L. J. (Q. B.) 519; *Hamlyn & Co.* v. *Griendtsveen & Co.* (1890), 6 T. L. R. 274, C. A.; *Parker* v. *Schuller* (1901), 17 T. L. R. 299, C. A.). If the contract is one that according to its terms, can wholly be performed abroad, or may be performed here or abroad, leave will not be granted (*Comber* v. *Leyland*, [1898] A. C. 524; *Bell* v. *Antwerp, London and Brazil Line*, *supra*; *The Eider*, *supra*). If the breach takes place out of the jurisdiction, leave cannot be given (*Crozier, Stephens & Co.* v. *Auerbach*, *supra*; *Parker* v. *Schuller*, *supra*; *Wancke* v. *Wingren*, *supra*). In an action for wrongful dismissal, if the notice of dismissal is given by a foreigner resident abroad by a letter written and posted abroad to the plaintiff here, there is no breach within the jurisdiction (*Holland* v. *Bennett*, [1902] 1 K. B. 867, C. A.; *Hamilton* v. *Barr* (1886), 18 L. R. Ir. 297, C. A.; *Mutzenbecher* v. *La Aseguradora Española*, [1906] 1 K. B. 254, C. A.). As to action for breach of promise of marriage, see *Franklyn* v. *Chaplin* (1900), 17 T. L. R. 84, C. A.; *Cooper* v. *Knight* (1901), 17 T. L. R. 299, C. A. If there is *primâ facie* evidence of a breach within the jurisdiction, and the breach is disputed on the other side, leave is given to serve out of the jurisdiction, unless the *primâ facie* case is entirely displaced (*Badische Anilin und Soda Fabrik* v. *Chemische Fabrik vormals Sandoz* (1903), 88 L. T. 490, C. A.; affirmed *sub nom.*, *Chemische Fabrik vormals Sandoz* v. *Badische Anilin und Soda Fabriks* (1904), 90 L. T. 733, H. L.).

(*h*) R. S. C., Ord. 11, r. 1 (e); *Lenders* v. *Anderson* (1883), 12 Q. B. D. 50; *Channel Coaling Co.* v. *Ross*, [1907] 1 K. B. 145; *Jones* v. *Scottish Accident Insurance Co.* (1886), 17 Q. B. D. 421. A person domiciled or ordinarily resident in Scotland or Ireland may agree that service upon an agent in England in an action to which this provision relates shall be good service (*Montgomery* v. *Liebenthal*, [1898] 1 Q. B. 487, C. A.; *Tharsis Sulphur and Copper Co.* v. *Société des Metaux* (1889), 58 L. J. (Q. B.) 435). In an agreement of tenancy between an English company and a person resident in Scotland, a clause by which the tenant submits to the jurisdiction of the High Court of Justice in England, does not enable the court to direct service of a writ in Scotland in an action which comes within R. S. C., Ord. 11, r. 1 (e) (*British Wagon Co.* v. *Gray*, [1896] 1 Q. B. 35, C. A.)

(*i*) R. S. C., Ord. 11, r. 1 (f). A plaintiff cannot acquire a right to serve a

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(7) When any person out of the jurisdiction is a necessary and proper party to an action properly brought against some other person duly served within the jurisdiction (*k*).

209. The granting of leave to serve a writ or notice of a writ out of the jurisdiction, in cases where it may be given under the above-mentioned provisions, is a matter for the discretion of the

Leave, a matter in the discretion of the court.

defendant out of the jurisdiction by merely claiming an injunction; the claim for an injunction must be made in good faith (*De Bernales* v. *New York Herald*, [1893] 2 Q. B. 97, n.). Leave to serve out of the jurisdiction is refused if the court is satisfied that there is no reasonable probability that the plaintiff will obtain an injunction (*Watson & Sons* v. *Daily Record (Glasgow), Ltd.*, [1907] 1 K. B. 853, C. A.). A *primâ facie* case for an injunction must be made out before leave is granted (*Badische Anilin und Soda Fabrik* v. *Johnson (Henry) & Co. and Basle Chemical Works, Bindschedler*, [1896] 1 Ch. 25, C. A.; [1897] 2 Ch. 322, 345, C. A.; *Chemische Fabrik vormals Sandoz* v. *Badische Anilin und Soda Fabriks* (1904), 90 L. T. 733, H. L.; *Alexander* v. *Valentine* (1908), 25 T. L. R. 29, C. A.). The act to be restrained must be one within the jurisdiction (*Kinahan* v. *Kinahan* (1890), 45 Ch. D. 78; *Morocco Bound Syndicate* v. *Harris*, [1895] 1 Ch. 534; *Badische Anilin und Soda Fabrik* v. *Johnson (Henry) & Co. and Basle Chemical Works, Bindschedler*, [1897] 2 Ch. 322, 345, C. A.; *Re De Penny, De Penny* v. *Christie*, [1891] 2 Ch. 63, 68; *Marshall* v. *Marshall* (1888), 38 Ch. D. 330, C. A.; *Re Burland's Trade-mark, Burland* v. *Broxburn Oil Co.* (1889), 41 Ch. D. 542; *Tozier* v. *Hawkins* (1885), 15 Q. B. D. 650, 680, C. A.); and see, generally, titles INJUNCTION, Vol. XVII., p. 275; NUISANCE, Vol. XXI., pp. 550 *et seq.*

(*k*) R. S. C., Ord. 11, r. 1 (g). If the conditions prescribed by this sub-rule are complied with, leave for service out of the jurisdiction may be given in cases in which leave could not be given under the other sub-rules, *e.g.*, in an action of tort where one of the defendants is not domiciled or ordinarily resident in England (*Croft* v. *King*, [1893] 1 Q. B. 419; *Williams* v. *Cartwright*, [1895] 1 Q. B. 142, C. A.; *The Duc d'Aumale*, [1903] P. 18, C. A.); an action to enforce against real estate abroad the trusts of a creditor's deed (*Jenney* v. *Mackintosh* (1887), 33 Ch. D. 595), or a charge (*Duder* v. *Amsterdamsch Trustees Kantoor*, [1902] 2 Ch. 132); or in an action for breach of contract against persons resident in Scotland (*Thanemore Steamship Co.* v. *Thompson* (1885), 52 L. T. 552). Any person who would, if subject to the jurisdiction, be joined as a defendant is a proper, if not a necessary party (*Massey* v. *Heynes* (1888), 21 Q. B. D. 330, C. A.; *Witted* v. *Galbraith*, [1893] 1 Q. B. 577, C. A.; *Plaskitt* v. *Eddis* (1898), 79 L. T. 136; *The Elton*, [1891] P. 265, *per* JEUNE, P., at p. 268. For particular cases, see *Massey* v. *Heynes*, *supra* (foreign principals); *Firth* v. *De las Rivas* (1893), 69 L. T. 666, C. A. (foreign partners); *The Elton*, *supra* (foreign owner of cargo); *Speller* v. *Bristol Steam Navigation Co.* (1884), 13 Q. B. D. 96, C. A.; *McCheane* v. *Gyles*, [1902] 1 Ch. 287, C. A.; *Gerson* v. *Simpson*, [1903] 2 K. B. 197, C. A., as reported 47 Sol. Jo. 13 (third party; and see *Dubout* v. *Macpherson* (1889), 23 Q. B. D. 340); see also *Washburn Co.* v. *Cunard Co.* (1889), 5 T. L. R. 592; *Bawtree* v. *Great North West Central Rail. Co.* (1898), 14 T. L. R. 448, C. A.; *Deutsche National Bank* v. *Paul*, [1898] 1 Ch. 283; and p. 99, *ante*. The plaintiff must be acting *bonâ fide* in suing the defendant who is within the jurisdiction; if the plaintiff merely joins a person within the jurisdiction as a party in order that he may sue someone without the jurisdiction, leave is not given or, if leave has been given, proceedings will be stayed (*Witted* v. *Galbraith*, [1893] 1 Q. B. 577, C. A.; *Deutsche National Bank* v. *Paul*, *supra*; *Massey* v. *Heynes*, *supra*; *Indigo Co.* v. *Ogilvy*, [1891] 2 Ch. 31, 45, C. A.; *Bennetts* v. *McIlwraith*, [1896] 2 Q. B. 464, C. A.; *Flower* v. *Rose* (1891), 7 T. L. R. 280; *Sharples* v. *Eason*, [1911] 2 I. R. 436, C. A.). The person sued within the jurisdiction must be as substantial a defendant as the person sought to be served without the jurisdiction (*Yorkshire Tannery Co.* v. *Eglinton Chemical Co.* (1884), 54 L. J. (CH.) 81). The plaintiff must show that he has a *primâ facie* cause of action (*Strauss* v. *Goldschmidt* (1892), 8 T. L. R. 512, C. A.). The relief sought against each defendant must be connected (*Collins* v. *North British and Mercantile Insurance Co.*, [1894] 3 Ch. 228), but need not be the same, and may be

court or a judge (*l*). In particular with regard to Scotland and Ireland, when leave is applied for in a proper case (*m*), the court or a judge must have regard to the comparative cost and convenience of proceeding in England or in the place of residence of the defendant or person sought to be served (*n*).

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210. Every application for leave to serve out of the jurisdiction must be supported by affidavit (*o*) or other evidence (*p*).

The application.

an alternative remedy (*Massey* v. *Heynes*, *supra*). The defendant within the jurisdiction must have been actually served, before leave can be given (*Yorkshire Tannery Co.* v. *Eglinton Chemical Co.* (1884), 54 L. J. (CH.) 81; *Collins* v. *North British and Mercantile Insurance Co.*, [1894] 3 Ch. 228; *The Duc d'Aumale*, [1903] P. 18, C. A.).

(*l*) R. S. C., Ord. 11, r. 4; *The Hagen*, [1908] P. 189, C. A.; *Watson & Sons* v. *Daily Record (Glasgow), Ltd.*, [1907] 1 K. B. 853, C. A.; *Strauss* v. *Goldschmidt* (1892), 8 T. L. R. 512, C. A.; *Plaskitt* v. *Eddis* (1898), 79 L. T. 136; *Société Générale de Paris* v. *Dreyfus Brothers* (1888), 37 Ch. D. 215, C. A.; *Hamlyn & Co.* v. *Griendtsveen & Co.* (1890), 6 T. L. R. 225, 274, C. A.; *Robey* v. *Snaefell Mining Co.* (1887), 20 Q. B. D. 152; *Re Norton's Settlement*, *Norton* v. *Norton*, [1908] 1 Ch. 471, C. A.; *Badische Anilin und Soda Fabrik* v. *Johnson (Henry) & Co. and Basle Chemical Works, Bindschedler*, [1896] 1 Ch. 25, C. A.; [1897] 2 Ch. 322, 345, C. A.; *Chemische Fabrik vormals Sandoz* v. *Badische Anilin und Soda Fabriks* (1904), 90 L. T. 733, H. L.; *Hassall* v. *Lawrence* (1887), 4 T. L. R. 23; *Massey* v. *Heynes* (1888), 21 Q. B. D. 330, C. A.; *Burt* v. *Bowen* (1891), 8 T. L. R. 28; *Call* v. *Oppenheim* (1886), 1 T. L. R. 622, C. A.; *Fowler* v. *Barstow* (1881), 20 Ch. D. 240, C. A.; *Thomas* v. *Hamilton (Duchess)* (1886), 17 Q. B. D. 592, C. A.; *Manitoba and North-Western Land Corporation* v. *Allan*, [1893] 3 Ch. 432; and see title CONFLICT OF LAWS, Vol. VI., p. 291. Conditions may be imposed as a term of granting leave (*Washburn Co.* v. *Cunard Co.* (1889), 5 T. L. R. 592; *Thomas* v. *Hamilton (Duchess)*, *supra*; *Manitoba and North-Western Land Corporation* v. *Allan*, *supra*; *Diamond* v. *Sutton* (1866), L. R. 1 Exch. 130; *Firth* v. *De las Rivas* (1893), 69 L. T. 666, C. A.).

(*m*) See R. S. C., Ord. 11, r. 1 (e).

(*n*) R. S. C., Ord. 11, r. 2; *Williams* v. *Cartwright*, [1895] 1 Q. B. 142, C. A.; *The Elton*, [1891] P. 265; *Re De Penny*, *De Penny* v. *Christie*, [1891] 2 Ch. 63, 71, C. A.; *Re Burland's Trade-mark*, *Burland* v. *Broxburn Oil Co.* (1889), 41 Ch. D. 542; *Tottenham* v. *Barry* (1879), 12 Ch. D. 797; *Cresswell* v. *Parker* (1879), 11 Ch. D. 601, C. A.; *Ex parte Macphail* (1879), 12 Ch. D. 632; *Marshall* v. *Marshall* (1888), 38 Ch. D. 330, C. A.; and see title COMPANIES, Vol. V., p. 18.

(*o*) R. S. C., Ord. 11, r. 4. The affidavit or other evidence must state that in the belief of the deponent the plaintiff has a good cause of action, and must show in what place or country the defendant is or probably may be found and whether he is a British subject or not, and the grounds upon which the application is made (*ibid.*). The application must be made to a judge in chambers and cannot be made to a master or district registrar (R. S. C., Ord. 54, r. 12; *Burt* v. *Bowen*, *supra*; *Stigand* v. *Stigand* (1882), 19 Ch. D. 460; *Traill* v. *Porter* (1878), 1 L. R. Ir. 60; see p. 128, *post*). As to the affidavit, see *Stigand* v. *Stigand*, *supra*; *Blake* v. *Lever* (1880), 6 L. R. Ir. 476; *Young* v. *Brassey* (1875), 1 Ch. D. 277; *Great Australian Gold Mining Co.* v. *Martin* (1877), 5 Ch. D. 1, C. A.; *Reynolds* v. *Coleman* (1887), 36 Ch. D. 453, C. A.; *The Hagen*, [1908] P. 189, C. A.; *Peru Republic* v. *Dreyfus Brothers & Co.* (1886), 55 L. T. 802; *Plaskitt* v. *Eddis*, *supra*; *Parker* v. *Schuller* (1901), 17 T. L. R. 299, C. A.; *Shearman* v. *Findlay* (1883), 32 W. R. 122; *Collins* v. *North British and Mercantile Insurance Co.*, *supra*; *Wood* v. *Middleton*, [1897] 1 Ch. 151; *Kinahan* v. *Kinahan* (1890), 45 Ch. D. 78, 83; *Fowler* v. *Barstow* (1881), 20 Ch. D. 240, C. A.; *Dickson* v. *Law*, [1895] 2 Ch. 62; *Seagrove* v. *Parks*, [1891] 1 Q. B. 551; *Tottenham* v. *Barry* (1879), 12 Ch. D. 797, 804; *Wood* v. *McInnes* (1878), 4 C. P. D. 67; *Williams* v. *Cartwright*, *supra*.

(*p*) *Randall* v. *Campbell*, [1877] W. N. 201; *Dickson* v. *Law*, *supra*; *Holland* v. *Leslie*, [1894] 2 Q. B. 346, 450, C. A.

SECT. 1.

An Ordinary Action in the King's Bench or Chancery Division.

An order giving leave to effect service or give notice of a writ out of the jurisdiction must limit a time after service or notice within which the defendant is to enter an appearance (*q*).

The order.

Effects of order.

211. A writ may by leave be served out of the jurisdiction on a British subject both in the British dominions and in a foreign State (*r*); and a writ may by leave be served out of the jurisdiction on a foreign subject in the British dominions (*s*). A foreigner out of the British dominions cannot be served with a writ (*t*), but may by leave be served with notice of the writ (*u*).

How service effected.

212. A writ for service out of the jurisdiction must be served in the same way as a writ for service within the jurisdiction (*w*).

Notice of a writ must, except in certain cases (*a*), be served in the same way as a writ (*b*).

Service of process generally.

213. The court or a judge may direct that any summons, order, or notice shall be served on any party or person in a foreign country, and the procedure above described as to serving notice of

(*q*) R. S. C., Ord. 11, r. 5. The time depends on the place or country where the writ is to be served or notice given (*ibid.*); see notice issued by the Chancery Registrars dated the 15th July, 1886, and table of time for entering appearance, Yearly Practice of the Supreme Court, 1912, p. 1511. As to the form of the writ or notice in lieu of writ, see R. S. C., App. A, Part I., Forms Nos. 5—10; *Reynolds* v. *Coleman* (1887), 36 Ch. D. 453, C. A. As to amendment of writ, see *Dickson* v. *Law*, [1895] 2 Ch. 62; *Holland* v. *Leslie*, [1894] 2 Q. B. 346, 450, C. A.; *Indigo Co.* v. *Ogilvy*, [1891] 2 Ch. 31, C. A. As to a concurrent writ for service out of the jurisdiction, see *Collins* v. *North British and Mercantile Insurance Co.*, [1894] 3 Ch. 228.

(*r*) *Great Australian Gold Mining Co.* v. *Martin* (1877), 5 Ch. D. 1, C. A.

(*s*) *Western National Bank of New York* v. *Perez, Triana & Co.*, [1891] 1 Q. B. 304, C. A.

(*t*) *Westman* v. *Aktiebolaget Ekmans Mekaniska Snickare-fabrik* (1876), 1 Ex. D. 237; *Hewitson* v. *Fabre* (1888), 21 Q. B. D. 6; *Re Howard, Padley* v. *Camphausen* (1879), 10 Ch. D. 550, C. A.; *Bacon* v. *Turner* (1876), 3 Ch. D. 275; and see titles COMPANIES, Vol. V., p. 20; CORPORATIONS, Vol. VIII., p. 395.

(*u*) R. S. C., Ord. 11, r. 6. As to the form of the notice, see R. S. C., App. A, Part I., No. 9; *Reynolds* v. *Coleman* (1887), 36 Ch. D. 453, C. A.

(*w*) *I.e.*, either personally or by substituted service; see pp. 115, 117, *ante*. It must be served at the place authorised by the order giving leave (*Bonnell* v. *Preston*, [1908] W. N. 155, C. A.).

(*a*) *I.e.*, except in countries to which R. S. C., Ord. 11, r. 8, applies. R. S. C., Ord. 11, r. 8, applies to a foreign country to which the rule may by order of the Lord Chancellor from time to time be applied. It has been so applied to the German Empire ([1904] W. N., Part II., p. 231), the Russian Empire ([1906] W. N., Part II., p. 99), to Spain and Belgium ([1910] W. N., Part II., p. 270); to Portugal ([1912] W. N., Part II., p. 115); and to Japan ([1912] W. N., Part II., p. 204)). In such countries the notice to be served is to be sealed with the seal of the Supreme Court for use out of the jurisdiction, and must be transmitted by the President of the Division in which the action is brought to the Secretary of State for Foreign Affairs, together with a copy translated into the language of the country in which service is to be effected, and with a request for its further transmission to the Government of the country in which leave to serve notice has been given; see R. S. C., App. A, Part I., No. 10A.

(*b*) *Dobson* v. *Festi*, [1891] 2 Q. B. 92, C. A.; *Trübner* v. *Trübner* (1889), 15 P. D. 24; *Beddington* v. *Beddington* (1876), 1 P. D. 426; *Strousberg* v. *Costa Rica Republic* (1880), 29 W. R. 125, C. A.; *South African Republic* v. *La Compagnie Franco-Belge du Chemin de Fer du Nord*, [1898] 1 Ch. 190; *Scott* v. *Royal Wax Candle Co.* (1876), 1 Q. B. D. 404.

a writ of summons applies to the service of any such summons, order, or notice (*c*).

(vii.) *Indorsement of Memorandum of Service.*

Memorandum of service.

214. The person serving a writ of summons must, within three days at most after service, indorse on the writ the day of the month and week of the service; otherwise the plaintiff cannot, in case of non-appearance, proceed by default (*d*).

(viii.) *Setting Aside Writ or Service.*

Setting aside writ or service.

215. If the writ is irregular or informal, the defendant may obtain an order setting it aside (*e*); or if the service has been irregular or informal, the defendant may obtain an order setting aside the service (*f*).

(*c*) R. S. C., Ord. 11, r. 8A (R. S. C., August, 1909). Before this rule there was no power to order the service out of the jurisdiction of anything but a writ or notice in lieu of a writ. Leave can only be given when there is jurisdiction to give leave to serve a writ of summons or notice of writ out of the jurisdiction (*Re Aktiebolaget Robertsfors and La Société Anonyme Des Papeteries De L'Aa*, [1910] 2 K. B. 727).

(*d*) R. S. C., Ord. 9, r. 15. This applies to substituted as well as to other service (*ibid.*) and to service of a writ out of the jurisdiction, but not to a notice in lieu of service of writ (*Re Livesey, Fish* v. *Chatterton* (1882), 47 L. T. 328; *Hastings* v. *Hurley* (1881), 16 Ch. D. 734). It applies to an amended writ when re-served (*The Cassiopeia* (1879), 4 P. D. 188, C. A.). As to the memorandum, see *Foat* v. *Bassett*, [1888] W. N. 255; *Davies* v. *Lound*, [1885] W. N. 54. As to extending the time for making the indorsement, see *Hastings* v. *Hurley*, *supra*; *Sproat* v. *Peckett* (1833), 48 L. T. 755; *Steers* v. *Rogers* (1891), 7 T. L. R. 183; *Shepherd* v. *Silcock*, [1886] W. N. 84. As to the necessity for the indorsement, see *Hamp-Adams* v. *Hall*, [1911] 2 K. B. 942, C. A. As to the reckoning of days under the Rules of the Supreme Court, see *ibid.*, Ord. 64, r. 12; and see title TIME.

(*e*) *Boyle* v. *Sacker* (1888), 39 Ch. D. 249, C. A.

(*f*) See *Meggitt* v. *Schuster* (1863), 7 L. T. 680; *Nelson* v. *Pastorino & Co.* (1883), 49 L. T. 564. In the case of the service of a writ within the jurisdiction, the application should be made to a master in chambers; in the case of the service of a writ out of the jurisdiction to a judge in chambers (*Black* v. *Dawson*, [1895] 1 Q. B. 848, C. A.; *Holland* v. *Bennett*, [1902] 1 K. B. 867, C. A.; *Balfour* v. *Wylie*, [1904] W. N. 72; see *Collins* v. *North British and Mercantile Insurance Co.*, [1894] 3 Ch. 228; *Dickson* v. *Law*, [1895] 2 Ch. 62; *Kinahan* v. *Kinahan* (1890), 45 Ch. D. 78; *Re Burland's Trade-mark, Burland* v. *Broxburn Oil Co.* (1889), 41 Ch. D. 542; *Fowler* v. *Barstow* (1881), 20 Ch. D. 240, C. A.; *Parker* v. *Schuller* (1901), 17 T. L. R. 299, C. A.). Proceedings may be set aside even after judgment (*Hewitson* v. *Fabre* (1888), 21 Q. B. D. 6; *Massey* v. *Heynes* (1888), 21 Q. B. D. 330, C. A.; *Reynolds* v. *Coleman* (1887), 36 Ch. D. 453, C. A.; *Field* v. *Bennett* (1886), 56 L. J. (Q. B.) 89). Irregularity or absence of jurisdiction over the defendant is waived by an unconditional appearance (*Mulckern* v. *Doerks* (1884), 53 L. J. (Q. B.) 526; *Oulton* v. *Radcliffe* (1874), L. R. 9 C. P. 189, *per* BRETT, J., at p. 195; *Anon.* (1819), 1 Chit. 129; *Bayne* v. *Slack* (1857), 3 C. B. (N. S.) 363; *Edwards* v. *Warden* (1874), 9 Ch. App. 495, 501, 502; *Harrison* v. *Williams* (1854), 24 L. T. (O. S.) 143; *Western National Bank of New York* v. *Perez, Triana & Co.*, [1891] 1 Q. B. 304, 308, C. A.; *Green* v. *Braddyll* (1856), 1 H. & N. 69 (irregularity); *Forbes* v. *Smith* (1855), 10 Exch. 717; *Oulton* v. *Radcliffe*, *supra*; *Re Orr Ewing, Orr Ewing* v. *Orr Ewing* (1882), 22 Ch. D. 456, 463, 464, 467; *Moore* v. *Gamgee* (1890), 25 Q. B. D. 244 (jurisdiction); and see *The Dupleix* (1911), 28 T. L. R. 577); see pp. 126, 145, note (*c*), *post*. The objection may not be taken by the defence (*Preston* v. *Lamont* (1876), 1 Ex. D. 361; *White* v. *Macgregor* (1882), 46 J. P. 775). See, further, as to setting aside writ or service, and as to conditional appearance and appearance under protest (*Keymer* v. *Reddy*, [1912] 1 K. B. 215, 219, C. A.; and p. 126, *post*).

SECT. 1.

An Ordinary Action in the King's Bench or Chancery Division.

SUB-SECT. 5.—*Appearance* (*g*).

(i.) *Entry.*

Place of entry.

216. If a defendant to a writ issued in a district registry resides or carries on business within the district, he must appear in the district registry (*h*). If he neither resides nor carries on business in the district, he may appear either at the district registry or at the Central Office (*i*). In all other cases the defendant must enter his appearance in the Central Office (*j*).

Time for entry.

217. An appearance should be entered within the time limited by the writ, that is, in the case of an ordinary writ for service within the jurisdiction, within eight days of the day of service, inclusive of that day (*k*); and, in the case of a writ for service out of the jurisdiction, within the time for appearance specially fixed by the order giving leave (*l*). A defendant may, however, appear at any time before judgment (*m*); but if he appears at any time after the time limited, he will not, unless the court or a judge otherwise orders, be entitled to any further time for delivering his defence or for any other purpose than if he had appeared according to the writ (*n*).

Mode of entry. *Præcipe.*

218. A defendant enters an appearance to a writ of summons by delivering to the proper officer a memorandum in writing dated on the day of its delivery, and containing the name of the defendant's solicitor, or stating that the defendant defends in person. The defendant at the same time delivers to the officer a duplicate of the memorandum which the officer must seal with the official seal, showing the date on which it is sealed, and return to the person entering the appearance (*o*).

(*g*) As to appearance in special proceedings, or by particular parties, see titles ADMIRALTY, Vol. I., pp. 85 (undertaking to appear—action *in rem*), 87 (appearance in Admiralty proceedings generally); BANKRUPTCY AND INSOLVENCY, Vol. II., p. 52 (procedure on petition); COMPANIES, Vol. V., pp. 17 (proceedings against comanies), 556 (attendance at winding-up proceedings); CORPORATIONS, Vol. VIII., p. 395; CROWN PRACTICE, Vol. X., pp. 10 (information), 205 (*certiorari*); FRIENDLY SOCIETIES, Vol. XV., p. 190; HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 142 (appearance to indictment); HUSBAND AND WIFE, Vol. XVI., pp. 510, 511 (matrimonial causes); INFANTS AND CHILDREN, Vol. XVII., p. 140 (guardian *ad litem*); LOCAL GOVERNMENT, Vol. XIX., p. 290 (local authority); LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XVIII., pp. 462 *et seq.*; MEDICINE AND PHARMACY, Vol. XX., p. 323 (disciplinary inquiry); PARTNERSHIP, Vol. XXII., pp. 43 *et seq.*; TRADE AND TRADE UNIONS. As to judgment in default of appearance, see title JUDGMENTS AND ORDERS, Vol. XIX., pp. 184 *et seq.*; and as to the effect of non-appearance in other matters, see titles CROWN PRACTICE, Vol. X., p. 10 (information); DAMAGES, Vol. X., p. 349 (assessment of damages); INTERPLEADER, Vol. XVII., p. 601; LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XVIII., p. 465.

(*h*) R. S. C., Ord. 12, r. 4.

(*i*) *Ibid.*, r. 5.

(*j*) *Ibid.*, rr. 1, 2. As to when the action proceeds in a district registry and when in London, see *ibid.*, rr. 6, 7, and R. S. C., Ord. 35, rr. 13—16; and see title COURTS, Vol. IX., pp. 70, 71.

(*k*) See R. S. C., App. A, Part II., Form No. 1. The time for appearance of a defendant on a British man-of-war, though technically within the jurisdiction, will be extended (*Fraser* v. *Akers* (1891), 35 Sol. Jo. 477; and see p. 115, *ante*).

(*l*) *Ibid.*, Ord. 11, r. 5; see p. 122, *ante*.

(*m*) R. S. C., Ord. 12, r. 22.

(*n*) *Ibid.* A defendant may waive service and appear *gratis* without being served at all; see Lush's Practice, 3rd ed., Vol. I., p. 392.

(*o*) R. S. C., Ord. 12, r. 8. As to the form of memorandum, see *ibid.*,

The defendant, on the day on which he enters an appearance to a writ of summons, must give notice of his appearance to the plaintiff's solicitor, or, if the plaintiff sues in person, to the plaintiff himself (*p*).

Notice.

219. If a defendant appears by a solicitor, the solicitor must state in the memorandum his place of business, and if the appearance is entered in the Central Office he must give an address for service not more than three miles from the Royal Courts of Justice (*q*); if the appearance is entered in a district registry, the address for service must be in the district (*r*).

Address for service.

If a defendant appears in person, he must state in the memorandum his address and an address for service, which must be within the same area as in the case of a defendant appearing by a solicitor (*s*).

If the memorandum does not contain such address, it cannot be received; and, if any address stated in the memorandum is illusory or fictitious, the appearance may be set aside on the application of the plaintiff (*t*).

Effect of absence of or fictitious address.

App. A, Part II., Form No. 1. On receipt of the memorandum of appearance the officer is forthwith to enter the appearance in the Cause Book (R. S. C., Ord. 12, r. 14). The appearance may be entered by the defendant in person or by a solicitor; any person authorised by the defendant may deliver to the officer the memorandum of appearance (*Oake* v. *Moorecroft* (1869), L. R. 5 Q. B. 76); but as to giving notice, see note (*p*), *infra*. A corporation can only enter an appearance by a solicitor (*Scriven* v. *Jescott* (*Leeds*), *Ltd.* (1908), 126 L. T. Jo. 100; see title CORPORATIONS, Vol. VIII., p. 395). An infant must appear by a guardian *ad litem* (R. S. C., Ord. 16, r. 18); see title INFANTS AND CHILDREN, Vol. XVII., p. 140; a lunatic so found, by his committee (R. S. C., Ord. 16, r. 17); but, in the case of a person of unsound mind not so found an appearance is entered for him in the usual way, and then a guardian *ad litem* is appointed (*ibid.*); see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 462 *et seq.* If a person is sued in a wrong name, he should appear in his right name (*e.g.*, A. B. sued as C. D.) (*Hobson* v. *Wadsworth* (1840), 8 Dowl. 601; *Kitchen* v. *Roots* (1840), 8 Dowl. 232). If persons are sued as partners in the name of their firm, they should appear individually in their own names (Ord. 48A, r. 5); see title PARTNERSHIP, Vol. XXII., pp. 43 *et seq.* If two or more defendants in the same action appear by the same solicitor and at the same time, the names of all the defendants so appearing must be inserted in one memorandum (R. S. C., Ord. 12, r. 17). An appearance once entered cannot be withdrawn without leave (*Menzies* v. *Rodrigues* (1814), 1 Price, 92; *Sambroke* v. *Hayes* (1835), 4 L. J. (CH.) 175). An appearance entered by a solicitor without authority may be struck out on the application of the defendant or the plaintiff (*Re Gray, Gray* v. *Coles* (1891), 65 L. T. 743; *Yonge* v. *Toynbee*, [1910] 1 K. B. 215, C. A.).

(*p*) R. S. C., Ord. 12, r. 9. As to form of notice, see R. S. C., App. A, Part II., No. 2. See *Smith* v. *Dobbin* (1877), 3 Ex. D. 338, C. A.; *Johnson* v. *Whitehead*, [1876] W. N. 10. The notice can only be given by the defendant or his solicitor; it cannot be given by an unqualified person (*Re Ainsworth, Ex parte Law Society*, [1905] 2 K. B. 103; and see title SOLICITORS).

(*q*) As to the computation of this distance, see note (*i*), p. 113, *ante*.

(*r*) R. S. C., Ord. 12, r. 10.

(*s*) *Ibid.*, r. 11.

(*t*) *Ibid.*, r. 12; Ord. 70, r. 1; see *Edell* v. *Cave* (1884), 54 L. J. (CH.) 308; *Anon.*, [1884] W. N. 241. If the plaintiff accepts an appearance and does not move to set it aside, he cannot afterwards have it altered (*Munster* v. *Cox* (1885), 10 App. Cas. 680).

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220. In an action for the recovery of land any person not named as a defendant in the writ of summons may, on filing an affidavit that he is in possession of the land either by himself or by his tenant, get leave to appear and defend (*u*).

(ii.) *Conditional.*

Appearance by person in possession of land.

221. A defendant before appearing may serve notice to set aside the service of the writ or notice of the writ (*v*). But, as in many cases the time limited for appearance expires before a motion can be made, the defendant may get leave to enter and may enter a conditional appearance (*w*). A defendant who objects to the jurisdiction has also an absolute right to enter an appearance under protest (*x*).

Conditional appearance.

SUB-SECT. 6.—*Proceedings at Chambers.*

(i.) *In General.*

Jurisdiction.

222. Any judge of the High Court of Justice may, subject to the Rules of Court, exercise in court or in chambers all or any part of the jurisdiction vested by the Judicature Act, 1873 (*a*), in the High Court (*b*) in all causes and matters, and in all proceedings in any

(*u*) R. S. C., Ord. 12, r. 25; see *Doe* d. *Tilyard* v. *Cooper* (1800), 8 Term Rep. 645; *Doe* d. *Pearson* v. *Roe* (1830), 6 Bing. 613; *Doe* d. *Hebblethwaite* v. *Roe* (1790), 3 Term Rep. 783, n. (b); *Lovelock* d. *Norris* v. *Dancaster* (1790), 4 Term Rep. 122; *Croft* v. *Lumley* (1885), 4 E. & B. 608; *Whitworth* v. *Humphries* (1860), 5 H. & N. 185; *Longbourne* v. *Fisher* (1878), 47 L. J. (CH.) 379; and see titles LANDLORD AND TENANT, Vol. XVIII., p. 559; REAL PROPERTY AND CHATTELS REAL. As to an application, by a person who has not appeared, for an order setting aside judgment, see *Minet* v. *Johnson* (1890), 63 L. T. 507, C. A.; *Jacques* v. *Harrison* (1883), 12 Q. B. D. 136, C. A. The application is made *ex parte* to a master in chambers, supported by an affidavit. If, in an action for the recovery of land, a writ is served on the tenant in occupation, he is required forthwith to give notice of it to his landlord (Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 209). A person who appears to defend an action for the recovery of land as landlord, in respect of property of which he is in possession only by his tenant, must state in his appearance that he appears as landlord (R. S. C., Ord. 12, r. 26; see *ibid.*, App. A, Part II., Form No. 4). A person not named as a defendant in any action for the recovery of land, who obtains leave to appear and defend, must enter an appearance, according to the rules which govern the entry of appearance (see p. 124, *ante*), entitled in the action against the party named in the writ as defendant, and he must forthwith give notice of such appearance to the plaintiff's solicitor or to the plaintiff, if he is suing in person, and is in all subsequent proceedings to be named as a defendant in the action (R. S. C., Ord. 12, rr. 27, 28). A person who so appears may limit his defence to a part only of the property mentioned in the writ, describing that part with reasonable certainty in his memorandum of appearance, or in a notice entitled in the action and signed by him or his solicitor to be served within four days after appearance If the appearance is not so limited, it is to be deemed an appearance to defend for the whole (*ibid.*, r. 28); for form of notice, see *ibid.*, App. A, Part II., Form No. 3.

(*v*) *Ibid.*, Ord. 12, r. 30; see p. 123, *ante*.

(*w*) Leave is obtained *ex parte* on an application to a master in chambers (*Bonnell* v. *Preston*, [1908] W. N. 155, C. A.). As to appearance under protest by a person served as a partner in a firm, see title PARTNERSHIP, Vol. XXII., p. 44.

(*x*) *Keymer* v. *Reddy*, [1912] 1 K. B. 215; see *Firth* v. *De las Rivas*, [1893] 1 Q. B. 768; *Mayer* v. *Claretie* (1890), 7 T. L. R. 40; R. S. C., Ord. 48A, r. 7.

(*a*) 36 & 37 Vict. c. 66.

(*b*) See title COURTS, Vol. IX., pp. 52 *et seq.*

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causes or matters which might before the passing of that Act have been heard either in court or in chambers by a single judge of any of the courts whose jurisdiction was by that Act transferred to the High Court (*c*), or which are directed to be so heard by the Rules of Court made under that Act (*d*).

Procedure.

223. Applications for orders relating to the interlocutory proceedings in an action are made in chambers (*e*).

Applications in chambers may in some cases be made *ex parte*; in all other cases they must be made by summons (*f*).

An ordinary summons must be served two clear days before the return of the summons, unless it is otherwise ordered (*g*).

If any party to a summons fails to attend, either upon the return of the summons or at any time appointed for the consideration or further consideration of the matter, the judge may proceed *ex parte*, if he thinks expedient (*h*).

Any question of fact material to any proceedings in chambers may be proved by affidavit (*i*).

(*c*) See title COURTS, Vol. IX., pp. 52 *et seq.*

(*d*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 39; *Salm Kyrburg* v. *Posnanski* (1884), 13 Q. B. D. 218; *Amstell* v. *Lesser* (1885), 16 Q. B. D. 187. Any judge sitting under the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 39, is to be deemed to constitute a court (*Amstell* v. *Lesser*, *supra*). As to the meaning of "the court or a judge," see note (*f*), p. 103, *ante*. As to proceedings in chambers, see R. S. C., Ord. 54; *Walmsley* v. *Mundy*, *Ex parte Goodenough* (1884), 13 Q. B. D. 807, 812, C. A.; *Clover* v. *Adams* (1881), 6 Q. B. D. 622. As to the jurisdiction of a master, see pp. 128, 130, 131, *post*.

(*e*) Any order which under the Rules of Court can be made by the court or a judge can be made in chambers, and an application for any such order before and after trial should be made in chambers. As to chambers in the King's Bench Division and the Chancery Division, see pp. 128 *et seq.*, *post*. As to orders on summons for directions, see R. S. C., Ord. 30, rr. 1, 2, 5.

(*f*) R. S. C., Ord. 54, r. 1. As to *ex parte* summonses (which are not used in the King's Bench Division), see R. S. C., Ord. 54, r. 2. The following *ex parte* applications in relation to an action are made to a master:—for leave to renew a writ, for substituted service, to enter judgment for possession of land in case of vacant possession, to appear and defend in an action for recovery of land, to sue or defend as a pauper, to issue a third-party notice, to carry on proceedings, to join other causes of actions with actions for recovery of land, to issue execution after six years, for garnishee order *nisi*, for charging order *nisi* on stock. The following *ex parte* applications in relation to an action must be made to a judge in chambers:—for leave to serve notice of writ out of jurisdiction, for an injunction or receiver in an urgent case (R. S. C., Ord. 50, r. 6); for a charging order for solicitor's costs, see R. S. C., Ord. 54, r. 12; Yearly Practice of the Supreme Court, 1912, pp. 730, 770. A receiver should not be appointed *ex parte*, except in very special circumstances (*Re Connolly Brothers, Ltd.*, *Wood* v. *Connolly Brothers, Ltd.*, [1911] 1 Ch. 731, C. A.).

(*g*) R. S. C., Ord. 54, r. 4E. A summons for time only may be served on the day previous to the return (*ibid.*). A summons to assign a guardian *ad litem* under *ibid.*, Ord. 13, r. 1, and for further consideration under *ibid.*, Ord. 55, r. 72, must be served six clear days before the return; a summons for summary judgment under *ibid.*, Ord. 14, r. 2, for sale under execution by private contract under *ibid.*, Ord. 43, r. 10, and for directions under *ibid.*, Ord. 30, must be served four days before the return; as to shortening the time for return, see *ibid.*, Ord. 64, r. 7. For a form of summons, see *ibid.*, App. K, Form No. 1. The summons must be addressed to all the persons on whom it is to be served (*ibid.*, Ord. 54, r. 10).

(*h*) *Ibid.*, r. 5. Such evidence of service may be required as the judge thinks just (*ibid.*); and see *ibid.*, Ord. 67, r. 9.

(*i*) *Ibid.*, Ord. 38, r. 1. The court or a judge may, on the application of

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On the hearing of any application in chambers counsel are heard, but have not exclusive right of audience; solicitors for the parties concerned have the right to be heard, and their managing clerks are allowed to represent them (*k*).

Proceedings in chambers are private, and there is no right to publish them without leave (*l*).

The costs of proceedings in chambers are in the discretion of the judge or master who hears the application (*m*).

(ii.) *In the King's Bench Division.*

(a) *Before a Master.*

Jurisdiction of master.

224. In the King's Bench Division, a master may transact all such business and exercise all such authority and jurisdiction in respect of the same as, under the Judicature Act, 1873 (*n*), or the Rules of the Supreme Court, may be transacted or exercised by a judge in chambers except (1) matters relating to criminal proceedings or to the liberty of the subject; (2) granting leave for service out of the jurisdiction of a writ of summons or notice of a writ of summons; (3) appeals from district registrars; (4) prohibitions; (5) injunctions and other orders under the Judicature Act, 1873 (*n*), s. 25 (8), other than orders for the appointment of receivers by way of equitable execution and injunctions so far only as they are ancillary or incidental to equitable execution and charging orders; (6) reviewing taxation of costs; (7) acknowledgments of married women or applications to dispense with the concurrence of a husband in a disposition by a married woman (*o*).

either party, order the attendance for cross-examination of the person making the affidavit (R. S. C., Ord. 38, r. 1). In applications under *ibid.*, Ord. 14, r. 1, *viva voce* evidence by the defendant is expressly allowed as an alternative to evidence by affidavit; see title JUDGMENTS AND ORDERS, Vol. XVII., pp. 191, 192.

(*k*) See title BARRISTERS, Vol. II., 372.

(*l*) R. S. C., Ord. 54, r. 39.

(*m*) R. S. C., Ord. 65, r. 1; see Judicature Act, 1890 (53 & 54 Vict. c. 44), s. 5.

(*n*) 36 & 37 Vict. c. 66. As to masters of the King's Bench Division generally, see title COURTS, Vol. IX., pp. 66, 67. As to the powers of a master in matters dealt with under other titles, see titles ARBITRATION, Vol. I., pp. 484, 488 (references); DAMAGES, Vol. X., p. 349 (references); DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI., pp. 59 (application for discovery), 89, 98 (inspection and costs), 106, 110 (interrogatories); ELECTIONS, Vol. XII., p. 421; INJUNCTIONS, Vol. XVII., pp. 272 *et seq.*; INTERPLEADER, Vol. XVII., pp. 606, 607 (hearing of summons), 609, 611 (issue), and see pp. 617, 618; JUDGMENTS AND ORDERS, Vol. XVIII., pp. 191 *et seq.* (procedure under R. S. C., Ord. 14), 212 *et seq.* (amendment or setting aside orders); PLEADING, Vol. XXII., pp. 417 *et seq.*

(*o*) R. S. C., Ord. 54, r. 12, as amended by R. S. C., June, 1908, and July, 1911. Applications which may be made to a master should in all cases in the first instance be made to the master and not to the judge. There are now six King's Bench masters, three of whom attend as masters in chambers at the Royal Courts of Justice every day during the sittings of the offices of the Supreme Court (R. S. C., Ord. 54, rr. 13, 15; see R. S. C., Ord. 63, r. 3). Every action in the King's Bench Division not proceeding in a district registry is assigned to one of the masters, and all documents and proceedings therein must be marked with the name of the master to whom the action is assigned, and every application or proceeding therein which by the rules is heard and dealt with by a master (*i.e.*, every application or proceeding which a

225. Any person affected by any order or decision of a master may appeal to a judge in chambers (*p*).

Appeal to judge in chambers.

The appeal is usually by one clear day's notice in writing to attend before the judge without a fresh summons, within five days after the decision complained of, or such further time as may be allowed by a judge or master, but may be by way of indorsement on the summons by the master at the request of any party (*q*).

An appeal from a master's decision does not stay the proceeding, unless a judge or master so orders (*r*).

(b) *Before a Judge.*

226. All judges' summonses (*s*) and appeals and applications to a judge in an action before the mode and place of trial have been fixed are returnable before and dealt with by the judge in chambers (*t*).

Judge in chambers.

All judges' summonses and appeals and applications to the judge in chambers after the mode and place of trial have been fixed are, as far as practicable, to be dealt with, if such judge so directs, by the judge who, according to the rota of business in the King's Bench Division and to the circuits announced for the judges, may be expected to try the action; but, if there is no such direction, such

master may deal with; see R. S. C., Ord. 54, r. 12), except taxation of costs (as to which see title SOLICITORS), is to be heard and dealt with by such master (R. S. C., Ord. 5, r. 6; R. S. C., Ord. 54, rr. 17, 18; Regulations of the Masters of the King's Bench Division, 7th August, 1906, Yearly Practice of the Supreme Court, 1912, p. 787). All or any number of the actions so assigned may be transferred by the Lord Chief Justice from any one master to any other master (R. S. C., Ord. 5, r. 6). During the absence from illness or any other urgent cause, or during a vacancy in the office of any master to whom any action has been assigned, or during any vacation, any other master may hear and dispose of any application therein on behalf or in the place of such master (*ibid.*, Ord. 5, r. 8; *ibid.*, Ord. 54, r. 9A). As to the entry of summonses in lists and time for the hearing and calling on of summonses, see *ibid.*, Ord. 54, rr. 26—28. As to a master referring a matter to the judge, see *ibid.*, Ord. 54, r. 20.

(*p*) *Ibid.*, r. 21. An appeal lies in every case except where the master acts as *persona designata*, *e.g.*, as to the sufficiency of security ordered to be given to the satisfaction of a master (*Hoare & Co.* v. *Morshead*, [1903] 2 K. B. 359, C. A., and compare *Sandback Charity Trustees* v. *North Staffordshire Rail. Co.* (1877), 3 Q. B. D. 1, C. A.; *Shrewsbury (Earl)* v. *Wirral Railways Committee*, [1895] 2 Ch. 812, C. A.; *Re Cannings, Ltd. and Middlesex County Council*, [1907] 1 K. B. 51, C. A.); and see title INTERPLEADER, Vol. XVII., p. 617.

(*q*) R. S. C., Ord. 54, r. 21. Unless otherwise ordered, there must be at least one clear day between service of the notice of appeal and the day of hearing (*ibid.*); see *Bell* v. *North Staffordshire Rail. Co.* (1879), 4 Q. B. D. 205; *Carter* v. *Stubbs* (1880), 6 Q. B. D. 116, C. A.; *Burke* v. *Rooney* (1879), 4 C. P. D. 226; *Gibbons* v. *London Financial Association* (1879), 4 C. P. D. 263.

(*r*) R. S. C., Ord. 54, r. 22. The judge who hears the appeal has jurisdiction over the costs (R. S. C., Ord. 61, r. 1); if he makes no order, the costs of the appeal are not costs in the cause (*Mann* v. *Harbord* (1869), L. R. 5 Exch. 17).

(*s*) See note (*f*), p. 127, *ante*.

(*t*) R. S. C., Ord. 54, r. 30. For the purpose of exercising every authority conferred by statute, order, or rule upon the judge at chambers, and not specifically provided for by the Rules of Court, the judge for interlocutory business is the judge at chambers (*ibid.*, r. 40). As to applications to the judge, see *ibid*, r. 30.

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summonses, appeals and applications are dealt with by the judge in chambers (*u*).

(iii.) *In the Chancery Division.*

227. The business in chambers of the judges of the Chancery Division is carried on in conjunction with their court business (*v*).

Business.

228. All applications relating to the conduct of any cause or matter, and such other matters as the judge thinks fit to dispose of in chambers, are disposed of in chambers (*a*).

Applications to judge.

The judges of the Chancery Division may, subject to the Rules of Court, order what matters shall be heard and investigated by the masters (*b*), and what matters by the judges themselves, but the following applications must be brought before the judge in person:—for the appointment of a provisional liquidator, for substituted service, for service out of the jurisdiction, for leave to take proceedings under a judgment or order for administration, for the appointment of a new trustee, for general administration, for the execution of a trust, for accounts or inquiries concerning the property of a deceased person or other property held upon any trust or concerning the parties entitled to such property, for a vesting or other order consequential on the appointment of a new trustee, for an order binding persons where service of notice of a judgment or order for

(*u*) As to the alteration of the mode and place of trial, see R. S. C., Ord. 54, r. 32. As to applications in actions to be tried on circuit, see *ibid.*, rr. 34—36. As to the lists of Middlesex actions, see *ibid.*, r. 33. The lists now kept in the King's Bench Division are as follows:—Special jury, No. 1; special jury, No. 2; common jury, No. 1; common jury, No. 2; non-jury. Actions for trial are to be entered by the associate in one or other of these lists, according to his discretion (Yearly Practice of the Supreme Court, 1912, p. 789). As to notice of a summons before, and of an appeal to, a judge sitting in Middlesex, other than the judge for interlocutory business, see R. S. C., Ord. 54, r. 35. If a judge before whom a summons is returnable is not available, or there is no provision as to the judge before whom a summons is returnable, it may be heard by the judge for interlocutory business (*ibid.*, r. 38). R. S. C., Ord. 54, does not affect the practice as to summonses of the court which deal with the separate lists of commercial causes (*ibid.*, r. 41); see Notice as to Commercial Causes, [1895] W. N., Part 2, p. 2; Yearly Practice of the Supreme Court, 1912, pp. 1611, 1612.

(*v*) R. S. C., Ord. 55, r. 1. Every writ issued in the Chancery Division is marked from the first with the name of one of the judges of the Chancery Division (*ibid.*, Ord. 5, r. 9 (a)). The six judges of the Chancery Division are divided into three pairs, one set of chambers with four masters (formerly called chief clerks) being attached to each pair. Each judge has jurisdiction over every cause or matter assigned to him or to the judge linked with him; see Yearly Practice of the Supreme Court, 1912, p. 28.

(*a*) R. S. C., Ord. 55, r. 2 (17), (18). Applications for time to plead, for leave to amend pleadings, for discovery and production of documents, are particularly mentioned in *ibid.*, r. 2 (17), as matters that are to be disposed of in chambers. See *ibid.*, r. 2, for a list of the matters to be disposed of in chambers by judges of the Chancery Division. In interlocutory proceedings in an action applications are made by a summons for directions (see p. 127, *ante*, and p. 135, *post*) or a notice under R. S. C., Ord. 30, or by an ordinary summons. As to an originating summons, see p. 186, *post*.

(*b*) As to the masters of the Chancery Division, see title COURTS, Vol. IX., pp. 67, 68. As to their powers and duties in certain particular matters, see titles JUDGMENTS AND ORDERS, Vol. XVIII., pp. 204 *et seq.*; LAND IMPROVEMENT, Vol. XVIII., p. 301.

accounts or inquiries has been dispensed with, for an order for sale in a debenture-holder's action, before judgment, or after judgment, before all the persons interested are ascertained (*c*).

Applications to master.

229. In the Chancery Division in chambers, every application in the first instance comes before a master, even in a matter in which a master can make no order; and the master hears the evidence and then adjourns the matter to the judge (*d*). In other cases the master may, at his discretion, adjourn a matter to the judge, and any party has a right to have any question brought before the judge without taking out a summons for that purpose (*e*).

Adjournment to the judge.

The adjournment to the judge is not in the nature of an appeal (*f*). In interlocutory proceedings in an action the master has no power to make an order, except when the matter is not adjourned to the judge. If no application is made for an adjournment and the master does not himself adjourn the matter, and an order is made, it can only be altered by a motion to the court to discharge it (*g*).

(iv.) *In a District Registry.*

Business.

230. Where an action is proceeding in a district registry (*h*), all interlocutory proceedings, except where the Rules of Court otherwise provide, or the court or a judge otherwise orders, must be taken in the district registry down to and including the entry of final judgment (*i*). In such an action, pleadings and other documents requiring to be filed are to be filed in the district registry (*j*), and the district registrar may exercise all such authority and jurisdiction in respect thereof as may be exercised by a judge in chambers, except such as by the Rules of Court a master is precluded from exercising (*k*).

Jurisdiction of district registrar.

(*c*) R. S. C., Ord. 55, r. 15; see also *ibid.*, rr. 10A, 15A, 35A; and *ibid.*, Ord. 51, r. 1B. As to the jurisdiction in companies' winding up, see title COMPANIES, Vol. V., pp. 392 *et seq.* As to applications to the court for reduction of capital, see *ibid.*, pp. 108 *et seq.*, and see *ibid.*, p. 109, note (*b*).

(*d*) *Re Marsden's Estate, Withington* v. *Neumann* (1889), 40 Ch. D. 475; and see note (*v*), p. 130, *ante*. In the Chancery Division all orders made in chambers are orders of the judge, even though made without the parties actually going before him (*Lloyd's Bank, Ltd.* v. *Princess Royal Colliery Co.* (1900), 48 W. R. 427); as to the right of the suitor to go before the judge, see *Scott* v. *Homer* (1890), 60 L. J. (CH.) 238.

(*e*) *Upton* v. *Brown* (1882), 20 Ch. D. 731, C. A.; *Re Rigg, Wadham* v. *Rigg* (1862), 10 W. R. 365; see R. S. C., Ord. 55, r. 69.

(*f*) *Re Watts, Smith* v. *Watts* (1882), 22 Ch. D. 5, C. A. The adjournment to the judge may be directed at any time before the order is passed and entered (*Re Thomas, Bartley* v. *Thomas*, [1911] 2 Ch. 389).

(*g*) See [1884] W. N. 218; Yearly Practice of the Supreme Court, 1912, p. 840; *Scott* v. *Homer* (1890), 60 L. J. (CH.) 238; *Harrington* v. *Ramage*, [1907] W. N. 137. As to the power of a master, see R. S. C., Ord. 55, rr. 16, 17, 17A; as to lists of business and as to attendances before the master, ses *ibid.*, rr. 38—43.

(*h*) As to district registries, see title COURTS, Vol. IX., pp. 69 *et seq.*; and see titles ADMIRALTY, Vol. I., pp. 80 *et seq.*; EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 152, 154, 165.

(*i*) R. S. C., Ord. 35, r. 1.

(*j*) *Ibid.*, r. 19.

(*k*) *Ibid.*, r. 6; see p. 128, *ante*, and *Townend* v. *Kirkham*, [1898] 1 Q. B. 51, 54, C. A. As to Chancery actions in the Liverpool and Manchester

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Appeal to judge.

Removal to London.

Removal to district registry.

231. Any person affected by any order of a district registrar may appeal to a judge, even in a matter in which the district registrar had jurisdiction only by consent (*l*).

232. An action proceeding in the district registry may, in some cases, be removed by the defendant as of right to London (*m*). In other cases when there is no right of removal, the court, judge, or district registrar may, on the application of either party, if satisfied that there is sufficient reason, order the removal of such an action to London (*n*).

The court or a judge may similarly remove an action proceeding in London to any district registry (*o*).

(v.) *Appeals from the Judge in Chambers.*

Appeal only by leave.

Consent orders.

Orders as to costs.

No appeal.

233. With certain exceptions, no appeal lies without the leave of the judge or of the Court of Appeal from any interlocutory order or interlocutory judgment of a judge (*p*).

No appeal lies from an order made by consent of parties or as to costs only, when such costs are in the discretion of the judge, except with the leave of the court or judge making the order (*q*).

No appeal lies from an order of a judge giving unconditional leave

District Registries, see R. S. C., Ord. 35, r. 6A. Applications to a district registrar are made in the same way as applications in chambers (*ibid.*, r. 7; see p. 127, *ante*). As to a district registrar referring a matter to a judge, see R. S. C., Ord. 35, r. 8.

(*l*) *Ibid.*, r. 9, as amended by R. S. C., July, 1905. The appeal is made in the same way as an appeal from the master (see p. 129, *ante*); but the notice is to attend before the judge within seven days after the party complaining has had notice of the order, and there must be at least two clear days between the service of the notice of the appeal and the day of hearing (R. S. C., Ord. 35, r. 9). An appeal from a district registrar is no stay of proceedings, unless a judge or the registrar so orders (*ibid.*, r. 10). *Ibid.*, r. 9, does not apply to the Chancery Division, because there is no appeal in the Chancery Division from a master to the judge (see p. 131, *ante*). If a summons is heard in an action in the Chancery Division proceeding in the district registry, it is the duty of the registrar, on the application of either party, to adjourn the summons to the judge (*Atkinson* v. *Button*, [1909] W. N. 74); see R. S. C., Ord. 35, rr. 11, 12. In such a matter, the adjournment is to the judge to whom the action is assigned, but in the district registry of Liverpool or Manchester the adjournment may be to any judge for the time being sitting at Liverpool or Manchester (*ibid.*, r. 12). As to filing of documents in such an action, see *ibid.*, r. 21.

(*m*) *Ibid.*, rr. 13, 14; *Smith* v. *Bell*, [1883] W. N. 196; *Walker* v. *Crabtree*, [1883] W. N. 197.

(*n*) R. S. C., Ord. 35, r. 16; *Re Thwaites, Yerburgh* v. *Aston*, [1890] W. N. 218; *Re Neath and Bristol Steamship Co.* (1888), 58 L. T. 180; *Birmingham Waste Co.* v. *Lane*, [1876] W. N. 50; *Lumb* v. *Whiteley*, [1877] W. N. 40; *Re Ebersley's Hotel Co.*, [1884] W. N. 252. If such an order is made, the defendant must give notice to the plaintiff of an address for service in London (see R. S. C., Ord. 35, r. 18). As to the transmission of documents by the district registrar, see *ibid.*, r. 20.

(*o*) *Ibid.*, r. 17.

(*p*) Judicature (Procedure) Act, 1894 (57 & 58 Vict. c. 16), s. 1 (b). As to the nature of an interlocutory order, see title JUDGMENTS AND ORDERS, Vol. XVIII., pp. 178 *et seq.* See also title HUSBAND AND WIFE, Vol. XVI., p. 461.

(*q*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 49.

to defend an action (*r*), or from any order allowing an extension of time for appealing from a judgment or order (*s*).

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234. In matters of practice and procedure, the appeal from the judge in chambers is to the Court of Appeal (*t*). In matters not relating to practice and procedure in the King's Bench Division, the appeal from the judge in chambers is to the divisional court (*u*). In the Chancery Division, the appeal in all cases from the judge in chambers is to the Court of Appeal (*v*).

To which court appeals lie.

In all matters coming within the discretion of the judge in chambers the Court of Appeal does not interfere unless the discretion has been exercised on a wrong principle or not at all, or there has been some miscarriage (*a*).

SUB-SECT. 7.—*Proceedings in Divisional Court.*

235. An appeal to the divisional court is by motion, and must be made within eight days after the decision appealed against, or, if no court to which the appeal can be made sits within such time, on the first day on which any such court may be sitting after the expiration of such time (*b*).

Appeal by motion.

In some proceedings in an action, motions are made to the divisional court by an independent application, and not by way of appeal (*c*).

Independent application.

(*r*) Judicature (Procedure) Act, 1894 (57 & 58 Vict. c. 16), s. 1 (3).

(*s*) *Ibid.*, s. 1 (1) (a).

(*t*) *Ibid.*, s. 1 (4). As to the Court of Appeal, see p. 192, *post*. In practice, every order made in chambers in the course of an action is treated as a matter of practice and procedure (Yearly Practice of the Supreme Court, 1912, pp. 785, 1369); see p. 194, *post*. In matters of practice and procedure a judge cannot now refer a summons to the divisional court; he must give a decision on it (*Roberts* v. *Plant*, [1895] 1 Q. B. 597, C. A.; *Hood-Barrs* v. *Cathcart* (1895), 64 L. J. (Q. B.) 352, C. A.).

(*u*) Judicature (Procedure) Act, 1894 (57 & 58 Vict. c. 16), s. 1 (5); R. S. C., Ord. 54, r. 23.

(*v*) See *A.-G.* v. *Llewellyn* (1888), 58 L. T. 367; *Re Somerville, Downes* v. *Somerville* (1887), 56 L. T. 424; *Boake* v. *Stevenson*, [1895] 1 Ch. 358.

(*a*) See *Bew* v. *Bew*, [1899] 2 Ch. 467, C. A.; *Golding* v. *Wharton Saltworks Co.* (1876), 1 Q. B. D. 374, C. A.; *Mangan* v. *Metropolitan Electric Supply Co.*, [1891] 2 Ch. 551, C. A.; *Davies* v. *Evans* (1882), 9 Q. B. D. 238, 244; *Gardner* v. *Jay* (1885), 29 Ch. D. 50, C. A.; *Young* v. *Thomas*, [1892] 2 Ch. 134, C. A.

(*b*) R. S. C., Ord. 54, r. 24. In matters arising in the course of an action there are now in practice few appeals which can be brought from chambers to the divisional court. Notice of appeal must be given within five days after the decision, for it must be served two clear days before the day fixed for hearing (*Steedman* v. *Hakim* (1888), 22 Q. B. D. 16, C. A.; *Hobbs* v. *Mead* (1888), 53 J. P. 40). If the last day on which notice can be served falls on a Sunday, the notice must be given on the day before (*Chambon* v. *Heighway* (1890), 54 J. P. 520); see title TIME. Notice may be given for a day not in the sittings (*Re Coulton, Hamling* v. *Elliott* (1886), 34 Ch. D. 22, C. A.). As to amending a notice, see *Williams* v. *De Boinville* (1886), 17 Q. B. D. 180. As to extending time, see *Wallingford* v. *Mutual Society* (1880), 5 App. Cas. 685.

(*c*) *E.g.*, motion for judgment where judgment cannot be entered without it (see R. S. C., Ord. 13, r. 12; Ord. 27, r. 11); motion to set aside a judgment entered by any officer of the court, or special referee or arbitrator under an order of the court, and to enter some other judgment (*ibid.*, Ord. 40, r. 6); motion to adopt or vary or send back the report of a referee (*ibid.*, Ord. 36, rr. 54, 55); see title ARBITRATION, Vol. I., p. 476.

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Except where there is any practice to the contrary, a motion is not to be made without previous notice to the parties affected thereby (*d*). Two clear days' notice must, as a rule, be given, unless special leave to the contrary is given by the court or a judge (*e*).

On the hearing of such a motion evidence may be given by affidavit (*f*).

Motions must be made by counsel or by litigants in person (*g*).

Notice of motion.

Evidence.

Audience.

SUB-SECT. 8.—*Summary Judgment.*

Summary judgment.

236. If a writ of summons is specially indorsed (*h*), and the defendant appears to it, the plaintiff may apply to a master in chambers for an order giving him leave to enter final judgment (*i*).

Appeals.

237. An appeal lies from the decision of a master to the judge in chambers (*k*). If a judge gives unconditional leave to defend, there is no appeal from his order (*l*). If a judge refuses unconditional leave to defend, an appeal lies from his decision to the Court of Appeal, and no leave of the judge is necessary (*m*). An appeal lies in such a case from the Court of Appeal to the House of Lords (*n*).

Costs.

238. The costs of and incident to all applications for summary judgment are dealt with by the master on the hearing of the

(*d*) R. S. C., Ord. 52, rr. 3, 6. No motion or application for a rule *nisi* or order to show cause can be made in any action (*ibid.*, r. 2). As to dismissing a motion etc. or adjourning a hearing, when due notice has not been given, see *ibid.*, r. 6. The hearing of any motion etc. may from time to time be adjourned upon such terms, if any, as the court thinks fit (*ibid.*, r. 7). The plaintiff may without special leave serve any notice of motion or other notice, or any petition or summons, upon any defendant who has been duly served with a writ of summons and has not appeared within the time limited (*ibid.*, r. 8). As to serving notice of motion with the writ of summons, or at any time after service of the writ of summons and before the time limited for appearance, see *ibid.*, r. 9.

(*e*) *Ibid.*, r. 5.

(*f*) *Ibid.*, Ord. 38, r. 1.

(*g*) There are some motions which can only be made by counsel; see title BARRISTERS, Vol. II., p. 372, 373. A chairman or other officer of a company cannot move on behalf of the company; counsel must be instructed (*Re London County Council and London Tramways Co.* (1897), 13 T. L. R. 254, C. A.). A next friend cannot move on behalf of an infant (*Murray* v. *Sitwell*, [1902] W. N. 119; *Re Berry, Berry* v. *Berry*, [1903] W. N. 125). As to other proceedings in the divisional court, see titles COUNTY COURTS, Vol. VIII., pp. 607 *et seq.*; CROWN PRACTICE, Vol. X., pp. 55, 110, 152, 201; MAGISTRATES, Vol. XIX., pp. 650 *et seq.*

(*h*) Under R. S. C., Ord. 3, r. 6; see p. 111, *ante*.

(*i*) See title JUDGMENTS AND ORDERS, Vol. XVIII., pp. 190 *et seq.*; as to motion for judgment before trial, see *ibid.*, pp. 194 *et seq.* As to reference to the master for trial, see title ARBITRATION, Vol. I., pp. 488, 492; R. S. C., Ord. 14, r. 7.

(*k*) *Ibid.*, Ord. 54, r. 21.

(*l*) Judicature (Procedure) Act, 1894 (57 & 58 Vict. c. 16), s. 1 (3); see p. 132, *ante*.

(*m*) Judicature (Procedure) Act, 1894 (57 & 58 Vict. c. 16), s. 1 (1), (2), (4); see R. S. C., Ord. 58, r. 15; *Cannon Brewery Co.* v. *Gilby* (1896), 75 L. T. 407, C. A.; *Standard Discount Co.* v. *La Grange* (1877), 3 C. P. D. 67, C. A.; *Robinson* v. *Bradshaw* (1883), 32 W. R. 95. As to an appeal from the master to whom an action is referred under R. S. C., Ord. 14, r. 7, see note (*c*), p. 133, *ante*.

(*n*) *Jacobs* v. *Booth's Distillery Co.* (1901), 85 L. T. 262; *Codd* v. *Delap* (1905), 92 L. T. 510.

application, or he may refer them to the judge at the trial; but, if no trial afterwards takes place, or no order as to costs is made, such costs are costs in the cause (*o*).

SUB-SECT. 9.—*Summons for Directions.*

Summons for directions.

239. The summons for directions is a summons taken out before the master in chambers in an action. On the hearing of this summons the master determines what pleadings, if any, are to be delivered, what interlocutory proceedings are to be taken in the action, and where and how the action is to be tried (*p*).

When necessary.

240. A summons for directions must be taken out by the plaintiff in every action except (1) Admiralty actions within the Judicature Act, 1873, s. 34 (*q*); (2) actions in which the writ is specially indorsed under R. S. C., Ord. 3, r. 6 (*r*); (3) actions in which notice of trial without pleadings has been given (*s*); and (4) actions commenced by an originating summons (*t*): in these excepted cases a summons for directions may be taken out by any party (*u*).

When issued.

241. A summons for directions must be taken out after appearance and before the plaintiff takes any fresh step in the action other than an application for an injunction or for a receiver or the entering of judgment in default of defence (*w*). If a plaintiff applies

(*o*) R. S. C., Ord. 14, r. 9 (a); see *Suckling* v. *Gabb* (1887), 36 W. R. 175; *Warner* v. *Bowlby* (1892), 9 T. L. R. 13; *Koosen* v. *Rose* (1897), 76 L. T. 145, C. A.; *Cox* v. *Hill* (1892), 67 L. T. 26; *Haycocks, Ltd.* v. *Mulholland*, [1904] 1 K. B. 145; *Dunn* v. *Appleton*, [1898] 1 Q. B. 564, C. A.; *Barker* v. *Hempstead* (1889), 23 Q. B. D. 8; *Copley* v. *Jackson & Co.*, [1884] W. N. 94; *Wilson* v. *Statham*, [1891] 2 Q. B. 261. If the plaintiff applies under R. S. C., Ord. 14, when the case is not within the order, or where the plaintiff, in the opinion of the master, knew that the defendant relied on a contention which would entitle him to unconditional leave to defend, or when there is no jurisdiction to make the order for summary judgment, the application is dismissed with costs to be paid forthwith by the plaintiff (R. S. C., Ord. 14, r. 9 (b); *Symon & Co.* v. *Palmer's Stores* (1903), *Ltd.*, [1912] 1 K. B. 259, C. A.). This order can only be made by a master or judge in chambers, or by the Court of Appeal on appeal from chambers; if the master or a judge orders the costs to be costs in the cause, the judge at the trial cannot order the costs to be paid by the plaintiff (*Koosen* v. *Rose*, *supra*). As to costs in an action for a sum under £100 which might have been brought in the county court, see County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 116; County Courts Act, 1903 (3 Edw. 7, c. 42), s. 3; *Mentors, Ltd.* v. *Evans*, [1912] 1 K. B. 254; affirmed, *sub nom. Mentors, Ltd.* v. *White* (1912), 56 Sol. Jo. 502, C. A.; and p. 182, *post*. As to signing judgment more than twelve months after obtaining an order for judgment, see *Deighton* v. *Cockle*, [1912] 1 K. B. 206, C. A.

(*p*) R. S. C., Ord. 30, rr. 1, 2; *County Theatres and Hotels, Ltd.* v. *Knowles*, [1902] 1 K. B. 480, C. A. For forms of summons, see R. S. C., App. K, Form No. 3B.

(*q*) 36 & 37 Vict. c. 66; see title ADMIRALTY, Vol. I., pp. 63 *et seq.*, 107.

(*r*) See p. 111, *ante*.

(*s*) *I.e.*, actions within R. S. C., Ord. 18A; see p. 111, *ante*, and p. 161, *post*.

(*t*) See p. 186, *post*.

(*u*) R. S. C., Ord. 30, r. 1 (a), (d). As to the summons for directions in proceedings for reduction of capital of a company, see title COMPANIES, Vol. V., pp. 109, 110.

(*w*) R. S. C., Ord. 30, r. 1 (b). An amendment of an ordinary writ so as to

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for judgment on a specially indorsed writ (*a*), or if a defendant in an action in which notice of trial without pleadings has been given (*b*), applies for a statement of claim, directions may be given as if the plaintiff had taken out a summons for that purpose (*c*).

Effect of failure to take out summons for directions.

242. Where the plaintiff is bound to take out a summons for directions, and fails to do so within fourteen days from the entry of the defendant's appearance, the defendant may apply for an order to dismiss the action. On such application the master may dismiss the action on such terms as may be just or deal with the application as if it were a summons for directions (*d*).

Directions.

243. On the hearing of a summons for directions the master, so far as is practicable, makes such order as may be just with respect to all the proceedings to be taken in the action and as to the costs of such proceedings, and more particularly with regard to pleadings (*e*), particulars (*f*), admissions (*g*), discovery (*h*), interrogatories (*i*), inspection of documents (*k*), inspection of real or personal property (*l*), commissions (*m*), examination of witnesses (*n*), place and mode of trial (*o*). Any party to whom the summons is

enable a plaintiff to proceed under *ibid.*, Ord. 14, may be made without a summons for directions (Yearly Practice of the Supreme Court, 1912, p. 362).

(*a*) R. S. C., Ord. 14.

(*b*) *Ibid.*, Ord. 18A.

(*c*) *Ibid.*, Ord. 30, r. 1 (c). If the plaintiff in an action, when the writ is specially indorsed, does not apply for judgment and does not take out a summons for directions, the defendant may do so (*ibid.*, r. 1 (d)). If, in such an action, the defendant obtains leave to defend, the master may then give directions as if a summons had been taken out (*ibid.*, Ord. 14, r. 8 (a)).

(*d*) *Ibid.*, Ord. 30, r. 8; see *Kemp* v. *Colman* (1899), 80 L. T. 54.

(*e*) As to pleadings generally, see title PLEADING, Vol. XXII., pp. 417 *et seq.* As to judgment in default of pleading, see title JUDGMENTS AND ORDERS, Vol. XVIII., pp. 186 *et seq.* As to motion for judgment on striking out defence, see *ibid.*, p. 188.

(*f*) As to particulars, see title PLEADING, Vol. XXII., pp. 428, 453, 440 *et seq.*

(*g*) As to admissions, see pp. 138, 145, 146, *post.*

(*h*) As to discovery, see title DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI., pp. 39 *et seq.*

(*i*) As to interrogatories, see *ibid.*, pp. 92 *et seq.*

(*k*) As to inspection of documents, see *ibid.*, pp. 67 *et seq.*

(*l*) As to inspection of property, see p. 143, *post.*

(*m*) As to commissions, see titles BANKRUPTCY AND INSOLVENCY, Vol. II., p. 318; EVIDENCE, Vol. XIII., pp. 609 *et seq.* As to examiners, see titles BARRISTERS, Vol. II., p. 382; COURTS, Vol. IX., p. 66; EVIDENCE, Vol. XIII., pp. 610 *et seq.*

(*n*) As to examination of witnesses, see title EVIDENCE, Vol. XIII., pp. 611 *et seq.*

(*o*) R. S. C., Ord. 30, r. 2; see p. 171, *post.* An order on a summons for directions can only be made as to proceedings before judgment; an application relating to proceedings after judgment must be made by an ordinary summons (*Brown* v. *Haig*, [1905] 2 Ch. 379). An order may be made in respect of any interlocutory proceedings before judgment (*Pepperell* v. *Hird*, [1902] 1 Ch. 477). As to an order for foreclosure in a foreclosure action, see *Horton* v. *Bosson* (1899), 80 L. T. 435, C. A. As to an order that the defendant shall take notice of trial at the assizes less than ten days before the commission day, see *Baxter* v. *Holdsworth*, [1899] 1 Q. B. 266, C. A.; *Re Pringle & Co.*, *Pownall* v. *Pringle & Co.* (1903), 89 L. T. 743. As to an order that evidence of any particular fact specified shall be given by statement on oath of information and belief, or by production of documents or entries in books, or by copies of documents or entries, or otherwise as may be directed (R. S. C., Ord. 30, r. 7), see Judicature

addressed is, so far as is practicable, to apply for any order or directions as to any interlocutory matter or thing which he may desire in the action (*p*).

Any application, subsequent to the original summons and before judgment, for directions as to any interlocutory matter or thing, by any party, is made under the summons for directions by two clear days' notice to the other party stating the grounds of the application (*q*).

Subsequent directions.

SUB-SECT. 10.—*Interlocutory Proceedings* (*r*).

(i.) *Accounts, Inquiries, and Issues.*

244. The court or a judge (*s*) may at any stage of the proceedings

Inquiries etc.

(Procedure) Act, 1894 (57 & 58 Vict. c. 16), s. 3; *Baerlein* v. *Chartered Mercantile Bank*, [1895] 2 Ch. 488, C. A. As to summonses for directions in a short cause in the Chancery Division, see *Re Pringle & Co., Pownall* v. *Pringle & Co.* (1903), 89 L. T. 743; *Re Cadogan and Hans Place Estate* (No. 2), *Ltd., Graham* v. *Cadogan and Hans Place Estate* (No. 2), *Ltd.*, [1906] W. N. 112; *Re Gutta Percha Corporation, Thornton* v. *Gutta Percha Corporation*, [1899] W. N. 251; see *Re Dupont, Ltd., Dupont* v. *Dupont, Ltd.*, [1906] W. N. 14. As to trial by jury in the short cause list in the King's Bench Division, see *Kelsey* v. *Doune*, [1912] 2 K. B. 482, C. A.; *Wolfe* v. *De Braam* (1899), 81 L. T. 533, C. A.; *Macartney* v. *Macartney* (1909), 25 T. L. R. 818. As to the separate list for commercial causes, see Notice as to Commercial Causes, Yearly Practice of the Supreme Court, 1912, p. 1611.

(*p*) R. S. C., Ord. 30, r. 4. No affidavit is to be used on the hearing of the summons except by special order of the master or judge (*ibid.*, r. 3).

(*q*) *Ibid.*, r. 5. A master may alter or vary a direction without appeal (R. S. C., Ord. 54, r. 32; *Kirk* v. *Lewis* (1907), Yearly Practice of the Supreme Court, 1912, p. 368; but see *Kelsey* v. *Doune*, *supra*. If a master on a summons for directions makes an order for the trial of an action in the short cause list without a jury, and the order is not appealed against, an application cannot afterwards be made to alter the mode of trial (*Kelsey* v. *Doune*, *supra*), in which *Wolfe* v. *De Braam*, *supra*, and *Macartney* v. *Macartney*, *supra*, were considered). In an application under R. S. C., Ord. 30, r. 5, an order may be made to strike out a statement of claim as disclosing no reasonable cause of action and to dismiss the action (*Pepperell* v. *Hird*, [1902] 1 Ch. 477). As to the costs of an application under R. S. C., Ord. 30, r. 5, see *MacGuare* v. *Milligan*, [1903] 1 Ch. 145. An application by any party which might properly have been made at the hearing of the original summons is, if granted on any subsequent application, to be at the costs of the party applying (R. S. C., Ord. 30, r. 6).

(*r*) As to interlocutory proceedings in matters specially dealt with elsewhere, see titles ADMIRALTY, Vol. I., pp. 97, 98 (discovery, interrogatories, motions, summonses, examination of witnesses, commissions, letters of request, subpœnas, and procedure in Admiralty actions); CROWN PRACTICE, Vol. X., p. 33 (petition of right); ELECTIONS, Vol. XII., pp. 422 *et seq.* (parliamentary election petitions); EVIDENCE, Vol. XIII., pp. 618 *et seq.* (evidence in interlocutory proceedings); FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., p. 90 (interlocutory injunction where conveyance impeachable by creditors); HUSBAND AND WIFE, Vol. XVI., pp. 497 *et seq.* (matrimonial causes), 513 (costs of interlocutory applications), 559 (appeals from interlocutory orders); INFANTS AND CHILDREN, Vol. XVII., p. 137 (actions by and against infants); INJUNCTION, Vol. XVII., pp. 284 *et seq.* (undertaking as to damages); and see titles JUDGMENTS AND ORDERS, Vol. XVIII., pp. 178 (distinction between interlocutory and final judgments), 205 (date of interlocutory judgment when damages are to be assessed), 218 (powers to vary interlocutory orders); LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 418 (interlocutory orders pending inquisition); RECEIVERS; SOLICITORS; SPECIFIC PERFORMANCE; TRUSTS AND TRUSTEES; and see p. 136, *ante*.

(*s*) As to the meaning of "the court or a judge," see note (*f*), p. 103, *ante*.

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direct any necessary accounts or inquiries (*t*) to be taken, although there is some special or further relief sought or some special issue to be tried (*a*).

Issues.

245. Where in any cause or matter it appears to the court or a judge that the issues of fact in dispute are not sufficiently defined, the parties may be directed to prepare issues which, in case of difference, are to be settled by the court or a judge (*b*).

(ii.) *Admissions.*

Admissions.

246. Any party to a cause or matter may give notice by his pleading or otherwise in writing that he admits the truth of the whole or any part of the case of any other party (*c*).

(*t*) As to orders for accounts, or accounts and inquiries, in special matters, see titles MISTAKE, Vol. XXI., p. 28; MORTGAGE, Vol. XXI., pp. 199, 287 *et seq.*; PARTNERSHIP, Vol. XXII., pp. 70 *et seq.*; RECEIVERS; TRUSTS AND TRUSTEES.

(*a*) R. S. C., Ord. 33, r. 2. As to the procedure where the writ is indorsed for an account, see title JUDGMENTS AND ORDERS, Vol. XVIII., p. 186. Under this rule accounts can be taken preliminary or subsequent to a trial (*Garnham* v. *Skipper* (1885), 29 Ch. D. 566, C. A.; *West London Dairy Society* v. *Abbott* (1881), 44 L. T. 376; *Walker* v. *Bunkell* (1883), 22 Ch. D. 722, C. A.; *Barber* v. *Mackrell* (1879), 12 Ch. D. 534, C. A.; *Taylor* v. *Mostyn* (1886), 33 Ch. D. 226, C. A.; *Kenrick* v. *Mountsteven* (1899), 48 W. R. 141; *Edmonds* v. *Robinson* (1885), 29 Ch. D. 170, C. A.; *Witham* v. *Vane*, [1884] W. N. 98). If there is any special matter affecting the account, there should be a declaration in the order directing the person who is taking the account to have regard to the particular circumstances and facts (*Sanguinetti* v. *Stuckey's Banking Co.* (No. 2), [1896] 1 Ch. 502). As to the directing of an account on the footing of wilful default, see *Re Wrightson, Wrightson* v. *Cooke*, [1908] 1 Ch. 789; *Re Kurtz, Emerson* v. *Henderson* (1904), 90 L. T. 12; *Re Barclay, Barclay* v. *Andrew*, [1899] 1 Ch. 674; *Re Youngs, Doggett* v. *Revett* (1885), 30 Ch. D. 431; *Re Armitage, Smith* v. *Armitage* (1883), 24 Ch. D. 727; *Re Symons, Luke* v. *Tonkin* (1882), 21 Ch. D. 757; *Barber* v. *Mackrell, supra*; *Laming* v. *Gee* (1878), 10 Ch. D. 715; *Mayer* v. *Murray* (1878), 8 Ch. D. 424; *Job* v. *Job* (1877), 6 Ch. D. 562. The account is taken in chambers; as to the form of the master's certificate, see R. S. C., App. L., No. 10; *Re Bowen, Bennett* v. *Bowen* (1882), 20 Ch. D. 538. If the account is of a complicated nature and *viva voce* evidence and continuous sittings are desirable, it should be taken by an official referee (*Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196, C. A.; see title ARBITRATION, Vol. I., pp. 484, 487). Special directions as to the way in which an account is to be taken or vouched may be given (R. S. C., Ord. 33, rr. 3, 4, 4A). The application may be made by motion or summons, and generally is made under the summons for directions (see p. 135, *ante*). In the Chancery Division, the judgment or order directing the accounts or inquiries must be brought into judge's chambers within ten days after it has been passed and entered, and a summons is then issued to proceed (R. S. C., Ord. 55, rr. 32, 33). As to an inquiry as to damages, see *ibid.*, Ord. 36, rr. 56—58; Ord. 13, r. 5. As to the form of the judgment or order, see *ibid.*, Ord. 33, r. 7; App. L, Form No. 28.

(*b*) *Ibid.*, Ord. 33, r. 1; see *ibid.*, Ord. 40, r. 10; Ord. 42, r. 9; Ord. 45, r. 4; Ord. 48A, r. 8; Ord. 57, r. 7. The issues may be directed or settled by a master in the King's Bench Division (*ibid.*, Ord. 54, r. 12). As to trial of issues, see *ibid.*, Ord. 36, rr. 2—9; Ord. 34, rr. 9—12. As to the settlement of issues, see *Clements* v. *Norris* (1877), 26 W. R. 94; *West* v. *White* (1877), 4 Ch. D. 631; *Re North Western Rubber Co., Ltd. and Hüttenbach & Co.*, [1908] 2 K. B. 907, C. A. As to issues in interpleader proceedings, see title INTERPLEADER, Vol. XVII., pp. 607 *et seq.*

(*c*) R. S. C., Ord. 32, r. 1; see *The Hardwick* (1883), 9 P. D. 32. Leave may be given to withdraw an admission (*Hollis* v. *Burton*, [1892] 3 Ch. 226, C. A.). As to judgment on admissions, see title JUDGMENTS AND ORDERS, Vol. XVIII., p. 195; and as to admissions for the purposes of trial, see, further, title

(iii.) *Amendment.*

Amendment of indorsement or pleadings.

247. Amendment of an indorsement or pleadings may be made in certain cases without leave, in other cases only by leave, of the court or a judge (*d*).

Principles on which amendment allowed.

248. Any amendment should be allowed provided that the party applying for it is acting *bonâ fide*, and that it will not injure the opposite party in a way that cannot be compensated for (*e*); but, *semble*, an amendment should not be allowed if it will change the whole nature of the action (*f*).

EVIDENCE, Vol. XIII., p. 484; p. 146, *post*. As to notices to admit documents and facts, see p. 145, *post*.

(*d*) See R. S. C., Ord. 28; title PLEADING, Vol. XXII., pp. 437 *et seq*. As to the expression "the court or a judge," see note (*f*), p. 103, *ante*. A writ may be amended before service, by leave of a master; after service it can only be amended by order (Practice Masters' Rules, 13).

(*e*) See *Mozley* v. *Cowie* (1878), 38 L. T. 908; *Dallinger* v. *St. Albyn* (1879), 41 L. T. 406; *Re Gaulard and Gibb's Patent* (1887), 57 L. J. (CH.) 209; *The Alert* (1895), 72 L. T. 124; *Laird* v. *Briggs* (1881), 19 Ch. D. 22, C. A.; *Edevain* v. *Cohen* (1890), 43 Ch. D. 187, C. A.; *Lowther* v. *Heaver* (1889), 41 Ch. D. 248, C. A.; *Moss* v. *Malings* (1886), 33 Ch. D. 603, 606; *Lawrance* v. *Norreys* (*Lord*) (1888), 39 Ch. D. 213, C. A.; *Caldwell* v. *Pagham Harbour Reclamation Co.* (1876), 2 Ch. D. 221; and see cases cited in title PLEADING, Vol. XXII., p. 438, note (*e*). Where a Statute of Limitation has run since the issue of the writ, an amendment will not be allowed which deprives the opposite party of the protection of the statute; see title LIMITATION OF ACTIONS, Vol. XIX., pp. 188, 189. An amendment will not be allowed which sets up a claim or defence which is bad in law or unnecessary (*Central Queensland Meat Export Co.* v. *Gallop* (1892), 8 T. L. R. 225; *Machado* v. *Fontes*, [1897] 2 Q. B. 231, C. A.; *Bevan* v. *Barnett* (1897), 13 T. L. R. 310) (as to which see *Penton* v. *Barnett*, [1898] 1 Q. B. 276, 280, C. A.); *Morel Brothers & Co.* v. *Westmorland* (*Earl*), [1903] 1 K. B. 64, 77, C. A.; *Marshall* v. *Langley*, [1889] W. N. 222; *Jones* v. *Hughes*, [1905] 1 Ch. 180, C. A.; *Sinclair* v. *James*, [1894] 3 Ch. 554: *Litchfield* v. *Dreyfus*, [1906] 1 K. B. 584; *Hubbuck* v. *Wilkinson, Heywood and Clark*, [1899] 1 Q. B. 86, C. A.; *Peru Republic* v. *Peruvian Guano Co.* (1887), 36 Ch. D. 489; *Salaman* v. *Warner* (1889), 64 L. T. 598). In *McManus* v. *Fortescue*, [1907] 2 K. B. 1, 5, C. A., an amendment by virtue of which the plaintiff would only be able to claim nominal damages was refused. An amendment for the purpose of adding a plea of fraud is generally allowed at an early stage of the proceedings if the circumstances warrant it, but it will only be allowed at a late stage in exceptional circumstances; see *Bentley & Co.* v. *Black* (1893), 9 T. L. R. 580, C. A.; *Lever & Co.* v. *Goodwin Brothers*, [1887] W. N. 107; *Symonds* v. *City Bank* (1886), 34 W. R. 364; *Hendricks* v. *Montague* (1881), 17 Ch. D. 638, C. A.; *Riding* v. *Hawkins* (1889), 14 P. D. 56, C. A.; *Halsey* v. *Brotherhood* (1880), 15 Ch. D. 514; *Noad* v. *Murrow* (1879), 40 L. T. 100. Except by consent a plaintiff will not be allowed to amend and set up a cause of action which has accrued since the issue of the writ (*Tottenham Local Board of Health* v. *Lea Conservancy Board* (1886), 2 T. L. R. 410, C. A.; *A.-G.* v. *Avon Corporation* (1863), 3 De G. J. & Sm. 637; *Evans* v. *Bagshaw* (1870), 5 Ch. App. 340).

(*f*) *Blenkhorne* v. *Penrose* (1880), 43 L. T. 668; *Newby* v. *Sharpe* (1878), 8 Ch. D. 39, C. A.; *Halsey* v. *Brotherhood* (1880), 15 Ch. D. 514, affirmed (1881), 19 Ch. D. 386, C. A.; *Clarke* v. *Yorke* (1882), 47 L. T. 381; *Ellis* v. *Manchester Carriage Co.* (1876), 2 C. P. D. 13; *Tuck* v. *Southern Counties Deposit Bank* (1889), 42 Ch. D. 471; *James* v. *Smith*, [1891] 1 Ch. 384; *Jacobs* v. *Seward* (1872), L. R. 5 H. L. 464; compare *Budding* v. *Murdock* (1875), 1 Ch. D. 42; *Northampton Coal, Iron and Waggon Co.* v. *Midland Waggon Co.* (1878), 7 Ch. D. 500, C. A.; *Hubbuck* v. *Helms* (1887), 56 L. J. (CH.) 536. The plaintiff may by his statement of claim alter, modify, or extend his claim without any amendment of the indorsement of the writ (see R. S. C., Ord. 28, r. 2; *Large* v. *Large*, [1877] W. N. 198; *Johnson* v. *Palmer* (1879), 4 C. P. D. 258; *Munster* v. *Railton* (1883), 11 Q. B. D. 435, C. A.; *Cargill* v. *Bower* (1878), 10 Ch. D. 502;

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The amendment, if allowed, is to be made in such manner and on such terms as may be just (*g*).

249. An amendment may be allowed at any stage of the proceedings (*h*), not only before (*i*), but at (*k*) and even after trial (*l*), and after judgment (*m*), and on or after appeal (*n*).

Time.

Lewis and Lewis v. *Durnford* (1907), 24 T. L. R. 64), but cannot in the statement of claim, without amending the writ, completely change the cause of action contained in the indorsement (*Cave* v. *Crew* (1893), 62 L. J. (CH.) 530; *Ker* v. *Williams* (1886), 30 Sol. Jo. 238), or introduce a new cause of action which cannot be conveniently tried with the original cause of action (*United Telephone Co.* v. *Tasker* (1888), 59 L. T. 852; *Moore* v. *Alwill* (1881), 8 L. R. Ir. 245).

(*g*) R. S. C., Ord. 28, rr. 1, 6; *Woolley* v. *Broad*, [1892] 2 Q. B. 317, C. A. The usual terms for allowing the amendment are that the party amending should in any event pay the costs of the application and all costs caused or thrown away by the amendment (*Steward* v. *North Metropolitan Tramways Co.* (1886), 16 Q. B. D. 556, C. A.; *Re Trufort, Trafford* v. *Blanc* (1885), 53 L. T. 498; *Preston Corporation* v. *Fullwood Local Board* (No. 2) (1885), 53 L. T. 718; see *A.-G.* v. *Pontypridd Waterworks Co.*, [1908] 1 Ch. 388; *Farquhar, North & Co.* v. *Lloyd, Ltd.* (1901), 17 T. L. R. 568, C. A.; *Hollis* v. *Burton*, [1892] 3 Ch. 226, C. A.; *Kurtz* v. *Spence* (1887), 36 Ch. D. 770, C. A.; *Re Bowden, Andrew* v. *Cooper* (1890), 45 Ch. D. 444; *Jacobs* v. *Schmaltz* (1890), 62 L. T. 121; *Ayscough* v. *Bullar* (1889), 41 Ch. D. 341, C. A.). The application to amend, if made before trial, should be made to a master in chambers (R. S. C., Ord. 54, r. 12; Ord. 55, r. 2 (17)); if made at the trial, it should be made to the judge trying the action (but see *Beckett* v. *Beckett*, [1901] P. 85); if made on the hearing of an appeal, it should be made to the Court of Appeal.

(*h*) R. S. C., Ord. 28, r. 1. This rule gives power to allow an amendment of particulars as well as of an indorsement or a pleading (*Clarapede & Co.* v. *Commercial Union Association* (1883), 32 W. R. 262; *Woolley* v. *Broad*, *supra*). As to particulars in an action, see title PLEADING, Vol. XXII., pp. 453 *et seq.*

(*i*) See cases cited in note (*f*), p. 139, *ante*, and note (*g*), *supra*; *Richards* v. *Butcher* (1890), 62 L. T. 867; *Reid* v. *Hooley* (1897), 13 T. L. R. 398, 449, C. A.; *Griffiths* v. *London and St. Katharine Docks Co.* (1884), 13 Q. B. D. 259, 261, C. A.; *Clark* v. *Wray* (1885), 31 Ch. D. 68; *Zacklynski* v. *Poluspie*, [1908] A. C. 65, P. C.

(*k*) *Dansk Rekylriffel Syndikat Aktieselskab* v. *Snell*, [1908] 2 Ch. 127; *Hyams* v. *Stuart King*, [1908] 2 K. B. 696, C. A.; *Litchfield* v. *Dreyfus*, [1906] 1 K. B. 584; *Crosfield (Joseph) & Sons, Ltd.* v. *Manchester Ship Canal Co.*, [1904] 2 Ch. 123; *Browne* v. *Peto* (1899), 16 T. L. R. 131; *The Alert* (1894), 72 L. T. 124; *Smith* v. *Roberts* (1892), 8 T. L. R. 506; *Laird* v. *Briggs* (1881), 19 Ch. D. 22, C. A.; *Blenkhorne* v. *Penrose* (1880), 43 L. T. 668; *De Bergue* v. *De Bergue*, [1880] W. N. 191; *Nobel's Explosives Co.* v. *Jones, Scott & Co.* (1881), 17 Ch. D. 721; affirmed (1882), 8 App. Cas. 5; *Dallinger* v. *St. Albyn* (1879), 41 L. T. 406; *Mozley* v. *Cowie* (1878), 38 L. T. 908; *King* v. *Corke* (1875), 1 Ch. D. 57; see cases cited in note (*f*), p. 139, *ante*. As a rule the plaintiff should apply not later than the close of his case, where the amendment is necessitated by a variance between the claim and the evidence; see *James* v. *Smith*, [1891] 1 Ch. 384; *Nicholson* v. *Brown*, [1897] W. N. 52; *Edevain* v. *Cohen* (1889), 41 Ch. D. 563, affirmed (1890), 43 Ch. D. 187, C. A.; *Riding* v. *Hawkins* (1889), 14 P. D. 56, C. A.; *Rainy* v. *Bravo* (1872), L. R. 4 P. C. 287.

(*l*) See *Chattell* v. *Daily Mail Publishing Co.* (1901), 18 T. L. R. 165, C. A.; *Beckett* v. *Beckett*, *supra*; *Modera* v. *Modera* (1893), 10 T. L. R. 69; *The Dictator*, [1892] P. 64; *Wyatt* v. *Rosherville Gardens Co.* (1885), 2 T. L. R. 282; *Noad* v. *Murrow* (1879), 40 L. T. 100; *Tebbs* v. *Barron* (1842), 4 Man. & G. 844; *Knowlman* v. *Bluett* (1873), L. R. 9 Exch. 1.

(*m*) See *Durham Brothers* v. *Robertson*, [1898] 1 Q. B. 765, 774, C. A.; *The Alert* (1895), 72 L. T. 124; *The Dictator*, [1892] P. 64; *The Duke of Buccleuch*, [1892] P. 201; *Edison and Swan United Electric Light Co.* v. *Holland* (1889), 41 Ch. D. 28, C. A.; *A.-G.* v. *Birmingham Corporation* (1880), 15 Ch. D. 423, C. A.; *Hurst* v. *Hurst* (1882), 21 Ch. D. 278, C. A.

(*n*) See R. S. C., Ord. 58, r. 4; *Farquhar, North & Co.* v. *Lloyd, Ltd.* (1901),

If the amendment is not made within the time limited by the order giving leave or, if no time is limited, within fourteen days from the date of the order, the order to amend is void, unless the time is extended (*o*).

General powers of court.

250. The court or a judge may at any time, and on such terms as to costs or otherwise as may be thought just, amend any defect or error in any proceedings (*p*), and all necessary amendments are to made for the purpose of determining the real question or issue raised by or depending on the proceedings (*q*). The court or a judge may also at any time correct clerical mistakes in judgments or orders, or errors arising therein from accidental omissions (*r*).

(iv.) *Compounding Penal Actions.*

Compounding penal actions.

251. The leave of the court in which a penal action, not brought by the party aggrieved, is pending, is required for the compounding of the action (*s*). Such leave cannot be given, where part of the

17 T. L. R. 568, C. A.; *Hollis* v. *Burton*, [1892] 3 Ch. 226, C. A.; *Woolley* v *Board*, [1892] 2 Q. B. 317, C. A.; *Ecklin* v. *Little* (1890), 6 T. L. R. 366; *Australian Steam Navigation Co.* v. *Smith & Sons* (1889), 14 App. Cas. 318, P. C.; *Edison and Swan United Electric Light Co.* v. *Holland* (1889), 41 Ch. D. 28, C. A.; *Kurtz* v. *Spence* (1887), 36 Ch. D. 770, C. A.; *Clarapede & Co.* v. *Commercial Union Association* (1883), 32 W. R. 262; *New Zealand and Australian Land Co.* v. *Watson* (1881), 7 Q. B. D. 374, C. A.; *Newby* v. *Sharpe* (1878), 8 Ch. D. 39, C. A. If a decision has been given against a party that he will fail unless he amends, and he elects to amend, he cannot appeal against the decision (*Bowden's (E. M.) Patents Syndicate, Ltd.* v. *Smith (Herbert), & Co.*, [1904] 2 Ch. 122, C. A.).

(*o*) R. S. C., Ord. 28, r. 7. If the amendment requires the insertion of more than 144 words, a print must be delivered (*ibid.*, r. 8). The document when amended is to be marked with the date of the order, if any, under which it is amended and of the day on which the amendment is made (*ibid.*, r. 9). The copy of an amended writ served on a defendant need not be marked in accordance with *ibid.*, r. 9 (*Hanmer* v. *Clifton*, [1894] 1 Q. B. 238). If a defendant has made default in appearance, an amended writ or statement of claim may be filed at the Central Office and personal service is not necessary (*Re Hartley, Nuttall* v. *Whittaker*, [1891] 2 Ch. 121; *Jamaica Rail. Co.* v. *Colonial Bank*, [1905] 1 Ch. 677, C. A.). If the defendant has appeared, no fresh appearance is necessary to the amended writ (*Paxton* v. *Baird*, [1893] 1 Q. B. 139). As to when a writ of summons may be amended without an order, see note (*e*), p. 139, *ante*.

(*p*) As to irregularity arising from non-compliance with the Rules of the Supreme Court or rules of practice, see pp. 144, 145, *post*.

(*q*) R. S. C., Ord. 28, r. 12; *Williams* v. *De Boinville* (1886), 17 Q. B. D. 180; *Gill* v. *Woodfin* (1884), 25 Ch. D. 707, C. A.; *Dunlop Pneumatic Tyre Co.* v. *Actien-Gesellschaft für Motor und Motor fahrzeugbau vorm. Cudell & Co.*, [1902] 1 K. B. 342, C. A.; *Re Robertson, Sanderson & Co.'s Application*, [1892] 2 Ch. 245; *Australian Steam Navigation Co.* v. *Smith & Sons* (1889), 14 App. Cas. 318, P. C.; *Re Smith, Ex parte London and North Western Rail. Co. and Midland Rail. Co.* (1888), 40 Ch. D. 386, C. A.

(*r*) See R. S. C., Ord. 28, r. 11; title JUDGMENTS AND ORDERS, Vol. XVIII., p. 213.

(*s*) Stat. (1575-1576) 18 Eliz. c. 5, ss. 4, 5; *Kirkham* v. *Wheeley* (1695), 1 Salk. 30; see *R.* v. *Collier* (1834), 2 Dowl. 581; *R.* v. *Crisp* (1818), 1 B. & Ald. 282; *Crowder* v. *Waystaff* (1797), 1 Bos. & P. 18; *Maughan* v. *Walker* (1793), 5 Term Rep. 98; *Morgan* v. *Lute* (1819), 1 Chit. 381; *Bradshaw* v. *Mottram*

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penalty goes to the Crown, unless notice is first given to the proper officer; in other cases it may be given without such notice (*a*).

(v.) *Consolidation.*

Consolidation of actions.

252. If two or more actions relating to the same subject-matter are pending in the same division of the High Court between the same plaintiff and the same defendant (*b*), or between the same plaintiff and different defendants (*c*), or between different plaintiffs and the same defendant (*d*), or between different plaintiffs and different defendants (*e*), the actions may be consolidated on the application of either a plaintiff or a defendant (*f*).

(vi.) *Interim Preservation of Subject-matter.*

Custody of goods.

253. Where by any contract a *primâ facie* case of liability is established and the defence alleges a right to be relieved wholly or partially from such liability, the court or a judge (*g*) may make an order for the preservation or interim custody of the subject-matter of the litigation, or order that the amount in dispute be brought into court or otherwise secured (*h*).

(1732), 1 Stra. 167; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 504.

(*a*) R. S. C., Ord. 50, r. 13. The order to compound a penal action must expressly state that the defendant undertakes to pay the sum for which the court has given him leave to compound the action (*ibid.*, r. 14). When leave is given to compound a penal action and where part of the penalty goes to the Crown, the King's half of the composition must be paid into the hands of the Master of the Crown Office Department of the Central Office for the use of the King (*ibid.*, r. 15).

(*b*) *Beardsall* v. *Cheetham* (1858), E. B. & E. 243.

(*c*) *Colledge* v. *Pike* (1886), 56 L. T. 124; *Foxwell* v. *Webster* (1863), 4 De G. J. & Sm. 77.

(*d*) *Amos* v. *Chadwick*, *Robinson* v. *Chadwick*, *Smith* v. *Chadwick* (1877), 4 Ch. D. 869; *Amos* v. *Chadwick* (1878), 9 Ch. D. 459, 463, C. A.

(*e*) *Teale* v. *Teale*, [1882] W. N. 83.

(*f*) R. S. C., Ord. 49, r. 8; *Martin* v. *Martin & Co.*, [1897] 1 Q. B. 429, C. A.; and see Yearly Practice of the Supreme Court, 1912, pp. 698, 699. Unless the issues are the same, actions commenced by the same plaintiff against different defendants cannot be consolidated at the plaintiff's instance without the consent of all parties (*Lee* v. *Arthur* (1909), 100 L. T. 61, C. A.). The application to consolidate is by a summons before a master, and may be made at any time after appearance. The general rule is to give the conduct of the proceedings in consolidated actions to the plaintiff in the first action, but it may be given to the persons most interested, out of whose pockets the costs of the consolidated action have to come (*Re Prime's Estate* (1883), 48 L. T. 208; *Re Swire, Mellor* v. *Swire* (1882), 21 Ch. D. 647, C. A.). As to the stay of one of two cross actions arising out of the same matter, see *Thomson* v. *South Eastern Rail. Co.* (1882), 9 Q. B. D. 320, C. A.

(*g*) As to the meaning of "the court or a judge," see note (*f*), p. 103, *ante*.

(*h*) R. S. C., Ord. 50, r. 1. The application for an order under this rule may be made by the plaintiff at any time after his right to the order appears on the pleadings, or, if there are no pleadings, after his right is made to appear by affidavit or otherwise to the satisfaction of the court or a judge (*ibid.*, r. 7). In *Chaplin* v. *Barnett* (1912), 28 T. L. R. 256, C. A., the court under this order authorised the receiver of the estate of a lunatic to raise by a charge on the estate a sum of money to pay a commission to an insurance company for taking over a transfer of a mortgage, payment being pressed for by the mortgagee.

The court or a judge (*i*), may on the application of any party order the sale of any goods, wares, or merchandise which may be of a perishable nature or likely to injure from keeping or which it may be desirable to have sold at once (*k*). Sale of goods.

The court or a judge (*i*) may on the application of any party to a cause or matter, and upon just terms, make an order for the detention or preservation of any property or thing which is the subject of such cause (*l*). Detention or preservation of property.

Where proceedings are taken to recover specific property other than land, and the person against whom the proceedings are brought does not dispute the title of the person seeking recovery, but only claims to retain the property because of a lien or otherwise as security for a sum of money, the court or a judge may make an order that the person seeking recovery of the property be at liberty to pay into court such sum of money, with such interest and costs, if any, as may be directed, and that, upon such payment being made, the property claimed be given up to the person claiming it (*m*). Delivery of property.

(vii.) *Inspection of Property.*

254. Upon the application of any party to a cause or matter, and upon terms, an order for the inspection of any property or thing which is the subject of such cause or matter, or as to which any question may arise, may be made; and for this purpose any person may be authorised to enter upon any land or building in the possession of any party to such cause or matter and to take any sample or make any observation or try any experiment which may be necessary or expedient in order to obtain full information or evidence (*n*). Inspection.

(*i*) As to the meaning of "the court or a judge," see note (*f*), p. 103, *ante*.

(*k*) R. S. C., Ord. 50, rr. 2, 6; *Daw* v. *Herring* (1891), 35 Sol. Jo. 752. The sale is to be by any person or persons named in the order, and in such manner and on such terms as the court or a judge may think desirable (R. S. C., Ord. 50, r. 2). For instances of applications for sale under this rule, see *Evans* v. *Davies*, [1893] 2 Ch. 216; *Coddington* v. *Jacksonville, Pensacola and Mobile Co.* (1878), 39 L. T. 12, C. A.; *Bartholomew* v. *Freeman* (1877), 3 C. P. D. 316; *Dangar, Grant & Co.* v. *Gospel Oak Iron Co.* (1890), 6 T. L. R. 260; *Ashbury* v. *Bierstadt* (1894), 10 T. L. R. 600; *The Hercules* (1885), 11 P. D. 10; *The Kathleen* (1874), L. R. 4 A. & E. 269.

(*l*) R. S. C., Ord. 50, rr. 3, 6. For instances of orders made under these rules, see *Velati & Co.* v. *Braham & Co.* (1877), 46 L. J. (Q. B.) 415; *Ridpath* v. *Zachner* (1893), 9 T. L. R. 538; *Charrington & Co., Ltd.* v. *Camp*, [1902] 1 Ch. 386; *Leney & Sons, Ltd.* v. *Callingham and Thompson*, [1908] 1 K. B. 79, C. A.; *Polini* v. *Gray* (1879), 12 Ch. D. 438, C. A.; *Strelley* v. *Pearson* (1880), 15 Ch. D. 113.

(*m*) R. S. C., Ord. 50, r. 8. The order may be made at any time after the claim as to the lien etc. appears from the pleadings, or, if there are no pleadings, by affidavit or otherwise to the satisfaction of the court or judge (*ibid.*). The plaintiff must pay into court the whole amount claimed (*Gebruder Naf* v. *Ploton* (1890), 25 Q. B. D. 13). For instances of applications under this rule, see *Huth* v. *Lamport* (1885), 16 Q. B. D. 443; *Re Galland* (1885), 31 Ch. D. 296; *Morgan* v. *Greatrex*, [1884] W. N. 2.

(*n*) R. S. C., Ord. 50, r. 3. An order can only be made under this rule when the owner or possessor of the property or thing is a party to the action (*Garrard* v. *Edge* (1889), 58 L. J. (CH.) 397, C. A.; *Reid* v. *Powers* (1883), 28 Sol. Jo. 653). Inspection cannot be granted to one defendant of property belonging to another defendant, when there is no question between them in the action

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An order may also be made for the inspection of such property by a jury (*o*).

Any judge by whom any cause or matter is heard or tried with or without a jury, or before whom any cause is brought by way of appeal, may inspect any property or thing concerning which any question may arise in such cause (*p*).

Inspection by jury.

Inspection by judge sitting without a jury.

(viii.) *Irregularity.*

Irregularity.

255. Non-compliance with any of the Rules of the Supreme Court, or with any rule of practice for the time being in force, does not render any proceedings void, unless the court or a judge (*q*) so directs, but proceedings in which there has been such non-compliance may be set aside wholly or in part as irregular, or be amended or otherwise dealt with, in such manner and on such terms as the court or a judge shall think fit (*a*).

(*Shaw* v. *Smith* (1886), 18 Q. B. D. 193, C. A.). Leave may be given to enter on land and excavate and inspect (*Lumb* v. *Beaumont* (1884), 27 Ch. D. 356; but see *Bradford Corporation* v. *Ferrand* (1902), 86 L. T. 497). As to orders for the inspection of mines, see *Cooper* v. *Ince Hall Co.*, [1876] W. N. 24; *Whaley* v. *Brancker* (1864), 12 W. R. 570; see title MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 539, 540. As to inspection in actions relating to patents, see *Flower* v. *Lloyd*, [1876] W. N. 169, 230, C. A.; *Burton* v. *War Ordnance Syndicate* (1892), 8 T. L. R. 246. For instances of orders made under this rule, see *Steamship New Orleans Co.* v. *London and Provincial Marine and General Insurance Co.*, [1909] 1 K. B. 943, C. A.; *Chaplin* v. *Puttick*, [1898] 2 Q. B. 160, C. A.; *Lewis* v. *Londesborough* (*Earl*), [1893] 2 Q. B. 191. The court may employ an independent expert to inspect or make experiments and report (*Badische Anilin und Soda Fabrik* v. *Levinstein* (1883), 24 Ch. D. 156; see *Colls* v. *Home and Colonial Stores, Ltd.*, [1904] A. C. 179, 192). The application is made in the same way as the application for an order for the preservation of property (R. S. C., Ord. 50, r. 6; see pp. 142, 143, *ante*). The costs of the application to inspect are in the discretion of the court (*Mitchell* v. *Darley Main Colliery Co.* (1883), 10 Q. B. D. 457). Costs of an inspection arranged between the parties without an order may be allowed in a proper case (*Ashworth* v. *English Card Clothing Co.*, [1904] 1 Ch. 702).

(*o*) R. S. C., Ord. 50, r. 5; see title JURIES, Vol. XVIII., pp. 245, 246. In the King's Bench Division, the application may be made *ex parte* to a master where the parties consent (*Pickard* v. *Great Northern Rail. Co.*, [1883] W. N. 194); otherwise the application is made to a master on notice (see R. S. C., App. K, Form 26A; and for form of order, see *ibid.*, Form 26B).

(*p*) *Ibid.*, Ord. 50, r. 4. A judge is not entitled to put a view in the place of evidence (*London General Omnibus Co.* v. *Lavell*, [1901] 1 Ch. 135, C. A.).

(*q*) As to the meaning of "the court or a judge," see note (*f*) p. 103, *ante*.

(*a*) R. S. C., Ord. 70 r. 1. For instances of irregularities where relief has been granted, see *Reynolds* v. *Coleman* (1887), 36 Ch. D. 453, 458, C. A.; *Dickson* v. *Law*, [1895] 2 Ch. 62 (service of writ out of jurisdiction without the proper indorsement); *Foat* v. *Basset*, [1888] W. N. 255 (imperfect memorandum of service indorsed on writ); *Steers* v. *Rogers* (1890), 7 T. L. R. 183 (indorsement of service on a sheet of paper attached to the writ instead of on the writ itself); *Fry* v. *Moore* (1889), 23 Q. B. D. 395, C. A. (obtaining an order for substituted service of an ordinary writ issued for service in the jurisdiction upon a defendant out of the jurisdiction at time of order; see *Wilding* v. *Bean*, [1891] 1 Q. B. 100, C. A.); *Lloyd* v. *Great Western Dairies Co.*, [1907] 2 K. B. 727, C. A. (joinder of other causes of action with claim for recovery of land); *Petty* v. *Daniel* (1886), 34 Ch. D. 172; *Re Wiggeston Hospital* (*Chaplain etc.*) *and Stephenson* (1885), 54 L. J. (Q. B.) 248; *Rendell* v. *Grundy*, [1895] 1 Q. B. 16, C. A.; *Re Evans, Evans* v. *Noton*, [1893] 1 Ch. 252, 256, C. A. (failure to serve copies of affidavits with notice of motion); *Dawson* v. *Beeson* (1882), 22 Ch. D. 504, C. A. (service of short notice of motion without the fact that the notice is short appearing clearly on the

An application to set aside any proceedings for irregularity will not be allowed, unless it is made within a reasonable time (*b*); and it will not be allowed if the party applying has taken any fresh step after knowledge of the irregularity (*c*).

The court or a judge has power to enlarge or abridge the time appointed by the rules or fixed by any order enlarging time for doing any act or taking any proceeding upon such terms, if any, as the justice of the case may require; and such enlargement may be ordered, although application is not made until after the expiration of the term appointed or allowed (*d*).

(ix.) *Notices to Admit and to Produce.*

Notice to admit documents etc.

256. Either party may by notice in writing call upon the other party to admit any document saving all just exceptions; and, in case of refusal or neglect to admit after such notice, the costs of proving any such document must be paid by the defaulting party, unless the court or a judge certifies that the refusal to admit was reasonable (*e*).

face of the notice); *Taylor* v. *Roe* (1893), 68 L. T. 213 (marking notice of motion with name of wrong judge); *Re Martin and Varlow* (1894), 43 W. R. 247 (presenting a petition instead of issuing a summons); *Mason* v. *Grigg*, [1909] 2 K. B. 341, C. A. (failure to lodge in the Central Office notice of appointment of solicitor to party hitherto acting in person). A proceeding which is an entire nullity cannot be waived or dealt with under R. S. C., Ord. 70, r. 1 (*Anlaby* v. *Praetorius* (1888), 20 Q. B. D. 764, C. A.); *Hughes* v. *Justin*, [1894] 1 Q. B. 667, C. A.; but see *Armitage* v. *Parsons*, [1908] 2 K. B. 410, C. A.; *R.* v. *Rowe* (1895), 71 L. T. 578; *Nelson* v. *Pastorino & Co.* (1883), 49 L. T. 564; *Phillipson & Son* v. *Emanuel* (1887), 56 L. T. 858; *Hewitson* v. *Fabre* (1888), 21 Q. B. D. 6; *Smurthwaite* v. *Hannay*, [1894] A. C. 494; *Lloyd* v. *Great Western Dairies Co.*, [1907] 2 K. B. 727, C. A.; *Hamp-Adams* v. *Hall*, [1911] 2 K. B. 942, C. A.).

(*b*) R. S. C., Ord. 70, r. 2; *Reynolds* v. *Coleman* (1887), 36 Ch. D. 353, C. A.; *Steers* v. *Rogers* (1890), 7 T. L. R. 183; *Willmott* v. *Freehold House Property* (1885), 51 L. T. 552, C. A.; *Re Derbon, Derbon* v. *Collis* (1888), 58 L. T. 519.

(*c*) R. S. C., Ord. 70, r. 2. For instances, see *Boyle* v. *Sacker* (1888), 39 Ch. D. 249, C. A.; *Ex parte Alcock* (1875), 1 C. P. D. 68; *Fry* v. *Moore* (1889), 23 Q. B. D. 395, C. A.; *Wood* v. *Middleton*, [1897] 1 Ch. 151; *Hampden* v. *Wallis* (1884), 26 Ch. D. 746, C. A.; *Re Cunningham* (1887), 55 L. T. 766; *The Assunta*, [1902] P. 150. As to the effect of an appearance, see *Mulckern* v. *Doerks* (1884), 53 L. J. (Q. B.) 526; *Hunt* v. *Worsfold*, [1896] 2 Ch. 224, *per* NORTH, J., at p. 227; *Tozier* v. *Hawkins* (1885), 15 Q. B. D. 650, 680, C. A.; *Rein* v. *Stein*, [1892] 1 Q. B. 753, C. A.; *Firth* v. *De las Rivas*, [1893] 1 Q. B. 768; *Mayer* v. *Claretie* (1890), 7 T. L. R. 40. When an application is made to set aside proceedings for irregularity, the objections intended to be insisted upon must be stated in the summons or notice of motion (R. S. C., Ord. 70, r. 3; *Petty* v. *Daniel* (1886), 34 Ch. D. 172, 180; *Dunlop Pneumatic Tyre Co.* v. *Actien-Gesellschaft für Motor und Motorfahrzeugbau vorm. Cudell & Co.*, [1902] 1 K. B. 342, C. A.; *Baillie* v. *Goodwin* (1886), 33 Ch. D. 604); but see *Pennington* v. *Cayley*, [1912] 2 Ch. 236.

(*d*) R. S. C., Ord. 64, r. 7; *Re Chifferiel, Chifferiel* v. *Watson* (1888), 36 W. R. 806; *Peckett* v. *Short* (1883), 32 W. R. 123; *Bradshaw* v. *Warlow* (1886), 32 Ch. D. 403, C. A.; *Australasian Automatic Weighing Machine Co.* v. *Walter*, [1891] W. N. 170; *Whistler* v. *Hancock* (1878), 3 Q. B. D. 83; *King* v. *Davenport* (1879), 4 Q. B. D. 402; *Carter* v. *Stubbs* (1880), 6 Q. B. D. 116, C. A.; *Gilder* v. *Morrison* (1882), 30 W. R. 815; *Script Phonography Co.* v. *Gregg* (1890), 59 L. J. (CH.) 406; *Re Mackintosh and Dixon*, [1903] W. N. 95; *Collinson* v. *Jeffery*, [1896] 1 Ch. 644; *Eaton* v. *Storer* (1882), 22 Ch. D. 91, C. A.; *Graves* v. *Terry* (1882), 9 Q. B. D. 170.

(*e*) R. S. C., Ord. 32, r. 2. For form of notice, see *ibid.*, App. B, Form No. 11; Ord. 32, r. 3. No costs of proving any document are to be

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A party who intends to rely on a document which is in the hands of the opposite party must give to the opposite party notice in writing to produce the document. Unless such notice is properly given and proof of its service is given at the trial, secondary evidence of the document cannot be given (*f*).

(x.) *Notice to Admit Facts.*

Notice to produce.

Notice to admit facts.

257. Any party may by notice in writing call on any other party to admit for the purposes of the cause only any specific fact or facts mentioned in the notice. In the case of refusal or neglect to admit such facts, the costs of proving the facts must be paid by the defaulting party, unless at the trial or hearing the court or a judge certifies that the refusal to admit was reasonable, or unless the court or a judge at any time otherwise directs (*g*).

(xi.) *Notice to Use Evidence already Taken.*

Evidence taken in another cause.

258. Evidence taken in another cause or matter may, if it is admissible, be read on *ex parte* applications by leave to be obtained at the time of the application, and, in any other case, upon the party desiring to read the evidence giving two days' previous notice to the other parties of his intention to read it (*h*).

Notice to read affidavits.

Any party intending to use at the trial of an action an affidavit

allowed, unless a notice to admit it has been given, except when the omission to give the notice is, in the opinion of the taxing officer, a saving of expense (R. S. C., Ord. 32, r. 2). The rule applies to documents even though they are not under the control of the party (*Rutter* v. *Chapman* (1841), 8 M. & W. 388), or are abroad (*Story* v. *Houlditch* (1840), 1 Scott (N. R.), 206, 211), or are denied in the pleadings (*Spencer* v. *Barough* (1842), 9 M. & W. 425). As to the desirability of making full use of the rule, see *Dudley, Stourbridge and District Electric Traction Co.* v. *Dudley Corporation*, [1906] W. N. 67, *per* KEKEWICH, J.

(*f*) See title EVIDENCE, Vol. XIII., p. 520. For form of notice to produce, see R. S. C., App. B, Form No. 14. An affidavit of the solicitor or his clerk of the service of any notice to produce, and of the time when it was served, is in all cases sufficient evidence of the service of the notice and of the time when it was served (*ibid.*, Ord. 32, r. 8). If a notice to admit or produce comprises documents which are not necessary, the costs so occasioned must be borne by the party giving the notice (*ibid.*, r. 9).

(*g*) *Ibid.*, r. 4. As to the form of the notice to admit, see *ibid.*, App. B, Form No. 12; as to the form of admission of facts, see *ibid.*, No. 13. The notice to admit facts may be given at any time not later than nine days before the day for which notice of trial has been given (*ibid.*, Ord. 32, r. 4). Any admission made in pursuance of such notice is to be deemed to be made for the purposes of the particular cause etc., and not as an admission to be used against the party on any other occasion or in favour of any person other than the party giving the notice; the court or a judge may at any time allow any party to amend or withdraw any admission so made on such terms as may be just (*ibid.*, r. 4). The notice can only be given to an opposite party, that is, to a party between whom and the party giving the notice there is some right to be adjusted in the action (*Brown* v. *Watkins* (1885), 16 Q. B. D. 125, 128; *Shaw* v. *Smith* (1886), 18 Q. B. D. 193, 197, C. A.). A premature notice should be left unanswered (*Crawford* v. *Chorley*, [1883] W. N. 198; *Hellier* v. *Ellis*, [1884] W. N. 9).

(*h*) R. S. C., Ord. 37, r. 3; see *Re Morris* (*Jane*) *and Morris* (*Mary*) *Persons of Unsound Mind not so found by Inquisition*, [1912] W. N. 88, C. A. As to the admissibility of such evidence, see title EVIDENCE, Vol. XIII., pp. 546 *et seq.*; *Printing Telegraph and Construction Co. of the Agence Havas* v *Drucker*, [1894] 2 Q. B. 801, C. A.

or deposition filed or made before issue joined must give notice of such intention to the opposite party within one month after issue joined (*i*).

(xii.) *Payment into Court* (*k*).

Payment into court.

259. In an action brought to recover a debt or damages any defendant may pay a sum of money into court by way of satisfaction of the plaintiff's claim; and in any such action, except where the claim is a claim for libel or slander, a defendant may pay money into court with a defence denying liability (*l*).

(*i*) R. S. C., Ord. 37, r. 24. By the special leave of the court or a judge a longer time for the delivery of the notice may be allowed, or the affidavit may be read without such notice (*ibid.*). As to taking evidence on commission, see title EVIDENCE, Vol. XIII., pp. 609 *et seq.*

(*k*) As to payment into and out of court in matters dealt with under other titles, see titles ADMIRALTY, Vol. I., pp. 96 (payment into court and tender, in satisfaction or with denial of liability), 110 (payment into court; limitation of liability), 134, 135 (payment out); AUCTION AND AUCTIONEERS, Vol. I., pp. 513, 514 (payment into court in interpleader action); BILLS OF SALE, Vol III., p. 63 (payment into court in interpleader action); BONDS, Vol. III., pp. 94, 102 (actions on bonds); CHARITIES, Vol. IV., pp. 275, 328 (payment into court of charity funds); CHOSES IN ACTION, Vol. IV., p. 374 (payment into court where assignment of chose in action is disputed); COMPANIES, Vol. V., pp. 456 *et seq.* (payment into court of unclaimed and undistributed assets in winding up); COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 96 (compensation moneys); CONTRACT, Vol. VII., p. 418 (tender); DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI., pp. 54, 55 (payment into and out of court as security for costs); ELECTIONS, Vol. XII., p. 495 (payment out of deposit in municipal election petition); EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 301 (power of personal representatives to pay trust moneys and securities into court); HUSBAND AND WIFE, Vol. XVI., p. 455 (payment into and out of court of amount paid on an application for summary judgment); INSURANCE, Vol. XVII., p. 566 (payment into court where no sufficient discharge of insurance moneys can be obtained); INTERPLEADER, Vol. XVII., p. 633 (payment by bailiff or defendant); LIBEL AND SLANDER, Vol. XVIII., p. 728 (payment into court); LIMITATION OF ACTIONS, Vol. XIX., p. 70 (effect of payment into court on Statute of Limitations); LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 434, 435 (lodgment of lunatic's money), 459 (court percentage); PARLIAMENT, Vol. XXI., p. 735 (deposits); PARTITION, Vol. XXI., p. 865 (proceeds of sale under order of court); PUBLIC AUTHORITIES AND PUBLIC OFFICERS, p. 299, *post;* RECEIVERS; SALE OF LAND; TRUSTS AND TRUSTEES.

(*l*) R. S. C., Ord. 22, r. 1; see title LIBEL AND SLANDER, Vol. XVIII., p. 728. The object of payment into court under this rule is to stop the action, or, if it is not stopped, to prevent the defendant from being liable for costs after the payment in of a sufficient sum. A payment into court in an action can only be made under R. S. C., Ord. 22, r. 1, when the action is to recover a debt or damages or is an admiralty action (*ibid.*); it cannot be made in an action where only an account is claimed (*Nichols* v. *Evens* (1883), 22 Ch. D. 611); it can by leave of the court or a judge be made in an action for the return of goods or their value (see p. 143, *ante*, and *Allan* v. *Dunn* (1857), 1 H. & N. 572); leave is not required if the claim is merely for damages for detention (*Crossfield* v. *Such* (1852), 8 Exch. 159). It may be made in an action where there is a claim for debt or damages joined to a claim for other relief, *e.g.*, an injunction or a declaration; but in such case the money can only be paid in in satisfaction of claim for debt or damages, and the plaintiff may take the money out and yet, if he succeeds in respect of the other claims, be entitled to the costs of such claims after payment in (*Coote* v. *Ford*, [1893] 2 Ch. 93, C. A.; *Moon* v. *Dickinson* (1890), 63 L. T. 371; *Young* v. *Black Sluice Commissioners* (1909), 73 J. P. 265). As to payment into court by a defendant where the plaintiff has committed an act of bankruptcy, see *McCarthy* v. *Capital and Counties Bank*, [1911] 2 K. B.

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Payment into court by way of satisfaction.

260. A payment into court by way of satisfaction admits the claim or cause of action in respect of which the payment is made (*m*). It may be made before defence or on delivery of defence or by leave at any later time (*n*). A payment into court before defence cannot be made except in satisfaction, and cannot be followed by a defence denying liability (*o*), and, upon payment into court before defence, the defendant must serve upon the plaintiff a notice specifying the fact of the payment and the claim or cause of action in respect of which it is made (*p*).

Payment into court with denial of liability.

261. Payment into court with a denial of liability can only be made with a defence, and cannot be made in actions for libel or slander (*q*).

Payment into court to be signified in defence.

262. The payment into court must be signified in the defence, and the claim or cause of action in satisfaction of which the payment is made must be also signified (*r*).

With a defence setting up a tender before action, the sum alleged to have been tendered must be brought into court (*s*).

Payment out of money paid into court in satisfaction.

263. If payment into court is made before delivery of defence, or if the liability of the defendant in respect of the claim or cause of action, in satisfaction of which the payment is made, is not denied in the defence, or if payment is made with a defence of tender of the sum paid, the money paid into court must be paid out to the plaintiff on his request, or to his solicitor on the plaintiff's written authority, unless it is otherwise ordered (*t*).

1088, C. A.; as to payment into court in an action in the King's Bench Division, in which there is a claim for money or damages by or on behalf of an infant, or a person of unsound mind not so found, see R. S. C., Ord. 22, r. 15; and see titles INFANTS AND CHILDREN, Vol. XVII., p. 145; LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 466.

(*m*) R. S. C., Ord. 22, r. 1.

(*n*) *Ibid.*

(*o*) *Dumbelton* v. *Williams; Torrey and Field, Ltd.* (1897), 76 L. T. 81, C. A.; see *Re Stamford and Warrington (Earl), Savage* v. *Payne* (1885), 53 L. T. 511, C. A. Payment into court without a denial of liability admits nothing more than a liability up to the amount paid in (*Hennell* v. *Davies*, [1893] 1 Q. B. 367).

(*p*) R. S. C., Ord. 22, r. 4. As to the form of the notice, see *ibid.*, App. B, Form No. 3.

(*q*) *Ibid.*, Ord. 22, r. 1; see p. 147, *ante*. If money is paid into court with a defence denying liability accompanied by a letter admitting liability, the defence is a sham and will be struck out as an abuse of the process of the court (*Critchell* v. *London and South Western Railway*, [1907] 1 K. B. 860, C. A.).

(*r*) R. S. C., Ord. 22, r. 2; *James Tucker Steamship Co.* v. *Lamport and Holt* (1906), 23 T. L. R. 10, C. A.; *Benning* v. *Ilford Gas Co.*, [1907] 2 K. B. 290.

(*s*) R. S. C., Ord. 22, r. 3. Such a defence, if successful, entitles the defendant to judgment in the action (*Griffiths* v. *Ystradyfodwg School Board* (1890), 24 Q. B. D. 307). A plea of tender cannot be pleaded to a claim for unliquidated damages (*Davys* v. *Richardson* (1888), 21 Q. B. D. 202, C. A.). As to tender in cases of mortgage, see *Bank of New South Wales* v. *O'Connor* (1889), 14 App. Cas. 273; *Johnson* v. *Evans*, [1889] W. N. 95. Where a defence of tender of amends is based on a statute, it is not necessary, it seems, with a plea of tender to pay money into court (*Jones* v. *Gooday* (1842), 9 M. & W. 736); see the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1 (c); title PUBLIC AUTHORITIES AND PUBLIC OFFICERS, p. 299, *post*. As to tender of amends in a case of trespass, see title TRESPASS.

(*t*) R. S. C., Ord. 22, r. 5; *Critchell* v. *London and South Western Railway*, [1907] 1 K. B. 860, C. A.; *Re Gordon, Ex parte Navalchand*, [1897] 2 Q. B.

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Payment out of money paid into court with denial of liability.

264. If money is paid into court with a defence denying liability, the plaintiff may accept the money in satisfaction of the claim in respect of which it is paid in, and may have it paid out to him (*a*). On such acceptance all further proceedings in the action, so far as they relate to the claim in respect of which the money is paid in are, except as to costs, stayed (*b*).

The plaintiff may refuse to accept the money in satisfaction, and may reply accordingly (*c*) and proceed with the action. In such case the money remains in court, and will not be paid out of court except in pursuance of an order (*d*). If the plaintiff proceeds with the action in respect of the claim, or any part of the claim as to which money has been paid in, and recovers less than the amount paid in, he is entitled to an order that the amount which he recovers be paid to him, and the defendant is entitled to judgment and an order for the payment of the balance (*e*). If the defendant succeeds in respect of the claim, he is entitled to judgment and an order that the whole amount paid in be repaid to him (*e*).

Costs.

265. If the plaintiff, whether payment in is made in satisfaction or with a defence denying liability (*f*), accepts in satisfaction the sum

516; *Hubback* v. *British North Borneo Co.*, [1904] 2 K. B. 473, 477, C. A. R. S. C., Ord. 22, r. 5, only applies where money is paid in in satisfaction or with a plea of tender. If the action abates by the death of the defendant, the plaintiff is entitled to have the money paid out to him (*Brown* v. *Feeney*, [1906] 1 K. B. 563, C. A.); if the plaintiff dies, his executor may have the money paid out to him (*Maxwell* v. *Wolseley* (*Viscount*), [1907] 1 K. B. 274, C. A.). In a proper case an order may be made restraining the plaintiff from taking the money out; see *Critchell* v. *London and South Western Railway*, [1907] 1 K. B. 860, 863, C. A.; *Cyprean Fabre & Co.* v. *Hall*, [1905] 2 I. R. 132; *Ponsford, Baker & Co.* v. *Union Bank of London and Smith's Bank, Ltd.*, [1906] 2 Ch. 444, 455, C. A. As to the procedure in taking money out of court, see Supreme Court Funds Rules, 1905, rr. 30, 32, 44, and Forms 10, 14A, 14B; Yearly Practice of the Supreme Court, 1912, p. 1677; *Williams* v. *Wade* (1888), 57 L. J. (CH.) 497; *Edwards* v. *Grove*, [1906] W. N. 191; *Marsh* v. *Joseph*, [1897] 1 Ch. 213, C. A.; *Bath* v. *Bath* (1901), 71 L. J. (CH.) 500, C. A.; *Re Williams' Settled Estates*, [1910] 2 Ch. 481.

(*a*) R. S. C., Ord. 22, r. 6 (a). The plaintiff in this case, after service of a notice (*ibid.*, App. B, Form No. 4) or delivery of a reply (*ibid.*, Ord. 23, r. 1) accepting the money, is entitled to have the money paid out to himself on request, or to his solicitor on the plaintiff's written authority, unless the court or a judge otherwise orders. The rules do not impose any limit of time within which the notice must be given, but the plaintiff is in practice allowed to give the notice and take the money out at any time within a year; see *Greaves* v. *Fleming* (1879), 4 Q. B. D. 226; see also title ADMIRALTY, Vol. I., p. 135.

(*b*) R. S. C., Ord. 22, r. 6 (a); *Coote* v. *Ford*, [1899] 2 Ch. 93, C. A. Where several defendants are sued on a joint cause of action and one of them pays money into court in satisfaction of the claim, and the plaintiff takes out the money in satisfaction, the plaintiff there and then puts an end to the whole action, and the other defendants who were not responsible for the payment in are entitled to their costs (*Beadon* v. *Capital Syndicate, Ltd.* (1912), 28 T. L. R. 394; affirmed, 28 T. L. R. 427, C. A.).

(*c*) R. S. C., Ord. 22, r. 6 (a). As to reply, see title PLEADING, Vol. XXII., pp. 458 *et seq.*

(*d*) R. S. C., Ord. 22, r. 6 (c); *Maple* v. *Shrewsbury* (*Earl*) (1887), 19 Q. B. D. 463, C. A.; *Re Gordon, Ex parte Navalchand*, [1897] 2 Q. B. 516; *Powell* v. *Vickers, Sons and Maxim*, [1907] 1 K. B. 71, C. A.

(*e*) R. S. C., Ord. 22, r. 6 (c); *Powell* v. *Vickers, Sons and Maxim, supra*; *The Blanche*, [1908] P. 259.

(*f*) *McIlwraith* v. *Green* (1884), 14 Q. B. D. 766, C. A., overruling *Crosland* v.

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paid in and the entire claim is satisfied, he may tax his costs, unless it is otherwise ordered, and if the costs are not paid within forty-eight hours after taxation he may sign judgment for his taxed costs (*g*).

If the plaintiff proceeds with the action and recovers something, but less than the amount paid in, he is as a rule entitled to the costs of the action up to the time of the payment in and of any issue on which he succeeds (*h*), but the defendant is entitled to the general costs of the action after the time of payment in (*i*), unless there are other claims which are not affected by the payment in (*k*).

Routledge, [1883] W. N. 228. This rule does not apply where the payment is made with a defence of tender (*Griffiths* v. *Ystradyfodwg School Board* (1890), 24 Q. B. D. 307), or where the claim is not for a debt or damages; see p. 148, *ante*.

(*g*) R. S. C., Ord. 22, r. 7. The plaintiff, if he wishes to tax his costs under this rule, must within four days after the receipt of notice of the payment in, or, when the payment in is with the defence, before reply, or, when no reply is ordered, within ten days from the delivery of the defence or the last of the defences, give notice of acceptance to the defendant (*ibid.*, App. B, No. 4; *Greaves* v. *Fleming* (1879), 4 Q. B. D. 226; *Re Gordon, Ex parte Navalchand*, [1897] 2 Q. B. 516). As to the plaintiff in an action for two breaches of contract accepting money paid into court in respect of one breach, see *McIlwraith* v. *Green* (1884), 14 Q. B. D. 766, C. A.; *Smith* v. *Northleach Rural Council*, [1902] 1 Ch. 197. As to payment in, when damages and also an injunction are claimed, see *Moon* v. *Dickinson* (1890), 63 L. T. 371; *Coote* v. *Ford*, [1899] 2 Ch. 93, C. A. In a proper case an order may be made in chambers depriving the plaintiff of his costs (*Broadhurst* v. *Willey*, [1876] W. N. 21; *Morris* v. *Burnett* (1878), 65 L. T. Jo. 176), but the plaintiff has *primâ facie* a right to his costs and ought not to be deprived of them without good reason (*Lomer* v. *Waters*, [1898] 2 Q. B. 326, C. A.); and in cases under this rule the plaintiff cannot be ordered to pay the defendant's costs (*Lomer* v. *Waters*, *supra*). If the defendant pays the costs within four days after taxation there is no judgment (*Smith* v. *Northleach Rural Council*, *supra*); see *Coote* v. *Ford*, *supra*, at p. 99. As to a joint cause of action against several defendants where one defendant pays into court, see *Beadon* v. *Capital Syndicate, Ltd.* (1912), 28 T. L. R. 394. As to form of judgment for costs under the rule, see R. S. C., App. F, Form No. 16.

(*h*) But as regards actions to which the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 116, applies, see p. 182, *post*.

(*i*) *Powell* v. *Vickers, Sons and Maxim*, [1907] 1 K. B. 71, C. A.; *Gretton* v. *Mees* (1878), 7 Ch. D. 839; *Buckton* v. *Higgs* (1879), 4 Ex. D. 174; *Suckling* v. *Gabb* (1887), 36 W. R. 175; *Wood* v. *Leetham* (1892), 61 L. J. (Q. B.) 215; *Wagstaffe* v. *Bentley*, [1902] 1 K. B. 124, C. A.; *Ridout* v. *Green* (1902), 87 L. T. 679; *Dunn* v. *South Eastern and Chatham Railway*, [1903] 1 K. B. 358; *Hubback* v. *British North Borneo Co.*, [1904] 2 K. B. 473, C. A.; *Langridge* v. *Campbell* (1877), 2 Ex. D. 281; *Benning* v. *Ilford Gas Co.*, [1907] 2 K. B. 290; *Fitzgerald* v. *Tilling* (1907), 96 L. T. 718, C. A.; *The Blanche*, [1908] P. 259; *Goutard* v. *Carr* (1884), 13 Q. B. D. 598, n., C. A.; *Wheeler* v. *United Telephone Co.* (1884), 13 Q. B. D. 597, C. A. If money is paid into court in actions which are consolidated (see p. 142, *ante*), and the plaintiff proceeds to trial in one and fails, the money paid in and the costs in all the actions are dealt with in the same manner as in the action tried (R. S. C., Ord. 22, r. 8).

(*k*) See *Coote* v. *Ford*, *supra*; *Kinnell* v. *Walker* (1911), 27 T. L. R. 257, C. A. As to costs where there is a defence under the Libel Act, 1843 (6 & 7 Vict. c. 96), and the Libel Act, 1845 (8 & 9 Vict c. 75), see *Oxley* v. *Wilkes*, [1898] 2 Q. B. 56, C. A.; *Sley* v. *Tillotson* (1898), 14 T. L. R. 545; see title LIBEL AND SLANDER, Vol. XVIII., p. 727. As to costs where the plaintiff has committed an act of bankruptcy and there has been payment into court, see *McCarthy* v. *Capital and Counties Bank*, [1911] 2 K. B. 1088, C. A.

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266. If there is a counterclaim in an action, the plaintiff may pay money into court in satisfaction of the counterclaim on the same conditions as those on which a defendant may pay into court (*l*).

Payment into court in respect of counterclaim.

267. If money has been paid into court as a condition of leave to defend (*m*), the defendant may by his pleading appropriate the whole or any part of such money and any additional payment, if necessary, to the whole or any specified portion of the plaintiff's claim; and the money so appropriated is deemed to be money paid into court pursuant to, and is subject to, the rules (*n*) above referred to (*o*).

Appropriation.

268. If a cause or matter is tried by a judge with a jury, and money has been paid into court, no communication of the fact of payment or of the amount paid in is to be made to the jury until after verdict (*p*).

Jury not to be informed of payment.

269. Orders are made in the Chancery Division for the payment of money into court by personal representatives or other persons in the position of trustees, who have trust funds in their hands or under their control, and in order to preserve property in dispute pending litigation (*q*).

Payment under order in Chancery Division.

Money paid into court under an order of the court or a judge or certificate of a master or associate is not paid out of court except in pursuance of an order (*r*).

Payment out of court.

(xiii.) *Remitting to County Court.*

270. An order remitting an action in the King's Bench Division to the county court may in certain cases (*s*) be made in chambers (*t*).

Remitting action to county court.

(*l*) R. S. C., Ord. 22, r. 9; see *Hutchinson* v. *Barker* (1894), 71 L. T. 625. A person who is brought into an action as a defendant to a counterclaim (see R. S. C., Ord. 21, rr. 11—15) may, it seems, pay money into court in respect of the counterclaim.

(*m*) Under R. S. C., Ord. 14; see Yearly Practice of the Supreme Court, 1912, p. 131.

(*n*) *I.e.*, R. S. C., Ord. 22, rr. 1—7.

(*o*) *Ibid.*, r. 11; see Supreme Court Funds Rules, 1905, r. 43; Yearly Practice of the Supreme Court, 1912, p. 1677.

(*p*) R. S. C., Ord. 22, r. 22; see title BARRISTERS, Vol. II., p. 410.

(*q*) See titles EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 301 *et seq.*; TRUSTS AND TRUSTEES; p. 189, *post;* Daniell's Chancery Practice, 7th ed., Vol. II., p. 1468; and see R. S. C., Ord. 22, rr. 12, 12A, 12B, 16, 18, 18A. As to the investment of money in court, see *ibid.*, r. 17.

(*r*) *Ibid.*, r. 11. The payment of money into court under a certificate of a master etc. must be expressly authorised by the certificate (*ibid.*, r. 10). As to the certificate of a master, see *ibid.*, Ord. 41, r. 8; of an associate, *ibid.*, Ord. 36, r. 42. As to money paid into court under the order of the court or a judge, see Yearly Practice of the Supreme Court, 1912, p. 131. As to orders for payment out, see *Maple* v. *Shrewsbury* (*Earl*) (1887), 19 Q. B. D. 463, C. A.; *Bird* v. *Barstow*, [1892] 1 Q. B. 94, C. A.; *Carr* v. *Carr* (1912), 106 L. T. 753 (where an insurance policy against issue was effected).

(*s*) See title COUNTY COURTS, Vol. VIII., p. 438. When an action has been remitted to the county court, the plaintiff may amend his claim in any manner allowed in an ordinary county court action, even though the action would not have been remitted if the amended claim had been the original claim (*Spring* v. *Fernandez*, [1912] 1 K. B. 294). See also title INTERPLEADER, Vol. XVII., pp. 594, 607, 630, 636, 638, 640, 641.

(*t*) See County Courts Act, 1888 (51 & 52 Vict. c. 43), ss. 65, 66, 69; R. S. C., Ord. 54, r. 12; title COUNTY COURTS, Vol. VIII., p. 438; *General Estates Co.* v. *Beaver*, [1912] 2 K. B. 398.

SECT. 1.

An Ordinary Action in the King's Bench or Chancery Division.

(xiv.) *Security for Costs* (*u*).

Security for costs.

When ordered.

271. In the following cases a plaintiff may be ordered to give security for costs, and if he does not give security as ordered, the action may be stayed till security is given, or dismissed for want of prosecution (*v*).

(*u*) As to security for costs in relation to matters dealt with in other titles, see titles ACTION, Vol. I., p. 48 (action on tort); ADMIRALTY, Vol. I., pp. 87 (special application), 112, 113 (on appeal on fact from county court or City of London Court), 125 (on appeal to Court of Appeal); BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 50 (when petitioning creditor ordered to give security for costs), 61 (effect of receiving order), 307 (on appeal), 315 (form of security); CHARITIES, Vol. IV., p. 355 (on appeals from orders of county courts); COMPANIES, Vol. V., pp. 404, 409 (when security required on winding-up petition), 548 (on appeal), 762 (foreign company); and see p. 153, *post*; CONSTITUTIONAL LAW, Vol. VI., pp. 366 (Queen Consort cannot be ordered to give security), 438 (liability of consular officer); COUNTY COURTS, Vol. VIII., p. 606 (on appeal); COURTS, Vol. IX., p. 49 (on ecclesiastical and maritime appeals to Privy Council); CROWN PRACTICE, Vol. X., pp. 34 (on petition of right), 128 (mandamus); DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI., pp. 53 *et seq.* (discovery); DISTRESS, Vol. XI., p. 201 (replevin proceedings); ELECTIONS, Vol. XII., pp. 419 *et seq.* (parliamentary election petitions), 529 (criminal proceedings on elections); HUSBAND AND WIFE, Vol. XVI., pp. 454, 455 (when married women will be ordered to give security), p. 523 (divorce proceedings); INFANTS AND CHILDREN, Vol. XVII., pp. 135, 137 (when next friend ordered to give security); INTERPLEADER, Vol. XVII., pp. 608, 609 (interpleader summons); MASTER AND SERVANT, Vol. XX., pp. 239, 240 (on appeal to House of Lords in workmen's compensation cases); PARLIAMENT, Vol. XXI., pp. 645, 646 (on appeal to House of Lords); RECEIVERS; TRADE AND TRADE UNIONS; TRUSTS AND TRUSTEES.

(*v*) R. S. C., Ord. 65, r. 6. The application is made at chambers by summons or on the summons for directions (*Vale* v. *Offert* (1874), 22 W. R. 629; *Brown* v. *Haig*, [1905] 2 Ch. 379; *Pittsburg Crushed Steel Co.* v. *Marx (Jacob) & Co.*, [1897] W. N. 36). A defendant cannot be ordered to give security for the costs of an action (*Re Barber, Burgess* v. *Vinnicome* (No. 2) (1886), 55 L. J. (CH.) 624; *Re Percy and Kelly Nickell Cobalt and Chrome Iron Mining Co.* (1876), 2 Ch. D. 531; *Neck* v. *Taylor*, [1893] 1 Q. B. 560, C. A.; *Mapleson* v. *Masini* (1880), 5 Q. B. D. 144; *Baxter* v. *Morgan* (1815), 6 Taunt. 379; *Accidental and Marine Insurance Co.* v. *Mercati* (1866), L. R. 3 Eq. 200; *Vincent* v. *Hunter* (1846), 5 Hare, 320; *Wild* v. *Murray* (1854), 18 Jur. 892; *Watteau* v. *Billam* (1849), 14 Jur. 165; compare *Sloggett* v. *Viant* (1842), 13 Sim. 187); but a defendant who puts forward a counterclaim in a matter wholly distinct from the claim may be ordered to give security for the costs of the counterclaim (*Neck* v. *Taylor*, *supra*; *Sykes* v. *Sacerdoti* (1885), 15 Q. B. D. 423, C. A.; *Lake* v. *Haseltine* (1885), 55 L. J. (Q. B.) 205; *Winterfield* v. *Bradnum* (1878), 3 Q. B. D. 324, C. A.; *New Fenix Compagnie Anonyme d'Assurances de Madrid* v. *General Accident Fire and Life Assurance Corporation, Ltd.*, [1911] 2 K. B. 619, C. A.); so also may a defendant who obtains leave to have the conduct of a cause (*Mynn* v. *Hart* (1845), 9 Jur. 860; *Smith* v. *Hammond* (1833), 6 Sim. 10); or a person who applies to be admitted as a defendant in an action (*Apollinaris Co.* v. *Wilson* (1886), 31 Ch. D. 632, C. A.; *Vavasseur* v. *Krupp* (1878), 9 Ch. D. 351, C. A.); compare *Re Miller's Patent* (1894), 70 L. T. 270; *Re La Société Anonyme des Verreries de l'Etoile*, [1893] W. N. 119). A defendant in replevin is in the position of a plaintiff, and may be ordered to give security (*Selby* v. *Cruchley* (1820), 1 Brod. & Bing. 505). There is no rule defining when the application is to be made, but it cannot be made until the defendant has appeared (*Lydney and Wigpool Iron Ore Co.* v. *Bird* (1883), 23 Ch. D. 358; *Martano* v. *Mann* (1880), 14 Ch. D. 419, C. A.). An application for security for costs is a waiver of any objection that may be taken to the service of the writ (*Lhoneux, Limon & Co.* v. *Hong-kong and Shanghai Banking Corporation* (1886), 33 Ch. D. 446; *Re Smith, Bain* v. *Bain*, [1896] W. N. 88, C. A.). Security for costs of inquiries after trial may be ordered (*Brown* v. *Haig*, [1905] 2 Ch. 379). If the plaintiff fails to give

(1) If the plaintiff is a mere nominal plaintiff and is in a condition of poverty or insolvency (*w*);

(2) If the plaintiff is a limited company under the Companies (Consolidation) Act, 1908 (*x*), and it appears by creditable testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if his defence is successful (*y*);

(3) If a plaintiff is ordinarily resident out of the jurisdiction and has no assets within the jurisdiction which can be reached, though he may be temporarily resident within the jurisdiction (*z*);

security for costs within a reasonable time after the order for security or within the time limited by the order, the action may be dismissed for want of prosecution (*Giddings* v. *Giddings* (1847), 10 Beav. 29; *La Grange* v. *McAndrew* (1879), 4 Q. B. D. 210; *Grant* v. *Ingram* (1869), 20 L. T. 70; *Re Hürter's Trade Mark*, [1887] W. N. 71). The court may order security for the costs up to a certain stage in the proceedings (*Western of Canada Oil Lands and Works Co.* v. *Walker* (1875), 10 Ch. App. 628). The amount of the security is in the discretion of the master. It may be increased during the proceedings (*Paxton* v. *Bell*, [1878] W. N. 249, C. A.; *Sturla* v. *Freccia*, [1878] W. N. 161; *Costa Rica Republic* v. *Erlanger* (1876), 3 Ch. D. 62; *Dominion Brewery, Ltd.* v. *Foster* (1897), 77 L. T. 507; *Imperial Bank of China, India and Japan* v. *Bank of Hindustan, China and Japan* (1866), 1 Ch. App. 437; *Freehold Land and Brick-making Co.* v. *Spargo*, [1868] W. N. 94; *Bentsen* v. *Taylor, Sons & Co.*, [1893] 2 Q. B. 193, C. A.). Security may be ordered for past as well as future costs (see *Massey* v. *Allen* (1879), 12 Ch. D. 807; *Brocklebank* v. *King's Lynn Steamship Co.* (1878), 3 C. P. D. 365; *Willmott* v. *Freehold House Property Co.* (1885), 33 W. R. 554, C. A.). Security may be given by a bond or by payment into court: as to a bond, see *Aldrich* v. *British Griffin Chilled Iron and Steel Co.*, [1904] 2 K. B. 850, C. A.; *Panton* v. *Labertouche* (1843), 1 Ph. 265; *Re Norman* (1849), 11 Beav. 401; *Cliffe* v. *Wilkinson* (1830), 4 Sim. 122; *Jones* v. *Jacobs* (1834), 2 Dowl. 442; *Lautour* v. *Holcombe* (1843), 1 Ph. 262; *Veitch* v. *Irving* (1840), 11 Sim. 122; *Lowndes* v. *Robertson* (1819), 4 Madd. 465); as to an undertaking in lieu of security, see *Hawkins Hill Consolidated Gold Mining Co.* v. *Want* (1893), 69 L. T. 297. As to payment of money into court, see *Lydney and Wigpool Iron Ore Co.* v. *Bird* (1886), 33 Ch. D. 85, C. A.; *Hood-Barrs* v. *Crossman and Pritchard*, [1897] A. C. 172; *Re Griffiths Cycle Corporation, Ltd., Dunlop Pneumatic Tyre Co., Ltd.* v. *John Griffiths Cycle Corporation, Ltd.* (1902), 85 L. T. 776, C. A.; *Re Wadsworth, Rhodes* v. *Sugden* (1885), 29 Ch. D. 517.

(*w*) For examples of security being ordered to be given by a nominal plaintiff, see *Lloyd* v. *Hathern Station Brick Co., Ltd.* (1901), 85 L. T. 158, C. A.; *Goatley* v. *Emmott* (1854), 15 C. B. 291; *Perkins* v. *Adcock* (1845), 14 M. & W. 808; *Elliot* v. *Kendrick* (1840), 12 Ad. & El. 597; *Hastings Corporation* v. *Ivall* (1874), 9 Ch. App. 758; *Macneal* v. *Biggart* (1870), 18 W. R. 470; *Burke* v. *Lidwell* (1844), 1 Jo. & Lat. 703; *Ball* v. *Ross* (1840), 1 Scott (N. R.), 217; *Tredwell* v. *Byrch* (1835), 1 Y. & C. (EX.) 476; *Tenant* v. *Brown* (1826), 5 B, & C. 208. For examples where security has been refused, see *Hinde* v. *Haskew* (1884), 1 T. L. R. 94; *White* v. *Butt*, [1909] 1 K. B. 50, C. A.; *Cook* v. *Whellock* (1890), 24 Q. B. D. 658, C. A.; *Buchan* v. *Hill*, [1888] W. N. 233; *Pooley's Trustee* v. *Whetham* (1884), 28 Ch. D. 38, C. A.; *Cowell* v. *Taylor* (1885), 31 Ch. D. 34, C. A.; *Denston* v. *Ashton* (1869), L. R. 4 Q. B. 590; *Greener* v. *Kahn (E.) & Co., Ltd.*, [1906] 2 K. B. 374, C. A.; *Affleck* v. *Hammond* (1911), 106 L. T. 8, C. A. A plaintiff will not be ordered to give security merely on the ground of his insolvency or poverty (*Cook* v. *Whellock, supra; Rhodes* v. *Dawson* (1886), 16 Q. B. D. 548, C. A.). As to security for costs against a relator in an action by the Attorney-General, see *A.-G.* v. *Allman*, [1906] 1 I. R. 473, C. A.; *A.-G.* v. *Knight* (1837), 3 My. & Cr. 154.

(*x*) 8 Edw. 7, c. 69.

(*y*) See title COMPANIES, Vol. V., p. 327; Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 278.

(*z*) R. S. C., Ord. 65, r. 6A; *Michiels* v. *Empire Palace, Ltd.*, [1892] W. N. 38; "Out of the jurisdiction" here means out of Great Britain; see the Judgment

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(4) Where the residence of the plaintiff is not correctly stated in the writ of summons (*a*), or where there have been frequent changes of his residence since the issue of the writ (*b*).

Extensions Act, 1868 (31 & 32 Vict. c. 54); *Fountaine's Case* (1889), 41 Ch. D. 118, C. A.; *Re Queensland Mercantile Agency Co.* (1891), 61 L. J. (CH.) 48. For examples where a plaintiff ordinarily resident out of the jurisdiction was ordered to give security, see *Re Pretoria-Pietersburg Rail. Co.* (No. 2), [1904] 2 Ch. 359; *Crozat* v. *Brogden*, [1894] 2 Q. B. 30, 36, C. A.; *Re Percy and Kelly Nickel, Cobalt and Chrome Iron Mining Co.* (1876), 2 Ch. D. 531; *Apollinaris Co.* v. *Wilson* (1886), 31 Ch. D. 632, C. A.; *The Newbattle* (1885), 10 P. D. 33, C. A.; *The Beatrice*, otherwise *The Rappahannock* (1866), 36 L. J. (ADM.) 10; *Vavasseur* v. *Krupp* (1878), 9 Ch. D. 351, C. A.; *Costa Rica Republic* v. *Erlanger* (1876), 3 Ch. D. 62; *Re Milward & Co.*, [1900] 1 Ch. 405, C. A. Security is not ordered merely because the plaintiff is about to leave the kingdom (*Adams* v. *Colethurst* (1794), 2 Anst. 552), or is abroad (*Hoby* v. *Hitchcock* (1800), 5 Ves. 699; *Green* v. *Charnock* (1791), 1 Ves. 396); but as to the case where a plaintiff has been ordered to be removed out of the kingdom under the Aliens Act, 1905 (5 Edw. 7, c. 13), compare *Seilaz* v. *Hanson* (1800), 5 Ves. 261. Security is not ordered from an Englishman who is compelled to reside abroad on public service (*Colebrook* v. *Jones* (1751), 1 Dick. 154; *O'Lawler* v. *Macdonald* (1819), 8 Taunt. 736; *Nugent* (*Lord*) v. *Harcourt* (1834), 2 Dowl. 578; *Fisher* v. *Bunbury* (1837), Sau. & Sc. 625; *Wright* v. *Everard* (1839), Sau. & Sc. 651, n.; *Evering* v. *Chiffenden* (1839), 7 Dowl. 536; *Evelyn* v. *Chippendale* (1839), 9 Sim. 497; *Clark* v. *Fergusson* (1859), 1 Giff. 184; *Aldborough* (*Lord*) v. *Burton* (1834), 2 My. & K. 401). If there are several co-plaintiffs and one is ordinarily resident within the jurisdiction, no security is ordered, although others may be resident abroad (*D'Hormusgee* v. *Grey* (1882), 10 Q. B. D. 13; *M'Connell and Varlett* v. *Johnston* (1801), 1 East, 431; *Winthorp* v. *Royal Exchange Assurance Co.* (1755), 1 Dick. 282; *Walker* v. *Easterby* (1802), 6 Ves. 612; *The Carnarvon Castle* (1878) 38 L. T. 736, C. A.; *Hanmer* v. *Mangles* (1843), 12 M. & W. 313). If the plaintiff, though ordinarily resident out of the jurisdiction, can show that he has assets within the jurisdiction which can be reached by process, security is not ordered (*Hamburger* v. *Poetting* (1882), 47 L. T. 249; *Fountaine's Case, supra*; *Clarke* v. *Barber* (1890), 6 T. L. R. 256; *Redfern* v. *Redfern* (1890), 63 L. T. 780; *Limerick and Waterford Rail. Co.* v. *Fraser* (1827), 4 Bing. 394; *Re Apollinaris Co.'s Trade-marks*, [1891] 1 Ch. 1, C. A.; *Sacker* v. *Bessler & Co.* (1887), 4 T. L. R. 17; *Ebrard* v. *Gassier* (1884), 28 Ch. D. 232, C. A.). Security is not ordered if the defendant has money of the plaintiff in his hands (*Crozat* v. *Broyden*, *supra*, at p. 36; *Duffy* v. *Joyce* (1890), 25 L. R. Ir. 42), or admits the claim (*De St. Martin* v. *Davis & Co.*, [1884] W. N. 86; *Mapleson* v. *Masini* (1880), 5 Q. B. D. 144, 147), or if the plaintiff has an unsatisfied judgment against the defendant (*Bristowe* v. *Needham* (1842), 4 Man. & G. 906; *Re Contract and Agency Corporation* (1887), 57 L. J. (CH.) 5; *La Bangue des Travaux Publiques etc.* v. *Wallis*, [1884] W. N. 64). If the plaintiff returns to and resides in England after the order for security has been made, it is a matter for the discretion of the court whether the order should or should not be set aside (see *Westenberg* v. *Mortimore* (1875), L. R. 10 C. P. 438; *Badnall* v. *Haylay* (1838), 4 M. & W. 535; *Mathews* v. *Chichester* (1861), 30 Beav. 135; *O'Connor* v. *Sierra Nevada Co.* (1857), 24 Beav. 435). Foreign ambassadors are not ordered to give security, but it is otherwise with regard to their servants (*de Montellano* (*Duke*) v. *Christin* (1815), 5 M. & S. 503; *Goodwin* v. *Archer* (1727), 2 P. Wms. 452; *Adderly* v. *Smith* (1763), 1 Dick. 355); and foreign Sovereigns (*Brazil* (*Emperor*) v. *Robinson* (1837), 6 Ad. & El. 801; *Greece* (*King*) v. *Wright* (1837), 6 Dowl. 12).

(*a*) *Re Sturgis British Motive Power Syndicate* (1885), 34 W. R. 163; *Swanzy* v. *Swanzy* (1858), 4 K. & J. 237; *Oldale* v. *Whitcher* (1859), 5 Jur. (N. S.) 84; see *Redondo* v. *Chaytor* (1879), 4 Q. B. D. 453, C. A. (as to which see now R. S. C., Ord. 65, r. 6A); and see *Pittsburg Crushed Steel Co.* v. *Marx* (*Jacob*) *& Co.*, [1897] W. N. 36; *Re a Solicitor*, *Karpeles* v. *Friedlander* (1889), 53 J. P. 264.

(*b*) *Player* v. *Anderson* (1846), 15 Sim. 104.

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(xv.) *Setting down Point of Law for Hearing.*

Setting down for hearing.

272. Any party may raise by his pleading any point of law; and any such point is disposed of at or after the trial, or by consent or by order, at any time before the trial (*c*).

Point of law disposing of action.

273. The court or a judge, if of opinion that the decision of the point of law substantially disposes of the whole action or of any distinct cause of action, ground of defence, set-off, counterclaim, or reply, may dismiss the action or make such other order as may be just (*d*).

(xvi.) *Stay of Proceedings.*

Stay of proceedings.

274. The High Court of Justice or the Court of Appeal may direct a stay of proceedings (*e*) in any cause or matter pending before

(*c*) R. S. C., Ord. 25, r. 2; see, further, title PLEADING, Vol. XXII., p. 433. Demurrers are abolished (R. S. C., Ord. 25, r. 1), and the question whether any pleading is good in law may be raised by an objection by the opposite party in his pleading (*ibid.*, r. 2), or by an application that the pleading objected to be struck out (*ibid.*, r. 4; *Hubbuck* v. *Wilkinson, Heywood and Clark*, [1899] 1 Q. B. 86, C. A.; *Worthington* v. *Belton* (1902), 18 T. L. R. 438, C. A.; see title PLEADING, Vol. XXII., pp. 434 *et seq.*; but the procedure under R. S. C., Ord. 25, r. 4, ought not to be applied to a question involving serious investigation, *e.g.*, of ancient law and questions of general importance (*Dyson* v. *A.-G.*, [1911] 1 K. B. 410, C. A.). The point of law may be raised either alone or together with issues of fact, but the two should be kept distinct; see *Stokes* v. *Grant* (1878), 4 C. P. D. 25; R. S. C., App. E, sect. III., No. 2. The application to set down a point of law for hearing is made to a master under the summons for directions (R. S. C., Ord. 30; see p. 135, *ante*), or by notice (R. S. C., Ord. 30, r. 5). An order setting down a point of law for hearing may be made on a summons to strike out a pleading (*Bottomley* v. *Brougham*, [1908] 1 K. B. 584; *Michael* v. *Spiers and Pond, Ltd.* (1900), 25 T. L. R. 740). It is a matter for the discretion of the master whether the order should be made (*London, Chatham and Dover Rail. Co.* v. *South Eastern Rail. Co.* (1885), 53 L. T. 109; *Cocksedge* v. *Metropolitan Coal Consumers' Association* (1891), 65 L. T. 432, C. A.; *Scott* v. *Mercantile Accident Assurance Co.* (1892), 8 T. L. R. 431; *Parr* v. *London, Edinburgh, and Glasgow Life Assurance Co.* (1891), 8 T. L. R. 88). For instances of orders setting down points of law for argument before trial, see *Bright (Charles) & Co., Ltd.* v. *Sellar*, [1904] 1 K. B. 6, C. A.; *Beardsley* v. *Beardsley*, [1899] 1 Q. B. 746; *Burrows* v. *Rhodes*, [1899] 1 Q. B. 816; *Cobb* v. *Great Western Rail. Co.*, [1893] 1 Q. B. 459, C. A.; *Roberts* v. *Holland*, [1893] 1 Q. B. 665; *Howitt* v. *Harrington (Earl)*, [1893] 2 Ch. 497; *British South Africa Co.* v. *Companhia de Moçambique*, [1893] A. C. 602; *Manchester Corporation* v. *Williams*, [1891] 1 Q. B. 94; *James* v. *Smith*, [1891] 1 Ch. 384; *Chatenay* v. *Brazilian Submarine Telegraph Co.*, [1891] 1 Q. B. 79, C. A.; *Stoneham* v. *Ocean Railway and General Accident Insurance Co.* (1887), 19 Q. B. D. 237; *Oakey* v. *Dalton* (1887), 35 Ch. D. 700; *Preston Corporation* v. *Fullwood Local Board* (No. 2) (1886), 53 L. T. 718; *Percival* v. *Dunn* (1885), 29 Ch. D. 128. The argument is heard before a judge in court; the party who by his pleading raises the point of law having the right to begin (*Stevens* v. *Chown*, [1901] 1 Ch. 894); and the judge at the hearing may give leave to amend (*Richards* v. *Butcher* (1890), 62 L. T. 867).

(*d*) R. S. C., Ord. 25, r. 3; *Percival* v. *Dunn* (1885), 29 Ch. D. 128; *Beardsley* v. *Beardsley*, [1899] 1 Q. B. 746; *Richards & Co.* v. *Butcher and Robinson* (1890), 62 L. T. 867; *Bozson* v. *Altrincham Urban Council*, [1903] 1 K. B. 547, C. A.; *Salaman* v. *Warner*, [1891] 1 Q. B. 734, C. A.; *James* v. *Insole* (1891), 64 L. T. 703, C. A.; *Re Palmer's Application* (1882), 22 Ch. D. 88, C. A.

(*e*) As to stay of proceedings in connection with matters dealt with under other titles, see titles ARBITRATION, Vol. I., pp. 451 *et seq.* (when arbitration pending); BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 53 *et seq.* (on what grounds court will stay bankruptcy proceedings); COMPANIES, Vol. V., pp. 533

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it, if it shall think fit; and any person, whether a party or not to any such cause or matter, who would have been entitled, if the Judicature Act, 1873 (*f*), had not passed, to apply to any court to restrain the prosecution of such cause, or who is entitled to enforce any judgment contrary to which all or any part of the proceedings in such cause may have been taken, may apply to the High Court or to the Court of Appeal by motion in a summary way for a stay of proceedings in such cause or matter, and the court thereupon makes such order as is just (*g*).

et seq., 543 *et seq.* (winding-up proceedings by court), 583, 584 (voluntarily winding up), 653 (winding up of unregistered company); CONFLICT OF LAWS, Vol. VI., pp. 299 *et seq.* (stay even when foreign suit pending); EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 177 (jurisdiction of Probate Division), 217 (stay on revocation of grant); HUSBAND AND WIFE, Vol. XVI., p. 505 (stay of divorce proceedings when pauper husband neglects to proceed); INJUNCTION, Vol. XVII., p. 261 (stay of proceedings by injunction); INTERPLEADER, Vol. XVII., pp. 602 *et seq.* (stay of interpleader proceedings in the High Court); and see titles SOLICITORS; SPECIFIC PERFORMANCE.

(*f*) 36 & 37 Vict. c. 66.

(*g*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24 (5). No cause or proceeding in the High Court or the Court of Appeal can now be restrained by prohibition or injunction, but in cases where injunctions might have been obtained before 1873 an equitable defence may now be pleaded, or a stay of proceedings may be obtained by application in the division in which the action is pending (*ibid.*); *Garbutt* v. *Fawcus* (1875), 1 Ch. D. 155, C. A.; *Wright* v. *Redgrave* (1879), 11 Ch. D. 24, C. A.; *Searle* v. *Choat* (1884), 25 Ch. D. 723, C. A.; *Powell* v. *Jewsbury* (1878), 9 Ch. D. 34, 39, C. A.; *Re Artistic Colour Printing Co.* (1880), 14 Ch. D. 502; *Tumin* v. *Levi* (1911), 28 T. L. R. 125, C. A.). A person may also be restrained by an order in an action in one division of the High Court from commencing proceedings in another division (*Besant* v. *Wood* (1879), 12 Ch. D. 605; see *Cercle Restaurant Castiglioni Co.* v. *Lavery* (1881), 18 Ch. D. 555; *New Travellers' Chambers* v. *Cheese* (1894), 70 L. T. 271; *Re a Company*, [1894] 2 Ch. 349; *Re Maidstone Palace of Varieties*, [1909] 2 Ch. 283). The Judicature Acts do not, however, affect the prerogative of the Crown, and on the application of the Attorney-General an order may be made in the King's Bench Division restraining an action in the Chancery Division relating to the King's revenue and removing it into the King's Bench Division (*A.-G.* v. *Constable* (1879), 4 Ex. D. 172). An injunction may be granted to restrain proceedings in inferior courts (*Hedley* v. *Bates* (1880), 13 Ch. D. 498; *Stannard* v. *St. Giles Vestry* (1881), 20 Ch. D. 190, C. A.; *Grand Junction Waterworks Co.* v. *Hampton Urban Council*, [1898] 2 Ch. 331; *The Teresa* (1894), 71 L. T. 342; *Re Womersley, Etheridge* v. *Womersley* (1885), 29 Ch. D. 557; *Townsend* v. *Townsend* (1883), 23 Ch. D. 100, C. A.; *Re Swire, Mellor* v. *Swire* (1882), 21 Ch. D. 647, C. A.; *Re Connolly Brothers, Ltd., Wood* v. *Connolly Brothers, Ltd.*, [1911] 1 Ch. 731, C. A.). The High Court has power to restrain persons amenable to its jurisdiction from prosecuting proceedings in a foreign country; see *The Christiansborg* (1885), 10 P. D. 141, C. A.; *McHenry* v. *Lewis* (1882), 22 Ch. D. 397, C. A.; *Peruvian Guano Co.* v. *Bockwoldt* (1883), 23 Ch. D. 225, C. A.; *Mutrie* v. *Binney* (1887), 35 Ch. D. 614, C. A.; *Armstrong* v. *Armstrong*, [1892] P. 98; *The Mannheim*, [1897] P. 13; *Jopson* v. *James* (1908), 77 L. J. (CH.) 824, C. A.; *Hyman* v. *Helm* (1883), 24 Ch. D. 531, C. A.; *Houston* v. *Sligo* (*Marquis*), [1884] W. N. 51, C. A.; *Baird* v. *Prescott & Co.* (1890), 6 T. L. R. 231, C. A.; *Re Derwent Rolling Mills, Ltd.* (1904), 21 T. L. R. 81; *Re Hermanos* (*Artola*), *Ex parte Châle* (*André*) (1890), 24 Q. B. D. 640, C. A.; *The Jasep* (1896), 12 T. L. R. 375, 434, C. A.; *The Hagen*, [1908] P. 189, 202, C. A.; *Thornton* v. *Thornton* (1886), 11 P. D. 176, C. A.; *Von Eckhardstein* v. *Von Eckhardstein* (1907), 23 T. L. R. 539, C. A.; *Christian* v. *Christian* (1897), 78 L. T. 86; *Vardopulo* v. *Vardopulo* (1909), 53 Sol. Jo. 469, C. A.; *Printing Machinery Co., Ltd.* v. *Linotype and Machinery, Ltd.*, [1912] 1 Ch. 566; *Pena Copper Mines, Ltd.* v. *Rio Tinto Co., Ltd.* (1911), 105 L. T. 846, C. A.; and see title CONFLICT OF LAWS, Vol. VI., p. 300. As to stay of

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275. The High Court of Justice has an inherent jurisdiction to stay proceedings which are an abuse of its process (*h*).

Inherent jurisdiction to stay.

276. If a pleading is ordered to be struck out on the ground that it discloses no reasonable cause of action, the action may be ordered to be stayed (*i*).

If a plaintiff having failed in one action commences a second action for the same matter, the court stays the second action until the costs of the first action have been paid; and this is done, although the actions are not between precisely the same parties, if the plaintiff is suing substantially by virtue of the same alleged title (*k*).

Circumstances which will, or may, call for an order to stay.

proceedings in respect of a matter which has been agreed to be referred to arbitration, see *Blackwell (R. W.) & Co., Ltd.* v. *Derby Corporation* (1911), 75 J. P. 129, C. A.; *Freeman (G.) & Sons* v. *Chester Rural Council*, [1911] 1 K. B. 783, C. A.; *The Dawlish*, [1910] P. 339; *Printing Machinery Co., Ltd.* v. *Linotype and Machinery, Ltd.*, [1912] 1 Ch. 566; *Pena Copper Mines, Ltd.* v. *Rio Tinto Co., Ltd.* (1911), 105 L. T. 846, C. A.; and see title ARBITRATION, Vol. I., p. 451.

(*h*) *Metropolitan Bank* v. *Pooley* (1885), 10 App. Cas. 210; *Dawkins* v. *Saxe Weimar (Prince Edward)* (1876), 1 Q. B. D. 499; *Willis* v. *Beauchamp (Earl)* (1886), 11 P. D. 59, C. A.; *Lawrance* v. *Norreys (Lord)* (1890), 15 App. Cas. 210; *Chaffers* v. *Goldsmid*, [1894] 1 Q. B. 186; *Chatterton* v. *Secretary of State for India*, [1895] 2 Q. B. 189, C. A.; *Egbert* v. *Short*, [1907] 2 Ch. 205; *Goodson* v. *Grierson*, [1908] 1 K. B. 761, C. A.; *The Manar*, [1903] P. 95. A person may be prohibited from taking further proceedings without leave (*Grepe* v. *Loam* (1888), 37 Ch. D. 168, C. A.; see the Vexatious Actions Act, 1896 (59 & 60 Vict. c. 51), s. 1; title ACTION, Vol. I., p. 30). As to cross actions between the same parties arising out of the same matter, see *Thomson* v. *South Eastern Rail. Co.* (1882), 9 Q. B. D. 320, C. A.; *Adamson* v. *Tuff* (1881), 44 L. T. 420; *Rees* v. *Luxmore* (1888), 4 T. L. R. 355; *Rechnitzer* v. *Samuel* (1906), 95 L. T. 75; *White* v. *Harrow* (1902), 50 W. R. 166. If a plaintiff has recourse to separate actions or proceedings in respect of the same subject-matter, when all the relief he is entitled to might be obtained in one action, a stay may be ordered in one or more of such actions (*Williams* v. *Hunt*, [1905] 1 K. B. 512, C. A.; *Sanders* v. *Hamilton* (1907), 96 L. T. 679; *Mohan* v. *Broughton*, [1899] P. 211; *Bean* v. *Flower* (1895), 73 L. T. 371, C. A.; *Poulett (Earl)* v. *Hill (Viscount)*, [1893] 1 Ch. 277, C. A.; *M'Cabe* v. *Great Northern Rail. Co.*, [1899] 2 I. R. 123, C. A.; *Re Aird, Morton* v. *Quick* (1878), 26 W. R. 441, C. A.; *Blake* v. *O'Kelly* (1874), 9 I. R. Eq. 54; *Sharp* v. *McHenry* (1886), 55 L. T. 747). There is power to stay proceedings pending the trial of a test action; see *Amos* v. *Chadwick, Robinson* v. *Chadwick, Smith* v. *Chadwick* (1877), 4 Ch. D. 869; *Amos* v. *Chadwick* (1878), 9 Ch. D. 459, C. A.; *Bennett* v. *Bury (Lord)* (1880), 5 C. P. D. 339; *Ladywell Mining Co.* v. *Huggons*, [1884] W. N. 55; *Colledge* v. *Pike* (1886), 56 L. T. 124. Proceedings may be stayed pending an appeal (R. S. C., Ord. 58, r. 11; see *Becker* v. *Earl's Court, Ltd.* (1911), 56 Sol. Jo. 206, C. A.); or on payment of the amount claimed and costs (see R. S. C., Ord. 3, r. 7; Chitty, King's Bench Forms, 177); or in actions of detinue on delivery up of goods claimed and payment of nominal damages (Chitty, King's Bench Forms, 178; see title TROVER AND DETINUE).

(*i*) R. S. C., Ord. 25, r. 4; see titles EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 177; PLEADING, Vol. XXII., pp. 435, 436.

(*k*) *M'Cabe* v. *Bank of Ireland* (1889), 14 App. Cas. 413; *Martin* v. *Beauchamp (Earl)* (1883), 25 Ch. D. 12, C. A.; *Re Payne, Randle* v. *Payne* (1883), 23 Ch. D. 288, C. A.; *Peters* v. *Tilly* (1886), 11 P. D. 145; *Hendre* v. *Gerner* (1888), 32 Sol. Jo. 322; *Hankin* v. *Turner* (1879), 27 W. R. 232; *Abdy* v. *Abdy* (1896), 12 T. L. R. 524. So, if an action has been discontinued and another action is brought for the same or substantially the same cause, before the costs of the discontinued action are paid, the court or a judge may order the stay of the subsequent action, until the costs of the other action have been paid (R. S. C., Ord. 26, r. 4; *Hall* v. *Paulet* (1892), 66 L. T. 645; *Re United Service Association, Ex parte Young*, [1901] 1 Ch. 97). As to the effect of non-payment of costs in interlocutory proceedings, see *Morton* v. *Palmer* (1882),

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If an order has been made directing a question of law to be raised for the opinion of the court before any evidence is given or any question or issue of fact is tried, or before any reference is made to a referee or arbitrator, all such further proceedings as the decision of the question of law may render unnecessary may be stayed (*l*).

If a solicitor whose name is indorsed on a writ declares after a demand has been made upon him in writing that the writ was not issued by him or with his authority or privity, all proceedings upon the writ must be stayed and no further proceedings can be taken without leave of the court or a judge (*m*).

If an action has been compromised and the action is proceeded with in spite of the compromise, an order may be obtained for the stay of proceedings (*n*).

A stay of proceedings is sometimes imposed as a means for securing the performance of an order (*o*).

(xvii.) *Transfer.*

Transfer of actions by order of the Lord Chancellor.

277. Causes or matters may be transferred from one division to another of the High Court or from one judge to another of the Chancery Division, but no transfer can be made from or to any division without the consent of the president of the division (*p*). In the Chancery Division a transfer of a cause or matter from one judge to another may be ordered to be made for the purpose only of hearing or of trial (*q*).

A particular application in any cause or matter may, by the direction of the Lord Chancellor, be heard and disposed of by any judge of the High Court who consents to do so, whether the cause is or is not assigned to the division to which he belongs (*r*).

Hearing by one judge of the Chancery Division for another.

278. Any judge of the Chancery Division may, at the request or with the consent of any other judge of that division before whom a cause or matter is pending, hear such cause or matter, or any

9 Q. B. D. 89; *Graham* v. *Sutton, Carden & Co.*, [1897] 2 Ch. 367; *Re Wickham, Marony* v. *Taylor* (1887), 35 Ch. D. 272, C. A.

(*l*) R. S. C., Ord. 34, r. 2; and see p. 155, *ante*.

(*m*) R. S. C., Ord. 7, r. 1.

(*n*) *Eden* v. *Naish* (1878), 7 Ch. D. 781; *Re Gaudet Frères Steamship Co.* (1879), 12 Ch. D. 882; *Baker* v. *Blaker* (1887), 55 L. T. 723; *Henderson* v. *Underwriting and Agency Association* (1892), 65 L. T. 732, C. A.; *Guy* v. *Walker* (1892), 8 T. L. R. 314, C. A.; see p. 168, *post*.

(*o*) See *Willis* v. *Baddeley*, [1892] 2 Q. B. 324, C. A.; R. S. C., App. K, No. 11A.

(*p*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 36; R. S. C., Ord. 49, r. 1. Applications under this rule, which are not common, must be made to the Lord Chancellor by petition, if all parties consent, or by motion, notice of which must be served on the other parties (*Humphreys* v. *Edwards* (1875), 45 L. J. (CH.) 112), if all the parties do not consent; see Memorandum (1875), 1 Ch. D. 41, C. A. In this case the motion is usually heard in court at the House of Lords and made by counsel. As to the costs of the transfer, see *Lyall* v. *Weldhen* (1874), 9 Ch. App. 287; *Norton* v. *Fenwick* (1885), 54 L. J. (CH.) 632.

(*q*) R. S. C., Ord. 49, r. 2; see *Lloyd* v. *Jones* (1877), 7 Ch. D. 390; *Shaw* v. *Brown* (1881), 50 L. J. (CH.) 232.

(*r*) R. S. C., Ord. 49, r. 4; see *Re Briton Medical and General Life Association* (1888), 39 Ch. D. 61.

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application therein, without any order for transfer or consent of the parties (*s*).

Transfer by order of the court or a judge.

279. Any cause or matter may at any stage be transferred from one division to another of the High Court by an order of the court or any judge of the division to which the cause or matter is assigned with the consent of the president of the division to which the cause or matter is proposed to be transferred (*t*).

SUB-SECT. 11.—*Discontinuance.*

Discontinuance.

280. The plaintiff may without leave wholly discontinue his action, against all or any of the defendants, or withdraw any part or parts of his alleged cause of complaint by giving notice in writing at any time before the receipt of the defence, or afterwards, before the plaintiff takes any other proceeding except an interlocutory application (*u*). Except as aforesaid, a plaintiff cannot withdraw

(*s*) Judicature Act, 1884 (47 & 48 Vict. c. 61), s. 6; R. S. C., Ord. 49, r. 4A; see *A.-G.* v. *Vyner*, [1889] W. N. 217. As to the transfer of an originating summons improperly marked with the name of a judge other than the judge prescribed by R. S. C., Ord. 55, r. 11, see *ibid.*, Ord. 49, r. 6.

(*t*) *Ibid.*, r. 3. In the King's Bench Division the application is made to a master in chambers by summons or notice under *ibid.*, Ord. 30, r. 5; see p. 137, *ante* (R. S. C., Ord. 54, r. 12); in the Chancery Division the application is by summons or motion. For instances of transfer from one division to another, see *Chapman* v. *Real Property Trust* (1878), 7 Ch. D. 732; *Re Low, Bland* v. *Low*, [1894] 1 Ch. 147, C. A.; *London Land Co.* v. *Harris* (1884), 13 Q. B. D 540; *Storey* v. *Waddle* (1879), 4 Q. B. D. 289, C. A.; *Hillman* v. *Mayhew* (1876), 1 Ex. D. 132; *Standard Discount Co.* v. *Barton* (1877), 37 L. T. 581; *Newbould* v. *Steade* (1882), 49 L. T. 649, C. A.; *Victoria Mutual Assurance Society* v. *Smith* (1889), 5 T. L. R. 182; *Leslie* v. *Clifford* (1884), 50 L. T. 590; *Hoult* v. *Anderson* (1886), 2 T. L. R. 257, C. A.; *Baerlein* v. *Chartered Mercantile Bank*, [1895] 2 Ch. 488, C. A.; *Re Martin, Hunt* v. *Chambers* (1882), 20 Ch. D. 365; *Forrester* v. *Jones*, [1899] W. N. 78; *Re Edge's Patent* (1890), 63 L. T. 370; *Mangan* v. *Metropolitan Electric Supply Co.*, [1891] 2 Ch. 551, C. A.; *Sea Insurance Co.* v. *Carr*, [1901] 1 K. B. 7, C. A.; *Humphreys* v. *Edwards* (1875), 45 L. J. (CH.) 112; *Ocean Steamship Co.* v. *Anderson, Tritton & Co.* (1885), 33 W. R. 536, C. A.; *The Gertrude* (1888), 13 P. D. 105, C. A.; *Roche* v. *London and South Western Rail. Co.*, [1899] 2 Q. B. 502, C. A.; see, further, titles ADMIRALTY, Vol. I., pp. 107, 108; BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 63, 64, 95, 298. Any cause or matter transferred from any other division to the Chancery Division must, by the order of transfer, be assigned to one of the judges of that division named in the order (R. S. C., Ord. 49, r. 7).

(*u*) *Ibid.*, Ord. 26, r. 1. On discontinuance the plaintiff must pay the defendant's costs, or, if the action is not wholly discontinued, the costs occasioned by the matter withdrawn (*The J. H. Henkes* (1887), 12 P. D. 106; see *Harrison* v. *Leutner* (1881), 16 Ch. D. 559, C. A.; *The St. Olaf* (1877), 2 P. D. 113; *Whiteley Exerciser* v. *Gamage*, [1898] 2 Ch. 405; *Suckling* v. *Gabb* (1887), 36 W. R. 175; *Windham* v. *Bainton* (1888), 21 Q. B. D. 199; *Sidebottom* v. *Hooton Park Club* (1902), 18 T. L. R. 453, C. A.; *Lloyd's Bank* v. *Princess Royal Colliery Co.* (1900), 48 W. R. 460; *Smith* v. *Northleach Rural Council*, [1902] 1 Ch. 197; *Wilcox and Gibbs* v. *Janes*, [1897] 2 Ch. 71; *Acetylene Illuminating Co.* v. *United Alkali Co.*, [1902] 1 Ch. 494). As to the form of notice of discontinuance, see R. S. C., App. B, Form No. 19; and see *The Pomerania* (1879), 4 P. D. 195; *Spincer* v. *Watts* (1889), 23 Q. B. D. 350, C. A.; *Moon* v. *Dickinson* (1890), 63 L. T. 371; *McIlwraith* v. *Green* (1884), 14 Q. B. D. 766, C. A. Discontinuance is only applicable to proceedings where a defence would in the ordinary course be delivered (*Re Dyson's Trade Mark* (1891), 65 L. T. 488). As to what is a "step in the proceedings," see *Moore* v. *Southern Counties Deposit Bank*, [1889] W. N. 156, C. A.; *Spincer* v. *Watts*, *supra*; *Vickers, Sons and*

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the record or discontinue the action without leave of the court or a judge; nor can a defendant withdraw his defence or part of it without such leave (*v*).

When a cause has been entered for trial, the entry may be withdrawn upon either plaintiff or defendant producing to the proper officer a consent in writing signed by the parties (*x*).

SUB-SECT. 12.—*Notice of Intention to Proceed.*

When notice required.

281. In any cause or matter, in which there has been no proceeding for one year from the last proceeding had, the party who desires to proceed must give a month's notice to the other party of his intention to proceed (*a*).

SUB-SECT. 13.—*Special Case* (*b*).

Special case.

282. The parties to any cause may concur in stating the

Maxim v. *Coventry Ordnance Works*, [1908] W. N. 12. One of several plaintiffs cannot withdraw from an action as a matter of course; see *Re Mathews, Oates* v. *Mooney*, [1905] 2 Ch. 460.

(*v*) R. S. C., Ord. 26, r. 1. A plaintiff cannot now elect to be nonsuited; an action can now only be discontinued under *ibid.* (*Fox* v. *Star Newspaper Co.*, [1900] A. C. 19). As to giving leave to discontinue, see *Robertson* v. *Purdey*, [1906] 2 Ch. 615; *Stahlschmidt* v. *Walford* (1879), 4 Q. B. D. 217; *Hess* v. *Labouchere* (1898), 14 T. L. R. 350; *Musman* v. *Boret* (1892), 66 L. T. 171; *Lambton & Co.* v. *Parkinson* (1887), 35 W. R. 545. Leave is obtained by applying to a master in chambers by summons or a notice under R. S. C., Ord. 30, r. 5; see p. 137, *ante* (*Lloyd's Bank* v. *Princess Royal Colliery Co.* (1900), 82 L. T. 559; *Anon.*, [1876] W. N. 40). As to the effect of discontinuance, see *The "Kronprinz"* (*Owners of Cargo*) v. *The "Kronprinz"* (*Owners*), *The "Ardandhu"* (1887), 12 App. Cas. 256; *Reid* v. *London and Staffordshire Fire Insurance Co.* (1883), 49 L. T. 468; *Gold Reefs of Western Australia, Ltd.* v. *Dawson*, [1897] 1 Ch. 115; *Conybeare* v. *Lewis* (1880), 13 Ch. D. 469, C. A.; *Newcomen* v. *Coulson* (1878), 7 Ch. D. 764; *Robinson* v. *Chadwick* (1878), 7 Ch. D. 878, 881; *Amos* v. *Chadwick* (1878), 9 Ch. D. 459, C. A.; *R.* v. *City of London Court Judge*, [1891] 2 Q. B. 71. As to entering judgment for the costs in case of discontinuance, see R. S. C., Ord. 26, r. 3; as to form of judgment, see *ibid.*, App. F, Form No. 14. As to stay of proceedings if the costs are not paid and another action is commenced, see *ibid.*, Ord. 26, r. 4; and see p. 157, *ante*.

(*x*) R. S. C., Ord. 26, r. 2; *Matthews* v. *Antrobus* (1879), 49 L. J. (CH.) 80.

(*a*) R. S. C., Ord. 64, r. 13. The "proceeding" referred to in the rule means a proceeding before and not after judgment (*May* v. *Wooding* (1815), 3 M. & S. 500; *Theobald* v. *Crickmore* (1819), 2 B. & Ald. 594; *Thompson* v. *Langridge* (1847), 1 Exch. 351; *Houlston* v. *Woodall* (1884), 76 L. T. Jo. 113, C. A.); and, therefore, does not apply to entering judgment after an order has been obtained under R. S. C., Ord. 14, giving leave to sign judgment (*Deighton* v. *Cockle*, [1912] 1 K. B. 206, C. A., overruling *Staffordshire Joint Stock Bank* v. *Weaver* [1884] W. N. 78), nor to issuing execution after judgment has been entered (*Taylor* v. *Roe* (1893), 62 L. J. (CH.) 391); but it does apply where the defendant has not entered an appearance and the plaintiff seeks to enter judgment in default (*Webster* v. *Myer* (1884), 14 Q. B. D. 231, C. A.); and in a foreclosure action where more than a year has elapsed after the date fixed for redemption (*Blake* v. *Summersby*, [1889] W. N. 39); provided there has been no change of parties as regards the plaintiffs in the foreclosure proceedings (*Pennington* v. *Cayley*, [1912] 2 Ch. 236). A defendant need not give a month's notice of his intention to apply to dismiss the action for want of prosecution (*Warnock* v. *Mann*, [1896] 2 I. R. 630).

(*b*) As to the stating of a special case in particular matters, see titles ARBITRATION, Vol. I., pp. 450, 458, 464 *et seq.*, 485, 489; BANKRUPTCY AND INSOLVENCY, Vol. II., p. 313; BASTARDY, Vol. II., p. 454; BUILDING SOCIETIES,

questions of law arising therein in the form of a special case for the opinion of the court (*c*).

When order for special case may be made.

283. When there is a question of law which it would be convenient to have decided before any evidence is given, or any question or issue of fact is tried, or any reference made to a referee, an order may be made that such questions be raised for the opinion of the court either by special case or in such other manner as may appear expedient (*d*).

Agreement on special case.

284. The parties to a special case may, if they think fit, enter into an agreement in writing that on the judgment of the court being given, in the affirmative or negative, on the questions of law raised by the special case, a sum of money, fixed by the parties, or to be ascertained by the court or in such manner as the court may direct, is to be paid by one of the parties to the other, with or without the costs of the cause; and judgment may be entered for the sum so agreed or ascertained with or without costs (*e*).

SUB-SECT. 14.—*Trial without Pleadings.*

When plaintiff may proceed to trial without pleadings.

285. In ordinary cases the master on the summons for directions decides what pleadings are to be delivered in an action (*f*). But a plaintiff may proceed to trial without pleadings, if the indorsement of the writ of summons contains a statement sufficient to give notice of the nature of his claim or of the relief or remedy required in the action, and states that if the defendant appears the plaintiff intends to proceed to trial without pleadings; and if no order for delivery of pleadings is made, twenty-one days' notice of trial without pleadings must be served by the plaintiff within ten days after the defendant's appearance (*g*).

Vol. III., pp. 385, 387; COMPANIES, Vol. V., pp. 317, 544; COUNTY COURTS, Vol. VIII., pp. 625 *et seq.*; CROWN PRACTICE, Vol. X., pp. 109, 165, 177; ELECTIONS, Vol. XII., pp. 459, 512; FRIENDLY SOCIETIES, Vol. XV., pp. 179, 181; HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 172; INCOME TAX, Vol. XVI., p. 681; INDUSTRIAL, PROVIDENT, AND SIMILAR SOCIETIES, Vol. XVII., p. 29; INTERPLEADER, Vol. XVII., pp. 616, 620; INTOXICATING LIQUORS, Vol. XVIII., p. 87; LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 465; MAGISTRATES, Vol. XIX., pp. 651 *et seq.*, 662, 663; MASTER AND SERVANT, Vol. XX., p. 238; POOR LAW, Vol. XXII., p. 605; RATES AND RATING, *post*; REVENUE.

(*c*) R. S. C., Ord. 34, r. 1; see *Bexley Local Board* v. *West Kent Main Sewerage Board* (1882), 9 Q. B. D. 518; *Bright* v. *Tyndall* (1876), 4 Ch. D. 189. As to the manner of stating a special case, see R. S. C., Ord. 34, r. 1, and as to entering the case for argument, see *ibid.*, r. 5. As to amendment, see *Re Taylor's Estate, Tomlim* v. *Underhay* (1882), 22 Ch. D. 495, C. A.; *The Immacolata Concezione* (1883), 9 P. D. 42. As to printing and signature by the parties or their counsel or solicitors, and as to copies for the judges, see R. S. C., Ord. 34, r. 3. As to the hearing of a special case, see *ibid.*, Ord. 59, r. 1; Ord. 34, r. 1; *Spurling* v. *Bantoft*, [1891] 2 Q. B. 384; *Barclay* v. *Pearson*, [1893] 2 Ch. 154.

(*d*) R. S. C., Ord. 34, r. 2; see *Bolivia Republic* v. *National Bolivian Navigation Co.* (1876), 24 W. R. 361; *Anon.*, [1875] W. N. 200; *Pooley* v. *Driver* (1876), 5 Ch. D. 458; *The Alps*, [1893] P. 109; *Barclay* v. *Pearson*, *supra*; *Metropolitan Board of Works* v. *New River Co.* (1876), 2 Q. B. D. 67, C. A.

(*e*) R. S. C., Ord. 34, r. 6.

(*f*) See p. 135, *ante*,

(*g*) R. S. C., Ord. 18A, rr. 1, 2, 6.

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Defendant's application for statement of claim.

286. The defendant may, however, within ten days after appearance apply by summons for the delivery of a statement of claim, and on the hearing of such a summons an order may be made that a statement of claim should be delivered, or that the action proceed to trial without pleadings; and in the last-mentioned case, that either party should deliver particulars of his claim or defence (*h*).

Effect of order for particulars.

If an order is made that the action proceed to trial without pleadings and no order is made as to particulars, all defences, except such as are mentioned in the next paragraph, are open at the trial to the defendant; but, if particulars are ordered, the parties are bound by the particulars delivered (*i*).

Defences barred if no statement of claim applied for.

287. If a defendant in such an action does not take out a summons for the delivery of a statement of claim, he is not allowed to rely on a set-off or counterclaim or on the defence of infancy, coverture, fraud, Statute of Limitations, or discharge under the Bankruptcy Acts, unless within ten days after appearance he gives notice to the plaintiff stating the grounds and particulars upon which he relies (*j*).

SUB-SECT. 15.—*Third Party Procedure.*

Claim must be for contribution or indemnity.

288. A defendant who claims to be entitled to contribution or indemnity (*k*) as against any person not a party to the action may

(*h*) R. S. C., Ord. 18A, r. 3; Ord. 30, r. 1 (c).
(*i*) *Ibid.*, Ord. 18A, r. 4.
(*j*) *Ibid.*, r. 5.
(*k*) The claim against the third party must be for contribution or indemnity arising out of a contract express or implied (*Birmingham and District Land Co.* v. *London and North Western Rail. Co.* (1886), 34 Ch. D. 261, C. A.; *Pontifex* v. *Foord* (1884), 12 Q. B. D. 152; *Speller* v. *Bristol Steam Navigation Co.* (1884), 13 Q. B. D. 96, C. A.; *Catton* v. *Bennett* (1884), 26 Ch. D. 161; *The Jacob Christensen*, [1895] P. 281; *The Kate*, [1907] P. 296, C. A.; *Markham* v. *Paget*, [1908] 1 Ch. 697), or out of a statute (*Gerson* v. *Simpson*, [1903] 2 K. B. 197, C. A.), or out of the relation of the parties (*Wynne* v. *Tempest*, [1897] 1 Ch. 110). The fact that, if the plaintiff succeeds, the defendant will have a claim for damages against the third party is not of itself sufficient (*Birmingham and District Land Co.* v. *London and North Western Rail. Co.*, *supra*; *Johnston* v. *Salvage Association* (1887), 19 Q. B. D. 458, C. A.; *Constantine & Co.* v. *Warden & Sons* (1895), 73 L. T. 450, C. A.; *Dunn* v. *Donald Currie* (1901), 6 Com. Cas. 118; *Nelson* v. *Empress Assurance Corporation*, [1905] 2 K. B. 281, C. A.). As to persons entitled to contribution, see *Furness, Withy & Co.* v. *Pickering*, [1908] 2 Ch. 224; *Gerson* v. *Simpson*, *supra*; *Shepheard* v. *Bray*, [1907] 2 Ch. 571, C. A. (co-directors); *Chillingworth* v. *Chambers*, [1896] 1 Ch. 685, C. A.; *Robinson* v. *Harkin*, [1896] 2 Ch. 415; *Jackson* v. *Dickinson*, [1903] 1 Ch. 947 (co-trustees); *Wolmershausen* v. *Gullick*, [1893] 2 Ch. 514; *Re Coulson's Trusts*, *Prichard* v. *Coulson* (1907), 97 L. T. 754; *Von Freeden* v. *Hull* (1907), 23 T. L. R. 335, C. A. (co-owners); *Bank of Ireland* v. *Forbes* (1879), 6 L. R. Ir. 19; and see title GUARANTEE, Vol. XV., pp. 533, 534 (co-sureties). The third party procedure is not applicable to a claim by one joint tortfeasor against another (*Horwell* v. *London General Omnibus Co.* (1877), 2 Ex. D. 365, C. A.; *Rice* v. *Alliance Gas Co.* (1883), 12 L. R. Ir. 172; *Smith & Son* v. *Clinton* (1908), 25 T. L. R. 34). As to persons entitled to an indemnity, see *Sheffield Corporation* v. *Barclay*, [1905] A. C. 392; *Carshore* v. *North Eastern Rail. Co.* (1885), 29 Ch. D. 344, C. A.; *Bank of England* v. *Cutler*, [1908] 2 K. B. 208, C. A.; *Bank of England* v. *Cutler* (1909), 25 T. L. R. 509; *Dugdale* v. *Lovering* (1875), L. R. 10 C. P. 196; *Guild* v. *Conrad*, [1894] 2 Q. B. 885, C. A.; *Edison and Swan United Electric Light Co.* v. *Holland* (1886), 33 Ch. D. 497; and see title GUARANTEE, Vol. XV., pp. 525, 526 (surety). As to a claim by the assignor of a lease against the assignee,

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by leave issue a third party notice claiming such contribution as indemnity (*l*). Such notice must state the nature and grounds of the claim for contribution or indemnity, and, unless otherwise ordered, must be served upon the person against whom contribution or indemnity is claimed within the time limited for delivering the defence (*l*).

Appearance by third party.

289. If the person served with such a notice wishes to dispute the plaintiff's claim or his own liability to the defendant, he must enter an appearance within eight days from the service of the notice; if he does not do so, he is deemed to admit the validity of any judgment obtained against the defendant and his own liability to contribute or indemnify to the extent claimed in the notice (*m*).

see *Moule* v. *Garrett* (1872), L. R. 7 Exch. 101, Ex. Ch.; *Bonner* v. *Tottenham and Edmonton Permanent Building Society*, [1899] 1 Q. B. 161, C. A.; *Gooch* v. *Clutterbuck*, [1899] 2 Q. B. 148, C. A.; *Wiley* v. *Smith*, [1894] 1 I. R. 153; *Greville* v. *Hayes*, [1894] 2 I. R. 20; and see title LANDLORD AND TENANT, Vol. XVIII., p. 593. As to a claim between lessee and sub-lessee, see *Pontifex* v. *Foord* (1884), 12 Q. B. D. 152; *Morris* v. *Kennedy* (1892), 30 L. R. Ir. 461; *Hornby* v. *Cardwell* (1881), 8 Q. B. D. 329, C. A.; between sub-lessee and lessor, see *Tritton* v. *Bankart* (1887), 56 L. J. (CH.) 629.

(*l*) R. S. C., Ord. 16, r. 48; as to the form, see *ibid.*, App. B, Form No. 1. With the notice there must be served a copy of the statement of claim, or, if there is no statement of claim, a copy of the writ of summons (*ibid.*, Ord. 16, r. 48). The object of the third party procedure is to prevent the same question being tried twice and to enable the court to settle disputes between all persons concerned in one action; see *McCheane* v. *Gyles*, [1902] 1 Ch. 287, C. A.; *Benecke* v. *Frost* (1876), 1 Q. B. D. 422; *Re Salmon, Priest* v. *Uppleby* (1889), 42 Ch. D. 351, C. A.; *Baxter* v. *France*, [1895] 1 Q. B. 455, C. A. The third party procedure is not applicable to proceedings by originating summons (*Re Wilson, A.-G.* v. *Woodall* (1890), 45 Ch. D. 266), or to a misfeasance summons against directors of a company (*Re Land Securities Co.* (1895), 2 Mans. 127). As to the position of third parties in an action, see *Eden* v. *Weardale Coal and Iron Co.* (1887), 35 Ch. D. 287, C. A.; *Edison and Swan United Electric Light Co.* v. *Holland* (1889), 41 Ch. D. 28, C. A.; *Re Salmon, Priest* v. *Uppleby, supra.* The application for leave to issue the notice to a master in chambers on an affidavit is made *ex parte* or on notice (*Furness, Withy & Co.* v. *Pickering*, [1908] 2 Ch. 224), and may be made not only by a defendant, but by a plaintiff who is made defendant to a counterclaim (*Levi* v. *Anglo-Continental Gold Reefs of Rhodesia, Ltd.*, [1902] 2 K. B. 481, C. A.). The application should be made before defence delivered (*Birmingham and District Land Co.* v. *London and North Western Rail. Co.* (No. 2) (1887), 56 L. T. 702 (but see *Re Gilson, Gilson* v. *Gilson*, [1894] 2 Ch. 92); *Associated Home Co.* v. *Whichcord* (1878), 8 Ch. D. 457). The granting of the order is a matter of discretion (*Baxter* v. *France* (No. 2), [1895] 1 Q. B. 591, C. A.; *Bower* v. *Hartley* (1876), 1 Q. B. D. 652, C. A.; *Associated Home Co.* v. *Whichcord, supra; Wye Valley Rail. Co.* v. *Hawes* (1881), 16 Ch. D. 489, C. A.; *Carrie* v. *Allen* (1883), 48 L. T. 464, C. A.; *Seligman* v. *Mansfield*, [1875] W. N. 240; *Swansea Shipping Co.* v. *Duncan* (1876), 1 Q. B. D. 644; *Hutchison* v. *Colorado United Mining Co.*, [1884] W. N. 40; *Carshore* v. *North Eastern Rail. Co.* (1885), 29 Ch. D. 344, C. A.; *Greville* v. *Hayes, supra*). As to the form of the order, see R. S. C., App. B, Form No. 1. Leave may be given by a judge in chambers (*ibid.*, Ord. 54, r. 12) to serve the notice out of the jurisdiction (*Swansea Shipping Co.* v. *Duncan, supra; Dubout* v. *Macpherson* (1889), 23 Q. B. D. 340; *Re Luckie, Nixon* v. *Luckie*, [1880] W. N. 12; *Bank of Ireland* v. *Forbes* (1879), 6 L. R. Ir. 19; *McCheane* v. *Gyles, supra;* compare *Hutchison* v. *Colorado United Mining Co., supra*); but such leave cannot be granted if the third party resides in Ireland or Scotland (*Speller* v. *Bristol Steam Navigation Co.* (1884), 13 Q. B. D. 96, C. A.; *McCheane* v. *Gyles, supra*).

(*m*) R. S. C., Ord. 16, r. 49. Leave may be given to appear after the expiration of the eight days (*ibid.*).

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290. If the third party does not enter an appearance and the defendant who gave the notice suffers judgment by default, the defendant may at any time after satisfaction of the judgment against himself, or by leave of the court or a judge before such satisfaction, enter judgment against the third party to the extent of the contribution or indemnity claimed in the notice (*n*).

Non-appearance by third party; judgment in default.

291. If the third party does not enter an appearance and the action is tried and results in favour of the plaintiff, the judge who tries the action may, at or after the trial, enter such judgment as the nature of the case may require for the defendant who gave the notice against the third party, but execution is not to issue on such judgment without leave of the judge, until the defendant has satisfied the judgment against himself (*o*). If the action is finally decided in the plaintiff's favour otherwise than by trial, the court or a judge may, on application by motion or summons, order such judgment as the nature of the case may require to be entered for the defendant against the third party, at any time after satisfaction by the defendant of the amount recovered by the plaintiff (*o*).

Appearance by third party.

292. If the third party appears, the defendant giving the notice may apply to the court or a judge for directions, and the court or a judge on the hearing of the application, if satisfied that there is a question proper to be tried as to the liability of the third party to make the contribution or indemnity claimed, in whole or in part, may order that such question be tried in such manner at or after the trial of the action as may be directed (*p*). If the court or a judge is not so satisfied, such judgment as the nature of the case requires may be ordered to be entered in favour of the defendant against the third party (*p*).

(*n*) R. S. C., Ord. 16, r. 50; see *Jablochkoff Electric Light Co.* v. *McMurdo*, [1884] W. N. 94.

(*o*) R. S. C., Ord. 16, r. 51.

(*p*) *Ibid.*, r. 52. If the defendant does not take out a summons for directions, or if, on the hearing of the summons, no directions are given, the third party proceedings come to an end (*Baxter* v. *France* (No. 2), [1895] 1 Q. B. 591, C. A.; *Schneider* v. *Batt* (1881), 8 Q. B. D. 701, C. A.; *The Bianca* (1883), 8 P. D. 91; *Blaina Iron Co.* v. *Garbutt* (1882), 46 L. T. 162; *Piller* v. *Roberts* (1882), 21 Ch. D. 198; *Hutchison* v. *Colorado United Mining Co.*, [1884] W. N. 40; *The Millwall*, [1905] P. 155, C. A.). On the hearing of the summons either the plaintiff or the third party or a defendant served with notice by his co-defendant may object to the proceedings (*Baxter* v. *France*, [1895] 1 Q. B. 455, C. A.; *The Jacob Christensen*, [1895] P. 281; *Pontifex* v. *Foord* (1884), 12 Q. B. D. 152; *Schneider* v. *Batt*, *supra*; *Wye Valley Rail. Co.* v. *Hawes* (1881), 16 Ch. D. 489, C. A.; *Bower* v. *Hartley* (1876), 1 Q. B. D. 652, C. A.; *Swansea Shipping Co.* v. *Duncan* (1876), 1 Q. B. D. 644; *Barton* v. *London and North Western Rail. Co.* (1888), 38 Ch. D. 144, C. A.). The master has a discretion as to whether he will give directions (*Baxter* v. *France* (No. 2), *supra*; see *Edison and Swan United Electric Light Co.* v. *Holland* (1886), 33 Ch. D. 497; *Carshore* v. *North Eastern Rail. Co.* (1885), 29 Ch. D. 344, C. A.). If the plaintiff has obtained judgment against the defendant, directions will not generally be given (*Rich* v. *Darrett* (1884), 28 Sol. Jo. 513; *Bell & Co.* v. *Von Dadelszen*, [1883] W. N. 208; *Caister* v. *Chapman*, [1884] W. N. 31; compare *Flower* v. *Todd*, [1884] W. N. 47). Judgment may be ordered by the master against a third party who has no defence to the claim for contribution or indemnity (*Gloucestershire Banking Co.* v. *Phillipps* (1884), 12 Q. B. D. 533). If the right to contribution or indemnity or the plaintiff's claim is questioned by the third party, the master

293. A third party may get leave to serve a fourth party with a notice of a claim for contribution and indemnity (*q*). Fourth party.

294. If a defendant claims to be entitled to contribution or indemnity against any other defendant, the same procedure may be adopted for the determination of such questions between the defendants (*r*). Claims between defendants *inter se*.

SUB-SECT. 16.—*Compromise of Action.*

295. All or any of the questions in dispute in an action which has been commenced may be settled by the parties by compromise When action may be compromised.

may order that these questions, or either of them, be tried (see R. S. C., App. K, No. 23B; Chitty's Forms, 213, 214; *Eden* v. *Weardale Iron and Coal Co.* (1887), 35 Ch. D. 287, C. A.; *Gerson* v. *Simpson*, [1903] 2 K. B. 197, 201, C. A.; *Coles* v. *Civil Service Supply Association* (1884), 26 Ch. D. 529; *Barton* v. *London and North Western Rail. Co.* (1888), 38 Ch. D. 144, C. A.; *Edison and Swan United Electric Light Co.* v. *Holland* (1889), 41 Ch. D. 28, C. A.; *Norris* v. *Beazley* (1877), 46 L. J. (Q. B.) 515; *Callender* v. *Wallingford* (1884), 53 L. J. (Q. B.) 359; *Sydney Municipal Council* v. *Bull*, [1909] 1 K. B. 7; *Witham* v. *Vane* (1880), 49 L. J. (CH.) 242; *Macbeth* v. *Buller*, [1895] 2 I. R. 357; *Blore* v. *Ashby* (1889), 42 Ch. D. 682; *Re Salmon, Priest* v. *Uppleby* (1889), 42 Ch. D. 351, C. A.). As to a counterclaim by the third party, see *Eden* v. *Weardale Iron and Coal Co.* (1884), 28 Ch. D. 333, C. A.; *Alcoy and Gandia Rail. Co.* v. *Greenhill*, [1896] 1 Ch. 19, C. A.; *Borough* v. *James*, [1884] W. N. 32; *Re Salmon, Priest* v. *Uppleby, supra*. As to discovery by or against the third party, see *Bates* v. *Burchell*, [1884] W. N. 108; *Eden* v. *Weardale Iron and Coal Co.* (1887), 34 Ch. D. 223, C. A.; 35 Ch. D. 287, C. A.; *MacAllister* v. *Rochester* (*Bishop*) (1880), 5 C. P. D. 194. As to appeal by plaintiff, see *Re Salmon, Priest* v. *Uppleby, supra*; by third party, *The Millwall*, [1905] P. 155, C. A. The court or a judge may decide all questions of costs as between a third party and the other parties to the action, and may order any one or more to pay the costs of any other, or give such direction as to costs as the justice of the case may require (R. S. C., Ord. 16, r. 54; *Edison and Swan United Electric Light Co.* v. *Holland, supra; Dawson* v. *Shepherd* (1880), 49 L. J. (EX.) 529; *Hornby* v. *Cardwell* (1881), 8 Q. B. D. 329, C. A.; *The Millwall, supra; Hooper* v. *Bromet* (1904), 90 L. T. 234, C. A.; *Shepheard* v. *Bray*, [1906] 2 Ch. 235; *Gerson* v. *Simpson, supra; Blore* v. *Ashby* (1889), 42 Ch. D. 682; *Piller* v. *Roberts* (1882), 21 Ch. D. 198; *Re Salmon, Priest* v. *Uppleby, supra; Assicurazioni Generali de Trieste* v. *Empress Assurance Corporation*, [1907] 2 K. B. 814; *Knight* v. *Hughes* (1828), 3 C. & P. 467; *Dearsley* v. *Middleweek* (1881), 18 Ch. D. 236; *Witham* v. *Vane* (1884), 32 W. R. 617, H. L.; *Williams* v. *South Eastern Rail. Co.* (1878), 26 W. R. 352; *Hanbury* v. *Upper Inny Drainage Board* (1883), 12 L. R. Ir. 217; *Maxwell* v. *British Thomson Houston Co.*, [1904] 2 K. B. 342; *Great Western Railway* v. *Fisher*, [1905] 1 Ch. 316; *Born* v. *Turner*, [1900] 2 Ch. 211; *Lewin* v. *Trimming* (1888), 21 Q. B. D. 230; *Barnett* v. *Eccles Corporation*, [1900] 2 Q. B. 423; *Howard* v. *Lovegrove* (1870), L. R. 6 Exch. 43; *Gooch* v. *Clutterbuck*, [1899] 2 Q. B. 148, C. A.; *Re Wells and Croft, Ex parte Official Receiver* (1895), 72 L. T. 359).

(*q*) R. S. C., Ord. 16, r. 54A; *Witham* v. *Vane, supra; Fowler* v. *Knoop* (1877), 36 L. T. 219; *Yorkshire Waggon Co.* v. *Newport Coal Co.* (1880), 5 Q. B. D. 268; *Walker* v. *Balfour* (1877), 25 W. R. 511; *Klawanski* v. *Premier Petroleum Co.*, [1911] W. N. 94.

(*r*) R. S. C., Ord. 16, r. 55. No leave to issue or serve the notice is necessary (*Towse* v. *Loveridge* (1883), 25 Ch. D. 76; *Baxter* v. *France*, [1895] 1 Q. B. 455, C. A.). A summons for directions must be taken out (*Flower* v. *Todd*, [1884] W. N. 47; *Tritton* v. *Bankart* (1887), 56 L. J. (CH.) 629, C. A.; *Baxter* v. *France* (No. 2), [1895] 1 Q. B. 591, C. A.). For form of judgment, see *English and Scottish Mercantile Investment Trust* v. *Flatau*, [1887] W. N. 204. As to the applicability of R. S. C., Ord. 16, r. 55, see *Re Holt, Holt* v. *Holt*, [1897] 2 Ch. 525; *Born* v. *Turner, supra; Butler* v. *Butler* (1880), 14 Ch. D. 329; *Sawyer* v. *Sawyer*, [1883] W. N. 212.

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without trial, and if such compromise is *bonâ fide* and validly entered into, the court does not allow the question so settled to be litigated between the parties to the settlement (*s*).

Any civil action in the High Court of Justice or any questions in dispute arising in it may be compromised at any stage after the commencement of the action (*t*).

Compromise by parties themselves.

296. Parties who are *sui juris* may themselves compromise an action without the knowledge or intervention of their solicitors on the record, provided such compromise is not made with the intention on the part of either party to deprive the solicitors of their costs (*u*).

Compromise by representative party.

297. A plaintiff (*a*) who is suing on behalf of himself and other persons may compromise the action (*b*), but a defendant who is authorised by the court (*c*) to defend on behalf of himself and other persons cannot consent to judgment against such persons; the proper course in such a case is to submit to judgment (*d*).

Compromise by persons under disability.

298. Any litigant who is of full age and sound mind is competent to agree to a compromise of litigation in which he is engaged (*e*),

(*s*) See *Knowles* v. *Roberts* (1888), 38 Ch. D. 263, C. A.; *Dixon* v. *Evans* (1872), L. R. 5 H. L. 606; *Huddersfield Banking Co., Ltd.* v. *Lister* (*H.*) *& Son, Ltd.*, [1895] 2 Ch. 273, 278, 282, 285, C. A.; *Rees* v. *Richmond* (1890), 62 L. T. 427; *Levi* v. *Taylor* (1903), 116 L. T. Jo. 64; *Lucy's Case* (1853), 4 De G. M. & G. 356, C. A.; *Holsworthy Urban Council* v. *Holsworthy Rural Council*, [1907] 2 Ch. 62. As to compromise of claims between members of a family, where there is no action, see title FAMILY ARRANGEMENTS, Vol. XIV., pp. 540 *et seq.*; and, as to compromise in proceedings concerning a trust where some of the persons interested in the compromise are not parties to the proceedings, see R. S. C., Ord. 16, r. 9A; title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 177; TRUSTS AND TRUSTEES. As to compromises with limited companies, see title COMPANIES, Vol. V., pp. 333, 334. As to counsel's authority to compromise, see title BARRISTERS, Vol. II., pp. 398 *et seq.*; as to solicitors' authority to compromise, see title SOLICITORS; *Little* v. *Spreadbury*, [1910] 2 K. B. 658.

(*t*) As to compounding a penal action, see stat. (1575-6) 18 Eliz. c. 5, s. 5; R. S. C., Ord. 50, rr. 13—15. As to a compromise in a criminal matter, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 504.

(*u*) *The Hope* (1883), 8 P. D. 144, C. A.; *Ex parte Morrison* (1868), L. R. 4 Q. B. 153; *Brunsdon* v. *Allard* (1859), 2 E. & E. 19; *Clark* v. *Smith* (1844), 6 Man. & G. 1051; *Quested* v. *Callis* (1842), 10 M. & W. 18. As to the remedies of a solicitor in the case of a collusive compromise made for the purpose of depriving him of his costs, see *Reynolds* v. *Reynolds* (1909), 26 T. L. R. 104, C. A.; *Ross* v. *Buxton* (1889), 42 Ch. D. 190; *The Hope, supra; Ex parte Games* (1864), 3 H. & C. 294; *Gould* v. *Davis* (1831), 1 Cr. & J. 415; title SOLICITORS.

(*a*) If one of several co-plaintiffs enters into a compromise with the opposite party and the other co-plaintiffs do not agree to the compromise, the co-plaintiff is not entitled to have his name removed from the record; the action proceeds in spite of the compromise, but the defendant may be given liberty to plead the compromise as a defence (*Re Matthews, Oates* v. *Mooney*, [1905] 2 Ch. 460). One of several co-defendants may, it seems, enter into a separate compromise and so get his name removed from the record; see R. S. C., Ord. 26, r. 1. The Public Trustee, where he occupies a position of a dual nature with conflicting interests, is not in a position to compromise with himself (*Re New Haw Estate Trust* (1912), 56 Sol. Jo. 538).

(*b*) *Wood* v. *Westall* (1831), You. 305.

(*c*) See R. S. C., 1883, Ord. 16, r. 9.

(*d*) *Rees* v. *Richmond* (1890), 62 L. T. 427.

(*e*) *Manby* v. *Bewicke* (1857), 3 K. & J. 342.

but in the case of an infant or person of unsound mind not so found the sanction of the court is necessary (*f*).

Form of compromise.

299. A compromise may take the form of an agreement to the entry of judgment by consent, or to an order for the stay of proceedings, or for a reference of the action, or to the withdrawal of the record or a juror, or to an undertaking not to appeal, or, after an appeal, to an alteration of the judgment appealed against (*g*). Except where judgment is given, it is a usual and proper term of a compromise that there should be a judge's order if necessary, so that the compromise may be made a rule of court (*h*).

Effect of compromise.

300. The effect of a compromise which settles an action is that the action cannot be proceeded with; questions in dispute which are thus settled cannot be litigated afresh between the parties to the compromise in any other action (*i*), and a second action brought by the same plaintiff in respect of the matters in issue in the first action will be stayed or dismissed (*k*).

If the compromise ends in a judgment by consent, such a judgment is as effective as an estoppel between the parties as a judgment in a contested case (*l*).

Enforcement of compromise.

301. An agreement for a compromise is a contract and may be enforced or set aside on the same grounds and in the same way as

(*f*) R. S. C., Ord. 22, r. 15; see titles INFANTS AND CHILDREN, Vol. XVII., pp. 145, 146; LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 465.

(*g*) See title BARRISTERS, Vol. II., p. 398; *Michel* v. *Mutch* (1886), 54 L. T. 45; *Levi* v. *Taylor* (1903), 116 L. T. Jo. 64; *Joynt* v. *MacCabe*, [1899] 1 I. R. 104.

(*h*) If an action is compromised out of court, and the compromise is not made an order of court, it cannot be enforced by motion in the action (*Forsyth* v. *Manton* (1820), 5 Madd. 78). In *Graves* v. *Graves* (1893), 69 L. T. 420, affirmed 28 L. J. 558, C. A., where an action had been settled on terms and all proceedings were stayed and there was no express provision for making the agreement a rule of court, an application to make the terms of the compromise a rule of court was refused. An agreement to refer need not be made a rule of court (Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 1; *Re Colman and Watson*, [1908] 1 K. B. 47, C. A.).

(*i*) See *Knowles* v. *Roberts* (1888), 38 Ch. D. 263, C. A.; *Re South American and Mexican Co., Ex parte Bank of England*, [1895] 1 Ch. 37, C. A.; *Cloutte* v. *Storey*, [1911] 1 Ch. 18, C. A.

(*k*) *Guy* v. *Walker*.(1892), 8 T. L. R. 314, C. A.; *Henderson* v. *Underwriting and Agency Association* (1892), 65 L. T. 732, C. A.; *Priestman* v. *Thomas* (1884), 9 P. D. 70; *Yate* v. *Moseley* (1800), 5 Ves. 480; see *Boyd* v. *Bischoffsheim* (1894), 38 Sol. Jo. 648; *Maynard* v. *Eaton* (1874), 9 Ch. App. 414.

(*l*) *Re South American and Mexican Co., Ex parte Bank of England, supra; Priestman* v. *Thomas* (1884), 9 P. D. 70. If there is no judgment, but only an agreement embodied in a judge's order, there is no estoppel (*Rice* v. *Reed*, [1900] 1 Q. B. 54, C. A.). A compromise is only effectual as regards matters which were in issue when the compromise was entered into (*Bennett* v. *Merriman* (1843), 6 Beav. 360; and see title ESTOPPEL, Vol. XIII., pp. 330, 331). As to ordering an interpleader issue, see *Stevenson* (*H.*) *& Son, Ltd.* v. *Brownell, Healy and Others, Claimants* (1912), 56 Sol. Jo. 571, C. A. As to taxation of costs on a compromise, see *Balme* v. *Paver* (1821), Jac. 305; *Langford* v. *Nott* (1820), 1 Jac. & W. 291; *Storie* v. *Bective* (*Lord*) (1819), 1 Jac. & W. 292, n.; *Vincent* v. *Venner* (1833), 1 My. & K. 212; *Re Hartley* (1861), 30 Beav. 620; and as to taxation of costs generally, see title SOLICITORS.

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any other contract, and in certain cases also by the summary intervention of the court (*m*).

If a judgment is signed by virtue of a compromise, the judgment may be enforced by execution as in a case which is contested (*n*). If an action is compromised and there is no consent to judgment, and the plaintiff then proceeds with the action, the defendant may, by a summons in the action, obtain an order staying the proceedings (*o*). If there is a default in the carrying out of the terms of the compromise by the plaintiff or the defendant, the agreement for the compromise, if it has been made a rule of court (*p*), and if it relates solely to the proceedings in the action, may be enforced by an application in the action (*q*).

A compromise made in an action before the delivery of the defence, by agreement between the solicitors, may be pleaded in the defence if it completely disposes of all the matters in issue, but, if its validity is doubtful or it requires something further to carry it into effect, specific performance of the agreement should be asked for either in a counterclaim or in a separate action (*r*).

Grounds on which compromise may be set aside.

302. The court may set aside or refuse to enforce a compromise upon any ground on which an agreement between the parties may be invalidated (*s*): thus, the court has set aside or refused to enforce a compromise on the ground that the agreement was illegal as against public policy (*t*), or was obtained by fraud (*a*) or misrepresentation,

(*m*) *Huddersfield Banking Co., Ltd.* v. *Lister* (*H.*) *& Son, Ltd.*, [1895] 2 Ch. 273, C. A.; *Wilding* v. *Sanderson*, [1897] 2 Ch. 534, C. A.; *Neale* v. *Gordon Lennox*, [1902] A. C. 465; see title CONTRACT, Vol. VII., pp. 327 *et seq.* As to the measure of damages in an action for breach of the agreement, see *Bayley* v. *Birch* (1894), 8 R. 647. As to enforcement by action for specific performance, see *Pryer* v. *Gribble* (1875), 10 Ch. App. 534; *Gibbs* v. *Glamis* (1841), 11 Sim. 584; *Knowles* v. *Roberts* (1888), 38 Ch. D. 263, C. A.; title SPECIFIC PERFORMANCE. The termination of an action is sufficient consideration for the contract (*Griffith* v. *Sheffield* (1758), 1 Eden, 73; *Longridge* v. *Dorville* (1821), 5 B. & Ald. 117; see *Stephen* v. *Bateman* (*Lord*) (1778), 1 Bro. C. C. 22).

(*n*) As to filing a judge's order to consent to judgment, see Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 27, and title JUDGMENTS AND ORDERS, Vol. XVIII., p. 189.

(*o*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24 (7); *Eden* v. *Naish* (1878), 7 Ch. D. 781. As to appeal, see *Downing* v. *Cage* (1700), 1 Eq. Cas. Abr. 165, H. L.; *Re West Devon Great Consols Mine* (1888), 38 Ch. D. 51, C. A.; *Pisani* v. *A.-G. for Gibraltar* (1874), L. R. 5 P. C. 516, 525.

(*p*) *Smythe* v. *Smythe* (1887), 18 Q. B. D. 544; *Graves* v. *Graves* (1893), 69 L. T. 420, affirmed 28 L. J. 558, C. A.; *Re Grimthorpe* (*Lord*), *Beckett* v. *Grimthorpe* (*Lord*), [1908] 1 Ch. 666.

(*q*) *Scully* v. *Dundonald* (*Lord*) (1878), 8 Ch. D. 658, 668, C. A.; *Alliance Pure White Lead Syndicate, Ltd.* v. *MacIvor's Patents, Ltd.* (1891), 7 T. L. R. 599; see *Re Gaudet Frères Steamship Co.* (1879), 12 Ch. D. 882. As to making an agreement for a compromise a rule of court, see p. 167, *ante*; as to a verbal agreement not included in the terms of settlement as drawn up, see *Faber* v. *Lathom* (*Earl*) (1897), 77 L. T. 168; *Guy* v. *Walker* (1892), 8 T. L. R. 314, C. A.

(*r*) *Bristow* v. *Bristow* (1848), 12 I. Eq. R. 329. As to counterclaim, see *Wood* v. *Rowe* (1820), 2 Bli. 595, H. L.

(*s*) *Huddersfield Banking Co., Ltd.* v. *Lister* (*H.*) *& Son, Ltd.*, *supra*.

(*t*) *Windhill Local Board of Health* v. *Vint* (1890), 45 Ch. D. 351, C. A.; see title CONTRACT, Vol. VII., p. 399.

(*a*) *Priestman* v. *Thomas* (1884), 9 P. D. 70, 210; see *Bainbrigge* v. *Moss* (1856), 3 Jur. (N. S.) 58; *Bradish* v. *Gee* (1754), 1 Keny. 73, 76.

or non-disclosure of a material fact which there was an obligation to disclose (*b*), or by duress (*c*), or was concluded under a mistake of fact (*d*), ignorance of a material fact (*e*), without authority (*f*), or under misapprehension or misunderstanding of such a nature that the parties were not *ad idem* (*g*). A compromise in ratification of a contract which is incapable of being ratified is not enforceable (*h*); and a compromise which is conditional on some term being carried out, or on the assent of the court or other persons being given to the arrangement, is not enforceable if the term is not carried out or the assent given effectually (*i*).

Mode of setting aside.

An application to set aside a compromise of an action cannot be made by a summons in the action: an action should be brought to set aside the compromise (*k*).

A compromise will not be set aside, when the party seeking to set it aside is guilty of delay in questioning it (*l*).

SUB-SECT. 17.—*Service of Proceedings.*

What is sufficient service.

303. Proceedings (*m*) service of which is necessary should

(*b*) *Gilbert* v. *Endean* (1878), 9 Ch. D. 259, C. A.; see *Turner* v. *Green*, [1895] 2 Ch. 205; see title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 682, 704.

(*c*) *Cumming* v. *Ince* (1847), 11 Q. B. 112.

(*d*) *Wilding* v. *Sanderson*, [1897] 2 Ch. 534, C. A.; *Huddersfield Banking Co., Ltd.* v. *Lister (H.) & Son, Ltd.*, [1895] 2 Ch. 273, C. A.; see *Re West Devon Great Consols Mine* (1888), 38 Ch. D. 51, C. A. As to mistake of law, see *Holsworthy Urban Council* v. *Holsworthy Rural Council*, [1907] 2 Ch. 62; *Lucy's Case* (1853), 4 De G. M. & G. 356, C. A.; *Cooper* v. *Phibbs* (1867), L. R. 2 H. L. 149; see title MISTAKE, Vol. XXI., pp. 16 *et seq.*

(*e*) *Furnival* v. *Bogle* (1827), 4 Russ. 142; see *Maynard* v. *Eaton* (1874), 9 Ch. App. 414.

(*f*) *Neale* v. *Gordon Lennox*, [1902] A. C. 465; *Swinfen* v. *Swinfen* (1857), 27 L. J. (CH.) 35, affirmed (1858), 27 L. J. (CH.) 491, C. A.; *Ellender* v. *Wood* (1888), 32 Sol. Jo. 628, C. A.; *Kempshall* v. *Holland* (1895), 14 R. 336, C. A.; see *Thomas* v. *Hewes* (1834), 2 Cr. & M. 519; *Little* v. *Spreadbury*, [1910] 2 K. B. 658.

(*g*) *Lewis's* v. *Lewis* (1890), 45 Ch. D. 281; *Hickman* v. *Berens*, [1895] 2 Ch. 638, C. A.; *Wilding* v. *Sanderson*, *supra*. A compromise will not be set aside on the ground that consent was given inadvertently, without evidence of mistake or misapprehension (*Re Davis, Davis* v. *Davis* (1880), 13 Ch. D. 861; see *Harvey* v. *Croydon Union Rural Sanitary Authority* (1884), 26 Ch. D. 249, C. A.; *Holt* v. *Jesse* (1876), 3 Ch. D. 177).

(*h*) *Great North-West Central Railway* v. *Charlebois*, [1899] A. C. 114, P. C.; *Smith* v. *King*, [1892] 2 Q. B. 543; see *Re Onslow, Ex parte Kibble* (1875), 10 Ch. App. 373.

(*i*) *Plumley* v. *Horrell* (1869), 20 L. T. 473; *Legh* v. *Holloway* (1803), 8 Ves. 213.

(*k*) *Emeris* v. *Woodward* (1889), 43 Ch. D. 185; *Gilbert* v. *Endean*, *supra*.

(*l*) See *Watt* v. *Assets Co.*, *Bain* v. *Assets Co.*, [1905] A. C. 317.

(*m*) As to service in various particular proceedings, see titles ADMIRALTY, Vol. I., pp. 84—86 (warrant of arrest); BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 51 (bankruptcy petition), 313, 314 (notice of motion), 320 (service by post), CHARITIES, Vol. IV., pp. 333 (petition), 337 (summons), 340 (notice); COMPANIES, Vol. V., pp. 17 *et seq.*, 83, 306 *et seq.* (legal process generally), 406, 596 (winding-up petition), 661 (service on stannaries mining company), 754 (service on *quasi*-corporations); COUNTY COURTS, Vol. VIII., pp. 619 *et seq.* (service generally); EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 156 *et seq.* (probate business); HUSBAND AND WIFE, Vol. XVI., pp. 508 *et seq.* (citation and petition in divorce proceedings); INTERPLEADER, Vol. XVII., pp. 600, 601 (interpleader summons); LUNATICS AND PERSONS OF

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primâ facie be served personally (*n*). Where personal service is not necessary, proceedings are sufficiently served if left, within the prescribed hours (*o*), at the address for service (*p*) of the person to be served, with any person resident at or belonging to such place, or if posted in a prepaid registered envelope addressed to such person at such address (*q*).

Service of notices issued from offices of the court.

304. Notices sent from any office of the Supreme Court may be sent by post; the posting of such notices is sufficient service, and the time at which the notice would be delivered in the ordinary course of post is considered the time of service (*r*).

UNSOUND MIND, Vol. XIX., p. 417 (notice of petition); MORTGAGE, Vol. XXI., pp. 150 (redemption action), 279 (foreclosure); PARLIAMENT, Vol. XXI., pp. 644 *et seq.* (appellate procedure); PARTNERSHIP, Vol. XXII., pp. 42 *et seq.* (actions against partners); REVENUE; SHIPPING AND NAVIGATION; SPECIFIC PERFORMANCE; TRUSTS AND TRUSTEES.

(*n*) Compare *Jarvis* v. *Hemmings*, [1912] 1 Ch. 462. Except when a solicitor agrees to accept service, personal service is required of a writ of summons (R. S. C., Ord. 9, r. 2; Ord. 16, r. 13; see p. 115, *ante*); a notice of a writ of summons out of the jurisdiction (*ibid.*, Ord. 11, r. 7; see p. 122, *ante*); a document other than a writ of summons by which proceedings are commenced (*ibid.*, Ord. 41, r. 4); *e.g.*, an originating summons (*ibid.*, Ord. 54, r. 4B), or petition (*ibid.*, Ord. 52, rr. 16, 17), or originating special case (*ibid.*, Ord. 34, r. 8), or notice of originating motion (*ibid.*, Ord. 52, r. 3; Ord. 67, r. 5); an order which may be enforced by attachment (*ibid.*, Ord. 44, r. 2; but see *ibid.*, Ord. 31, r. 22); a third party notice (*ibid.*, Ord. 16, r. 48); an order to do an act (*ibid.*, Ord. 41, r. 5); a summons to attend chambers in the Chancery Division under *ibid.*, Ord. 55, r. 16; copy defence and counterclaim served on a person not a party to the action (*ibid.*, Ord. 21, r. 12); notice of judgment or order under *ibid.*, Ord. 16, r. 40, unless dispensed with under *ibid.*, Ord. 55, r. 35, or under *ibid.*, Ord. 16, r. 64. Where personal service is necessary, it should be effected as nearly as may be in manner prescribed for the personal service of a writ of summons (*ibid.*, Ord. 67, r. 5; see *Robinson* v. *Galland*, [1889] W. N. 108; and see p. 115, *ante*). A governor of a prison cannot refuse to allow service on a prisoner in his custody (*Danson* v. *Le Capelain* (1852), 7 Exch. 667); and see title PRISONS, p. 252, *post*.

(*o*) Before 6 p.m., except on Saturdays; on Saturdays before 2 p.m. (see R. S. C., Ord. 64, r. 11); and see title TIME. If the proceeding is served after 2 p.m. on Saturday, it is deemed to be served on the following Monday; if after 6 p.m. on any other weekday, it is deemed to be served on the following day (R. S. C., Ord. 64, r. 11).

(*p*) See R. S. C., Ord. 4; Ord 12. As to service on the solicitor on the record, see *De la Pole* (*Lady*) v. *Dick* (1885), 29 Ch. D. 351, C. A.; *Callow* v. *Young* (1886), 55 L. T. 543; *Re Ward, Mills, Witham and Lambert, De Mora* v. *Concha*, [1887] W. N. 194; *Davidson* v. *Leslie* (1845), 9 Beav. 104; *Wright* v. *King* (1846), 9 Beav. 161; and see R. S. C., Ord. 67, r. 7. As to service on the solicitor of a person who is not a party, see *ibid.*, r. 8. An order (except for attachment) is regularly served, if an office copy of the order is exhibited; it is not necessary that the original should be shown (*ibid.*, r. 1). The court or a judge may now direct that a summons, order, or notice be served on a party in a foreign country (*ibid.*, Ord. 11, r. 8A); see p. 122, *ante*.

(*q*) R. S. C., Ord. 67, r. 2. As to service of an order giving leave to sign judgment, see *Farden* v. *Richter* (1889), 23 Q. B. D. 124; *Hopton* v. *Robertson*, [1884] W. N. 77. As to service by post, see R. S. C., Ord. 67, r. 2; *Kemp* v. *Wanklyn*, [1894] 1 Q. B. 583, C. A. As to prepayment in the case of service by post, see *Walthamstow Urban District Council* v. *Henwood*, [1897] 1 Ch. 41; *Jiminez* v. *Owen*, [1883] W. N. 232; *Leigh* v. *Stogdon* (1895), 90 L. T. Jo. 359. As to proof of posting and delivery of letters, see title EVIDENCE, Vol. XIII., pp. 556, 557. As to service by post, see, further, title POST OFFICE, Vol. XXII., pp. 257 *et seq.*

(*r*) R. S. C., Ord. 67, r. 3; *Bishop* v. *Helps* (1845), 2 C. B. 45; *Hornsby* v.

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305. Where no appearance has been entered by a party or where an address for service has not been given (*s*), proceedings in respect of which personal service is not requisite may be served by filing them with the proper officer (*t*). Service by filing.

306. Where personal service of a proceeding is required and prompt personal service cannot be effected, the court or a judge (*a*) may order substituted or other service or the substitution of notice for service by letter, public advertisement, or otherwise (*b*). Substituted service.

SUB-SECT. 18.—*Trial* (*c*).

(i.) *Mode.*

307. An action may be tried by a judge alone, or by a judge with a jury, or by a judge sitting with assessors, or by an official or special referee with or without assessors (*d*). Mode of trial.

308. In actions of slander, libel, false imprisonment, malicious prosecution, seduction, or breach of promise of marriage, the Where right to trial by jury exists.

Robson (1856), 1 C. B. (N. S.) 63; *Moore* v. *Forest* (1879), 6 L. R. Ir. 142, C. A.; *Colvill* v. *Lewis* (1846), 2 C. B. 60; *Doogan* v. *Colquhoun* (1886), 20 L. R. Ir. 361, C. A.; *Kemp* v. *Wanklyn*, [1894] 1 Q. B. 583, C. A.; *Hudson* v. *Louth* (1879), 6 L. R. Ir. 69, C. A.; *Adams* v. *Buchanan* (1885), 18 L. R. Ir. 292; *Lewis* v. *Evans* (1874), L. R. 10 C. P. 297.

(*s*) See R. S. C., Ord. 4; Ord. 12.

(*t*) *Ibid.*, Ord. 67, r. 4; see *Verney* v. *Thomas* (1888), 58 L. T. 20. The following proceedings have been held to be properly served by filing:—Notice of motion for judgment (*Morton* v. *Miller* (1876), 3 Ch. D. 516, C. A.); notice of motion for leave to issue writ of attachment (*Re Morris, Morris* v. *Fowler* (1890), 44 Ch. D. 151; *Re Evans, Evans* v. *Noton*, [1893] 1 Ch. 252, C. A.; compare *Re Bassett, Bassett* v. *Bassett*, [1894] 3 Ch. 179); notice of intention to proceed (*Morison* v. *Telfer*, [1906] W. N. 31); amended writ of summons (*Jamaica Rail. Co.* v. *Colonial Bank*, [1905] 1 Ch. 677, C. A.); writ of inquiry or order to assess damages, but notice should be given to defendant (Yearly Practice of the Supreme Court, 1912, p. 1120); order of revivor (*Jackson* v. *Kilham*, [1891] W. N. 171); statement of claim after amendment of writ (*Southall Development Syndicate* v. *Dunsdon* (1907), 96 L. T. 109). The rule does not apply to a summons for the appointment of a receiver after judgment signed in default of appearance (*Tilling, Ltd.* v. *Blythe*, [1899] 1 Q. B. 557, C. A.); or to a summons for directions (*Re Norman, Norman* v. *Norman* [1900] W. N. 159). As to an application for a charging order, see Yearly Practice of the Supreme Court, 1912, pp. 664, 665; and as to an amended originating summons, see Yearly Practice of the Supreme Court, 1912, pp. 1120, 1121.

(*a*) As to the meaning of the expression "the court or a judge," see note (*f*), p. 103, *ante*.

(*b*) R. S. C., Ord. 67, r. 10; see *ibid.*, Ord. 10; and see p. 117, *ante*; *Re Whalley, Ex parte Warburg* (1883), 24 Ch. D. 364, C. A.; *Re London County Council*, [1901] W. N. 7, C. A.; *Hamilton* v. *Thomas*, [1883] W. N. 31; *Whyte-Melville* v. *Whyte-Melville* (1888), 4 T. L. R. 491; *Hunt* v. *Austin, Ex parte Mason* (1882), 9 Q. B. D. 598, C. A.; *Rowley* v. *Southwell* (1889), 71 L. T. 805; *Jarvis* v. *Hemmings*, [1912] 1 Ch. 462.

(*c*) As to the hearing of the parties at trial, see title BARRISTERS, Vol. II., pp. 409 *et seq.*; and, as to subsequent procedure, see title JUDGMENTS AND ORDERS, Vol. XVIII., pp. 197 *et seq.* As to the duties of registrars, see *ibid.*, pp. 203, 204; R. S. C., Ord. 62, r. 14A; *Re Empire Guarantee and Insurance Co., Re Assurance Companies Act*, 1909 (1912), 56 Sol. Jo. 444. As to the effect of statements of counsel made at the trial, see titles BARRISTERS, Vol. II., p. 451; EVIDENCE, Vol. XIII., p. 462. As to the enforcement of orders of court, see titles EXECUTION, Vol. XIV., pp. 1 *et seq.*; JUDGMENTS AND ORDERS, Vol. XVIII., pp. 219 *et seq.*

(*d*) R. S. C., Ord. 36, rr. 1—7; and see the text, *infra*.

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plaintiff or the defendant is entitled as of right to have the issues of fact tried by a judge with a jury. The plaintiff or defendant should signify his desire to have a jury at the time when the summons for directions is heard. The order made on the summons for directions should state whether the action is to be tried by a judge or by a judge and jury (*e*).

General rules as to trial with or without a jury.

309. Causes assigned by the Judicature Act, 1873 (*f*), to the Chancery Division are tried by a judge without a jury, unless otherwise ordered (*g*).

The court or a judge (*h*) may direct a trial without a jury of any question or issue of fact, or partly of fact and partly of law, in any cause which, before the passing of the Judicature Act, 1873 (*f*), could without any consent of parties have been tried without a jury (*i*); or of any cause requiring any prolonged examination of documents or accounts, or any scientific or local investigation (*k*).

In any other cause, if any party applies on the hearing of the

(*e*) R. S. C., Ord. 54, r. 32. As to a defendant in an action in the Chancery Division who counterclaims for damages for libel, see *Kinnaird* (*Lord*) v. *Field*, [1905] 2 Ch. 361, C. A. The rules preserve the right to trial by jury (*Jenkins* v. *Bushby*, [1891] 1 Ch. 484, C. A.; *Baring Brothers & Co.* v. *North Western of Uruguay Rail. Co.*, [1893] 2 Q. B. 406; *The Temple Bar* (1885), 11 P. D. 6, C. A.; *Timson* v. *Wilson* (1888), 38 Ch. D. 72, C. A.). The order for directions or the order giving leave to defend under R. S. C., Ord. 14, must state whether an action is to be tried by or without a jury, and, if by a jury, whether by a special or common jury (*ibid.*, Ord. 54, r. 32; and see *Kelsey* v. *Doune*, [1912] 2 K. B. 482, C. A.). The former procedure under R. S. C., Ord. 36, rr. 2, 6, is now inapplicable in all cases in which there has been a summons for directions and the mode of trial has been dealt with therein; see *Kelsey* v. *Doune*, *supra*. As to the summoning of jurors to the High Court, see title JURIES, Vol. XVIII., p. 237.

(*f*) 36 & 37 Vict. c. 66.

(*g*) R. S. C., Ord. 36, r. 3. As to actions assigned to the Chancery Division, see Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 34; title COURTS, Vol. IX., p. 60. As to directing trial by jury in an action in the Chancery Division, see *Gardner* v. *Jay* (1885), 29 Ch. D. 50, C. A.; *Mangan* v. *Metropolitan Electric Supply Co.*, [1891] 1 Ch. 551, C. A.; *A.-G.* v. *Vyner* (1890), 38 W. R. 194, C. A.; *Coote* v. *Ingram* (1887), 35 Ch. D. 117; *Thornton* v. *Union Discount Co. of London* (1891), 7 T. L. R. 410, C. A.; *Swindell* v. *Birmingham Syndicate* (1876), 3 Ch. D. 127, 133, C. A.; *Ruston* v. *Tobin* (1879), 10 Ch. D. 558, 565, C. A.; *Re Martin, Hunt* v. *Chambers* (1882), 20 Ch. D. 365, 373; *Cardinall* v. *Cardinall* (1884), 25 Ch. D. 772; *Reynolds and Gibson* v. *Bank of Liverpool* (1892), 8 T. L. R. 46; *Sheppard* v. *Gilmore* (1885), 53 L. T. 625; *Lynch* v. *MacDonald* (1887), 37 Ch. D. 227, C. A.; *Ehrmann* v. *Ehrmann* (1895), 72 L. T. 548, C. A.; *Kinnaird* (*Lord*) v. *Field*, *supra*. If an order is made for the trial by jury of an action in the Chancery Division, the action is generally transferred to the King's Bench Division (R. S. C., Ord. 49, r. 3; see p. 158, *ante*; and see *Re Martin, Hunt* v. *Chambers*, *supra*; *Warner* v. *Murdoch* (1877), 4 Ch. 750, C. A.; *Mangan* v. *Metropolitan Electric Supply Co.*, *supra*; *Forrester* v. *Jones*, [1899] W. N. 78).

(*h*) As to the meaning of the expression "the court or a judge," see note (*f*), p. 103, *ante*.

(*i*) R. S. C., Ord. 36, r. 4. This rule relates to actions which before 1873 were brought in the Court of Chancery or the Court of Admiralty (*Jenkins* v. *Bushby*, *supra*, at p. 490; *The Temple Bar*, *supra*; *Baring Brothers & Co.* v. *North Western of Uruguay Rail. Co.*, *supra*; *Fennessy* v. *Clark* (1887), 37 Ch. D. 184, C. A.).

(*k*) *Jenkins* v. *Bushby*, *supra*; *Shafto* v. *Bolckow, Vaughan & Co., Ltd.* (No. 2) (1887), 57 L. T. 17; *Swyny* v. *North Eastern Rail. Co.* (1896), 74 L. T. 88, C. A.

summons for directions for a trial with a jury, an order should be made for such a trial (*l*).

In every cause, unless a trial with a jury is ordered under the rules above referred to (*m*), or either party has obtained an order to have a trial with a jury (*n*), the mode of trial is by a judge without a jury, but the court or a judge may at any time order any cause to be tried by a judge with a jury, or by a judge sitting with assessors, or by an official or special referee with or without assessors (*o*).

310. Every trial of any question or issue of fact with a jury is

Number of judges at the hearing.

(*l*) R. S. C., Ord. 54, r. 32. As to the present practice, see *Kelsey* v. *Doune*, [1912] 2 K. B. 482, C. A. See also *The Temple Bar* (1885), 11 P. D. 6, C. A.; *Timson* v. *Wilson* (1888), 38 Ch. D. 72, C. A.; *Thornton* v. *Union Discount Co. of London* (1891), 7 T. L. R. 410, C. A.; *Mangan* v. *Metropolitan Electric Supply Co.*, [1891] 1 Ch. 551, C. A.; *Woolfe* v. *De Braam* (1899), 81 L. T. 533, C. A.; *Macartney* v. *Macartney* (1909), 25 T. L. R. 818; *Baring Brothers & Co.* v. *North Western of Uruguay Rail. Co.*, [1893] 2 Q. B. 406; *Coles* v. *Civil Service Association* (1884), 26 Ch. D. 529; *Trower* v. *Law Life Assurance Society* (1885), 54 L. J. (Q. B.) 407, C. A.; *Lowenfeld* v. *Lowenfeld*, [1903] W. N. 90; *Moore* v. *Deakin* (1886), 53 L. T. 858; *Tonsley* v. *Heffer* (1881), 19 Q. B. D. 153; *Drinkwater* v. *Union Bank of Manchester* (1885), 1 T. L. R. 362; *Thompson* v. *Rourke*, [1892] P. 244, C. A.

(*m*) *Ibid.*, Ord. 36, r. 6.

(*n*) Under *ibid.*, r. 2.

(*o*) *Ibid.*, Ord. 36, r. 7; *Jenkins* v. *Bushby*, [1891] 1 Ch. 484, 490, C. A.; *Coote* v. *Ingram* (1887), 35 Ch. D. 117; *A.-G.* v. *Vyner* (1890), 38 W. R. 194, C. A.; *Timson* v. *Wilson*, *supra*; *Kinnaird* (*Lord*) v. *Field*, [1905] 2 Ch. 361, C. A.; *Re East London Rail. Co., Oliver's Claim* (1890), 24 Q. B. D. 507, C. A.; *The Temple Bar*, *supra*; *Moss* v. *Bradburn* (1884), 32 W. R. 368; *Baring Brothers & Co.* v. *North Western of Uruguay Rail. Co.*, *supra*; *Mangan* v. *Metropolitan Electric Supply Co.*, *supra*; *Thornton* v. *Union Discount Co. of London*, *supra*; *Case* v. *Willis* (1892), 8 T. L. R. 610. Applications as to the mode of trial of a cause or issue in it should be made under the summons for directions (R. S. C., Ord. 30). As to a trial by a judge with assessors, see Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 56; R. S. C., Ord. 36, r. 43; Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 31 (1); *Hattersley & Sons* v. *Hodgson* (1905), 21 T. L. R. 178, C. A.; *Steamship "Gannet" (Owners)* v. *Steamship "Algoa" (Owners)*, *The "Gannet,"* [1900] A. C. 234; *The City of Berlin*, [1908] P. 110, C. A.; *The Koning Willem II.*, [1908] P. 125, C. A. As to official and special referees, see note (*c*), p. 133, *ante*. As to the trial of causes and issues by a commissioner, see Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 29, and R. S. C., Ord. 36, r. 44. As to the trial of separate issues, see *Krehl* v. *Burrell* (1878), 10 Ch. D. 420, C. A.; *Lowe* v. *Lowe* (1878), 10 Ch. D. 432, C. A. As to trying different questions of fact in one action at different times, see R. S. C., Ord. 36, r. 8; *Piercy* v. *Young* (1880), 15 Ch. D. 475; *Emma Silver Mining Co.* v. *Grant* (1879), 11 Ch. D. 918, C. A.; *Smith* v. *Hargrove* (1885), 16 Q. B. D. 183; *Simson and Mason* v. *New Brunswick Trading Co.* (1888), 5 T. L. R. 148; *Philipps* v. *Philipps* (1880), 5 Q. B. D. 60, as cited in Yearly Practice of the Supreme Court, 1912, p. 477; *Dent* v. *Sovereign Life Assurance Co.* (1879), 27 W. R. 379; *Tasmanian Main Line Rail. Co.* v. *Clark* (1879), 27 W. R. 677; and see R. S. C., Ord. 18, r. 1. As to the mode of ascertaining the law applicable to the facts of the case as administered in any other part of the King's dominions, see British Law Ascertainment Act, 1859 (22 & 23 Vict. c. 63); title EVIDENCE, Vol. XIII., pp. 490, 491. The order for the settlement of the case is obtained on motion; see Daniell's Chancery Practice, 7th ed., pp. 1606—1608. As to similar provisions in relation to foreign law, see Foreign Law Ascertainment Act, 1861 (24 & 25 Vict. c. 11); title EVIDENCE, Vol. XIII., p. 491. As to the examination of witnesses in reference to a suit pending in a foreign tribunal, see title EVIDENCE, Vol. XIII., pp. 630, 631; *Eccles & Co.* v. *Louisville and Nashville Railroad Co.*, [1912] 1 K. B. 135, C. A.

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by a single judge, unless it is specially ordered to be tried by two or more judges (*p*).

Special jury.

311. Either the plaintiff or the defendant, in any cause in which he is entitled to a jury, may, by obtaining an order for a special jury, have the issues so tried (*q*).

(ii.) *Place.*

Place of trial.

312. There is no local venue for the trial of any action, except where some statute provides for such venue (*r*). In every action in every division the place of trial is to be fixed by a master on the hearing of the summons for directions or on an application thereunder (*s*).

(iii.) *Notice.*

Notice by plaintiff.

313. Notice of trial may be given by the plaintiff or other party in the position of the plaintiff with the reply, if any, whether it closes the pleadings or not, or, where no order for reply has been made, on the expiration of four days after the delivery of the defence or the last of the defences, or at any time when the issues of fact are ready for trial (*t*).

Notice by defendant.

314. If the plaintiff does not give notice of trial within six weeks after the time when he first became entitled to give it, or

(*p*) R. S. C., Ord. 36, r. 9 ; *Dixon* v. *Farrer* (1886), 18 Q. B. D. 43, 51, C. A. As to trials at bar, see *R.* v. *Jameson* (1896), 60 J. P. 662; *Anderson* v. *Gorrie* (1894), 10 T. L. R. 383, C. A.

(*q*) R. S. C., Ord. 36, r. 7 ; compare *Kelsey* v. *Doune*, [1912] 2 K. B. 482, C. A. ; and see title JURIES, Vol. XVII., p. 264 ; *Webster* v. *Appleton* (1890), 62 L. T. 704; *Griffiths* v. *Griffiths* (1898), 14 T. L. R. 184; *Linscott* v. *Jupp* (1891), 8 T. L. R. 130. As to the trial of a cause with a special jury of the City of London, see *Barnes* v. *Lawson* (1911), 16 Com. Cas. 74.

(*r*) R. S. C., Ord. 36, rr. 1, 1A. Local venues were abolished by the Judicature Act, 1875 (38 & 39 Vict. c. 77) (see *ibid.*, Sched. I. ; R. S. C., Ord. 36, r. 1), and the exception only refers to statutes passed since that Act (*Buckley* v. *Hull Docks Co.*, [1893] 2 Q. B. 93). The Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 2 (a), repeals so much of any public general Act as provides that any proceeding to which that Act applies is to be commenced in any particular place ; see title PUBLIC AUTHORITIES AND PUBLIC OFFICERS, pp. 338 *et seq.*, *post*.

(*s*) R. S. C., Ord. 54, r. 32. As to the rights of the Crown, see titles CONSTITUTIONAL LAW, Vol. V., p. 411, and CROWN PRACTICE, Vol. X., pp. 18, 149. In cases in which the Crown is not concerned, and in which there is no local venue, no plaintiff can now select the place of trial of an action as of right (R. S. C., Ord. 36, r. 1, as altered by R. S. C., July, 1902); the selection of the place of trial is a matter for the discretion of the master, to be determined according to the balance of convenience and the interests of justice (*Winstanley* v. *Kendal* (1902), *Times*, 28th October); see *Thorogood* v. *Newman* (1906), 51 Sol. Jo. 81 ; *Lever Brothers* v. *Associated Newspapers* (1907), *Times*, 3rd June. The place of trial is to be fixed by the order made on the summons for directions, but may subsequently be altered for sufficient cause on notice under a summons for directions (R. S. C., Ord. 54, r. 32 ; but see *Kelsey* v. *Doune*, *supra*).

(*t*) R. S. C., Ord. 36, r. 11 ; see *Freeman* v. *Springham* (1863), 14 C. B. (N. S.) 197 ; *Robinson* v. *Caldwell*, [1893] 1 Q. B. 519 ; *Beresford* v. *Geddes* (1867), L. R. 2 C. P. 285. As to the trial of commercial causes, see *Barry* v. *Peruvian Corporation*, [1896] 1 Q. B. 208, C. A. ; *Barnes* v. *Lawson* (1911), 16 Com. Cas. 74. As to the form of notice of trial, see R. S. C., App. B, Form No. 16. The notice must be in writing (R. S. C., Ord. 66, r. 1). As to service, see pp. 169 *et seq.*, *ante*.

within such extended time as may be allowed, the defendant may give notice of trial (*a*).

315. Ten days' notice of trial must be given, unless the party to whom it is given consents or is under terms or has been ordered to take short notice of trial, or unless it is otherwise ordered (*b*).

Length of notice.

316. Notice of trial for London or Middlesex, Manchester or Liverpool, is deemed to be for any day after the expiration of the notice on which the trial may come on in its order upon the list: elsewhere, it is deemed to be for the first day of the then next assizes at the place for which notice is given (*c*).

Day of trial.

Countermanding notice.

317. Notice of trial cannot be countermanded except by consent or leave (*d*).

(iv.) *Entry.*

Entry.

318. After notice of trial has been given, the action may be entered for trial, although the pleadings are not closed (*e*).

Practice in London, Middlesex, Manchester, and Liverpool.

319. If notice of trial in London or Middlesex, Manchester or Liverpool, has been given, and the party giving notice does not enter the action for trial on the day or day after giving notice, the party to whom notice has been given may, unless the notice has been countermanded, enter the trial within four days (*f*). In London or Middlesex, Manchester or Liverpool, unless either party enters the trial within six days after notice of trial, the notice is no longer in force (*g*).

Practice elsewhere.

320. If notice has been given of trial elsewhere than in London or Middlesex, Manchester or Liverpool, either party may at any time, not less than seven days before the commission day appointed for the place, enter the action for trial at the next assizes, at the

(*a*) R. S. C., Ord. 36, r. 12. The defendant may apply to dismiss the action (*ibid.*); see *Saunders* v. *Pawley* (1885), 14 Q. B. D. 234; *Evelyn* v. *Evelyn* (1879), 13 Ch. D. 138; *Freason* v. *Loe* (1877), 20 W. R. 138; *Robarts* v. *French* (1895), 43 W. R. 258, C. A.; *Crick* v. *Hewlett* (1884), 27 Ch. D. 354; *Sievier* v. *Spearman* (1896), 74 L. T. 132, C. A.; *Ambroise* v. *Evelyn* (1879), 11 Ch. D. 759; *Roberts* v. *Booth*, [1893] 1 Ch. 52; *Wilmott* v. *Freehold House Property Co.* (1885), 52 L. T. 743, C. A.; title JUDGMENTS AND ORDERS, Vol. XVIII., p. 188.

(*b*) R. S. C., Ord. 36, r. 14; *Laskier* v. *Tekeian* (1892), 67 L. T. 121; *Baxter* v. *Holdsworth*, [1899] 1 Q. B. 266, C. A.; *Pretty* v. *Nauscawen* (1873), L. R. 9 Exch. 42; *Re Pringle & Co., Pownall* v. *Pringle & Co.*, [1903] W. N. 208 (see 89 L. T. 743). Short notice of trial is four days' notice, unless otherwise ordered; see R. S. C., Ord. 64, r. 2.

(*c*) *Ibid.*, Ord. 36, rr. 17, 18.

(*d*) *Ibid.*, r. 19. Leave may be given subject to such terms as to costs or otherwise as may be just (*ibid.*).

(*e*) *Ibid.*, rr. 15, 16, 30.

(*f*) *Ibid.*, r. 20. As to countermanding notice of trial, see the text, *supra*. As to lists for London and Middlesex, see *ibid.*, Ord. 36, r. 29. As to setting down a cause for further consideration in the Chancery Division, see *ibid.*, Ord. 36, r. 21.

(*g*) *Ibid.*, Ord. 36, r. 16. As to special sittings for trials at Liverpool and Manchester, see *ibid.*, Ord. 36, r. 22c; Order in Council of 29th June, 1909, [1909] W. N. Part II., 263.

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district registry, if any, of the city or town where the trial is to be had, or with the associate (*h*).

(v.) *Postponement.*

Postponement.

321. The judge may postpone or adjourn a trial for such time, to such place, and upon such terms, if any, as he thinks fit (*i*).

(vi.) *Impounding Documents.*

Impounding documents.

322. Documents which have been put in evidence on the trial of an action are in the custody of the court and may be impounded by order of the court. Impounded documents, while in the custody of the court, must not be parted with; they may not be inspected except on a written order signed by the judge on whose order they were impounded and by the president of the division in which they are impounded (*k*); and they must not be delivered out of the custody of the court except on an order made on motion in open court; but, upon the request in writing of the law officers of the Crown, or either of them, or of the Director of Public Prosecutions, they must be given into the custody of such law officer or Director (*l*).

SUB-SECT. 19.—*Costs* (*m*).

(i.) *Jurisdiction to Award Costs.*

Jurisdiction as to costs.

323. Subject to the provisions of the Judicature Acts (*m*) and of the Rules of the Supreme Court, and to the express provisions of any statute, the costs of and incident to all proceedings in the Supreme Court (*n*), including the administation of estates and trusts,

(*h*) R. S. C., Ord. 36, r. 22B; the trial may be entered later by leave (*ibid.*). As to entries for trial in other district registries, where there is no district registry for the assize town, see *ibid.*, r. 23. As to lists of causes for trial to be provided by district registries, see *ibid.*, rr. 24—28.

(*i*) *Ibid.*, r. 34, "if he think it expedient for the interests of justice" (*ibid.*). If the action is not in the week's printed list, the application should be made by summons in chambers; if it is in the week's printed list, the application should be made in court (Yearly Practice of the Supreme Court, 1912, p. 488). As to postponement, see *Steuart* v. *Gladstone* (1877), 7 Ch. D. 394; *Smith* v. *Chorley District Council*, [1897] 1 Q. B. 532, C. A.; *Fairburn* v. *Household* (1885), 53 L. T. 513, C. A.; *Re Wickham, Marony* v. *Taylor* (1887), 35 Ch. D. 272, C. A.; *Lydall* v. *Martinson* (1877), 5 Ch. D. 780; *Boucicault* v. *Boucicault* (1888), 4 T. L. R. 195, C. A.

(*k*) For documents impounded by the Court of Appeal an order of that court is necessary (R. S. C., Ord. 42, r. 33A).

(*l*) *Ibid.*; see *Re a Solicitor, Ex parte Incorporated Law Society* (1891), 65 L. T. 584.

(*m*) As to the Judicature Acts, see note (*o*), p. 177, *post.*

(*n*) As to costs generally, see titles ACTION, Vol. I., pp. 3, 5, 14, 23, 54; DAMAGES, Vol. X., pp. 326 *et seq.*; SOLICITORS. As to costs in particular matters, see titles ADMIRALTY, Vol. I., pp. 79, 90, 96, 103, 114, 119, 126, 134; AGRICULTURE, Vol. I., p. 266 (arbitration); ARBITRATION, Vol. I., pp. 466, 467 (special case), 470, 471 (arbitration), 477 (application to set aside award), 486 (reference for inquiry), 490 (reference for trial); BANKERS AND BANKING, Vol. I., p. 646 (production of bankers' books); BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 105 *et seq.* (liability of official receiver), 115 (costs in case of co-debtors), 127 *et seq.* (costs in trustee's accounts), 141 (witness), 233 (liability of official receiver); 234 (liability of

are in the discretion of the court or a judge (*o*); but there is no

trustee), 262 (bankrupt's costs), 279 (trustee's costs), 296 (summary cases), 305 (appeal), 308 (appeal), 321—323 (costs generally); 344, 352 (costs under the Debtors Act); BASTARDY, Vol. II., p. 434 (court's discretion); BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS, Vol. II., p. 526 (action on negotiable instrument); CHARITIES, Vol. IV., pp. 340 *et seq.* (charity matters generally); COMPANIES, Vol. V., pp. 113 (reduction of capital), 290, 291 (action on behalf of shareholders), 337 (debenture-holders' action), 410, 411, 413, 421, 434, 448 *et seq.*, 467, 477, 479, 485, 523 *et seq.*, 539, 564 *et seq.*, 584, 595, 596 (winding up); COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 83 *et seq.*, 93 *et seq.*; CONTEMPT OF COURT, ATTACHMENT, AND COMMITTAL, Vol. VII., p. 317 (contempt proceedings); COUNTY COURTS, Vol. VIII., pp. 578 *et seq.* (general principles of county court costs), 609 (appeal), 664 (licensing matters), 674 (parliamentary elections); COURTS, Vol. IX., p. 46 (proceedings before Privy Council); CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 429 (payment of costs by administrator of convict's property), 448 (costs in case of incorrigible rogue); CROWN PRACTICE, Vol. X., pp. 12, 26 (informations), 35 (petition of right), 39 (inquisition of escheat), 62, 75 (*habeas corpus*), 125 *et seq.* (mandamus), 140 (*quo warranto*), 154 (prohibition), 203, 211 (*certiorari*); DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI., pp. 55, 56, 90, 113; DISTRESS, Vol. XI., p. 203 (replevin proceedings); ECCLESIASTICAL LAW, Vol. XI., p. 519 (proceedings in ecclesiastical courts); ELECTIONS, Vol. XII., pp. 250, 252, 253, 255 (appeals from decision of revising barrister), 421, 472 *et seq.* (parliamentary election petitions), 529 (criminal proceedings); ESTATE AND OTHER DEATH DUTIES, Vol. XIII., pp. 226, 228 (proceedings for recovery of overpaid duty); EXECUTION, Vol. XIV., pp. 32 *et seq.* (executions), 100, 101 (garnishee proceedings), 127 (examination of debtor); EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 180 *et seq.* (probate actions), 302 (payment into court), 330 (actions by and against personal representatives); FAMILY ARRANGEMENTS, Vol. XIV., p. 552 (action to set aside family arrangements); FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., pp. 91, 106; FRIENDLY SOCIETIES, Vol. XV., p. 179 (friendly society arbitrations); GAMING AND WAGERING, Vol. XV., p. 271 note (*e*) (effect of pleading Gaming Act); HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 146 (indictments to enforce repairs), 227 (proceedings by local authority); HUSBAND AND WIFE, Vol. XVI., pp. 374, 375 (removal of restraint for payment of costs), 456 (action by married woman), 505 (costs against pauper husband), 513, 538, 547 *et seq.*, 553 *et seq.*, 561, 576, 593, 604 (matrimonial causes); INFANTS AND CHILDREN, Vol. XVII., pp. 135 (liability of next friend), 138 (proceedings on behalf of infants generally), 144 (proceedings against infants), 177 (child or young person ordered to pay); INJUNCTION, Vol. XVII., pp. 287 *et seq.*; INTERPLEADER, Vol. XVII., pp. 620, 621 *et seq.*, 640, 643; INTOXICATING LIQUORS, Vol. XVIII., p. 76 (appeal in compensation matters); JUDGMENTS AND ORDERS, Vol. XVIII., p. 199 (judgment for costs); JURIES, Vol. XVIII., p. 262 (special jury); LAND TAX, Vol. XVIII., p. 320; LANDLORD AND TENANT, Vol. XVIII., pp. 542, 546 (forfeiture of premises), 594 (costs recoverable under express covenant); LIBEL AND SLANDER, Vol. XVIII., pp. 676 (effect of plea of justification), 730 (apportionment between defendants); LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 459 *et seq.*, 463 (lunacy proceedings generally), 498, 499 (pauper lunatics), 656, 666 (appeal to High Court); MASTER AND SERVANT, Vol. XX., pp. 196, 241 (workmen's compensation); MAYOR'S COURT, LONDON, Vol. XVI., p. 295; MISTAKE, Vol. XXI., pp. 28, 29; MORTGAGE, Vol. XXI., p. 156 (redemption action), 231 *et seq.* (costs, charges and expenses of mortgagee), 295, 296 (foreclosure proceedings); PARLIAMENT, Vol. XXI., p. 650 (appeals in House of Lords); PATENTS AND INVENTIONS, Vol. XXII., pp. 225 *et seq.*; POLICE, Vol. XXII., p. 476; POOR LAW, Vol. XXII., pp. 540, 541; PUBLIC AUTHORITIES AND PUBLIC OFFICERS, p. 348, *post*; RECEIVERS; REVENUE; SOLICITORS; SPECIFIC PERFORMANCE; TRADE MARKS, TRADE NAMES, AND DESIGNS; TRUSTS AND TRUSTEES.

(*o*) Judicature Act, 1890 (53 & 54 Vict. c. 44), s. 5; R. S. C., Ord. 65, r. 1. The jurisdiction as to costs in the Supreme Court is governed by the Judicature

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jurisdiction to award costs to or against the Crown (*p*) in a common law matter, where there is no express statutory provision enabling such costs to be awarded (*q*).

(ii.) *Costs in Discretion of the Judge.*

Discretion.

324. The costs of and incidental to all proceedings in the Supreme Court, except actions which are tried by a judge with a jury, are in the discretion of the court or judge before whom such proceedings take place (*a*). There is, however, no discretion to make a successful defendant pay the whole costs of the action of an unsuccessful plaintiff (*b*), though there is a discretion to deprive a successful litigant of his costs, or to make a successful plaintiff pay the costs of the other side, or to make a successful defendant pay part of the costs of the other side, either because he has failed on certain issues or because he has been guilty of misconduct connected with the question between the parties (*c*). But to enable

Acts (see Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 49; Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 33 (2); Judicature Act, 1890 (53 & 54 Vict. c. 44), s. 5; Judicature (Procedure) Act, 1894 (57 & 58 Vict. c. 16), s. 2; County Courts Act, 1888 (51 & 52 Vict. c. 43), ss. 65, 66, 69, 116; the Rules of the Supreme Court (see *ibid.*, Ord. 65); and the provisions of special statutes as to costs in particular cases). The effect of the Judicature Acts and of the Rules under them has been to repeal all previous general enactments as to costs inconsistent with them, unless such enactments are specially preserved (*Garnett* v. *Bradley* (1878), 3 App. Cas. 944; *Parsons* v. *Tinling* (1877), 2 C. P. D. 119; *Lewin* v. *Trimming* (1888), 21 Q. B. D. 230, 233; *Tenant* v. *Ellis* (1880), 6 Q. B. D. 46; *Rockett* v. *Clippingdale*, [1891] 2 Q. B. 293, C. A.). The provisions of special statutes as to particular cases are unaffected by the Judicature Acts and Rules (*Reeve* v. *Gibson*, [1891] 1 Q. B. 652, C. A.; *Hasker* v. *Wood* (1885), 54 L. J. (Q. B.) 419); and see *Re Butler's Will, Ex parte Metropolitan Board of Works* (1912), 106 L. T. 673.

(*p*) See titles CONSTITUTIONAL LAW, Vol. VI., pp. 366, 412; CROWN PRACTICE, Vol. X., pp. 12, 26, 35, 39; *Re Cardwell, A.-G.* v. *Day*, [1912] 1 Ch. 779.

(*q*) The provisions as to costs apply to all proceedings in the Supreme Court, *e.g.*, examination of judgment debtor (*Adlington* v. *Conyngham*, [1898] 2 Q. B. 492, C. A.); an order for inspection of property (*Mitchell* v. *Darley Main Colliery Co.* (1883), 10 Q. B. D. 457); issue of a writ of possession (*Dartford Brewery Co., Ltd.* v. *Moseley*, [1906] 1 K. B. 462, C. A.) or of attachment (*Abud* v. *Riches* (1876), 2 Ch. D. 528); dismissal of action for want of prosecution (*Snelling* v. *Pulling* (1885), 29 Ch. D. 85, C. A.); judgment in default of defence (*Young* v. *Thomas*, [1892] 2 Ch. 134, C. A.); see also *Re Fisher*, [1894] 1 Ch. 450, C. A.; *Re Beddoe, Downes* v. *Cottam*, [1893] 1 Ch. 547, 554, C. A.; *Re Wrexham, Mold and Connah's Quay Railway*, [1900] 1 Ch. 261, C. A.; *Re Bombay Civil Fund Act*, 1882, *Pringle* v. *Secretary of State for India* (1888), 40 Ch. D. 288; *Re Brandreth's Trade-mark* (1878), 9 Ch. D. 618. There is no jurisdiction to give the costs of a proceeding which is not in the Supreme Court, although an appeal from or an application relating to such proceeding comes into the Supreme Court, unless a statute gives such jurisdiction; see *Re Australian Wine Importers, Ltd.* (1889), 41 Ch. D. 278, C. A.; *Pietschmann's Patent* (1886), 1 Griffin's Patent Cases, 314; *Gath* v. *Howarth*, [1884] W. N. 99.

(*a*) R. S. C., Ord. 65, r. 1; *Suckling* v. *Gabb* (1887), 36 W. R. 175; *Neaves* v. *Spooner* (1888), 36 W. R. 257, C. A.; *Whitmore* v. *O'Reilly*, [1906] 2 I. R. 357, C. A.; *Florence* v. *Mallinson* (1891), 65 L. T. 354, C. A.

(*b*) *Dicks* v. *Yates* (1881), 18 Ch. D. 76, 85; *Foster* v. *Great Western Rail. Co.* (1882), 8 Q. B. D. 515, C. A.; *Andrew* v. *Grove*, [1902] 1 K. B. 625; *Westgate* v. *Crowe*, [1908] 1 K. B. 24; see *Butcher* v. *Pooler* (1883), 24 Ch. D. 273; *Lambton & Co.* v. *Parkinson* (1887), 35 W. R. 545.

(*c*) *Dicks* v. *Yates*, *supra*; *Harnett* v. *Vise* (1880), 5 Ex. D. 307, C. A.;

Depriving successful litigant of costs.

a judge to deprive a successful litigant of his costs or order him to pay the costs of the other side, there must be materials upon which the judge can exercise his discretion, and if there are no such materials, he is wrong in making such an order (*d*). If a plaintiff comes to enforce a legal right and completely succeeds and has been guilty of no misconduct, there are no materials on which the court can exercise a discretion and the plaintiff is entitled to his costs (*e*); and, *a fortiori*, a successful defendant who has been guilty of no misconduct has a right to his costs (*f*). A plaintiff, however, who brings a vexatious or unnecessary action, even if he succeeds to some extent, may be ordered to pay the defendant's costs (*g*). A judge has no power to order any party to pay a sum

Whitmore v. *O'Reilly*, [1906] 2 I. R. 357, C. A.; *Leckhampton Quarries Co.* v. *Ballinger and Cheltenham Rural District Council* (1905), 49 Sol. Jo. 618, C. A.; *Nicolas* v. *Atkinson* (1909), 25 T. L. R. 568; *Willmott* v. *Barber* (1881), 17 Ch. D. 772, C. A.; see *Sutcliffe* v. *Smith* (1886), 2 T. L. R. 881, C. A.

(*d*) *Civil Service Co-operative Society* v. *General Steam Navigation Co.*, [1903] 2 K. B. 756, C. A.; see *Walker* v. *Wilsher* (1889), 23 Q. B. D. 335, C. A.; *Jones* v. *Curling* (1884), 13 Q. B. D. 262, C. A.; *Edmund* v. *Martell* (1907), 24 T. L. R 25, C. A.; *Re Knight's Will* (1884), 26 Ch. D. 82, C. A. The refusal by a plaintiff, of an offer by the defendant to give all the relief which the plaintiff desires and to pay all costs, is a ground for the judge exercising his discretion and depriving the plaintiff, if he proceeds, of all costs subsequent to the offer (*Jenkins* v. *Hope*, [1896] 1 Ch. 278; *Wright* v. *Ransom* (1902), 47 Sol. Jo. 92; *Florence* v. *Mallinson* (1891), 65 L. T. 354, C. A.; *The Reading*, [1908] P. 162; see *Trotter* v. *Maclean* (1879), 13 Ch. D. 574; *Birmingham and District Land Co.* v. *London and North Western Rail. Co.* (1887), 57 L. T. 185; *Real and Personal Advance Co.* v. *McCarthy* (1880), 14 Ch. D. 188; *Schlesinger* v. *Turner* (1890), 63 L. T. 764; *Fennessy* v. *Day and Martin* (1886), 55 L. T. 161). If the plaintiff proceeds by a more expensive method than necessary, he may be disallowed or may be ordered to pay the extra costs incurred (*Re Kellock* (1887), 35 W. R. 695; *Re Martin and Varlow* (1895), 43 W. R. 427; *A.-G.* v. *St. John's Hospital, Bath*, [1893] 3 Ch. 151; *Re Lancashire and Yorkshire Rail. Co., Slater* v. *Slater* (1895), 72 L. T. 627; *Curwen* v. *Milburn* (1889), 42 Ch. D. 424; *London Steam Dyeing Co.* v. *Digby* (1888), 57 L. J. (CH.) 505; *Allen* v. *Oakey* (1890), 62 L. T. 724; *Johnson* v. *Evans* (1889), 60 L. T. 29; *Blackett* v. *Blackett* (1884), 51 L. T. 427; *Heimbs* v. *Newcastle Co-operative Society* (1897), 76 L. T. 109).

(*e*) *Cooper* v. *Whittingham* (1880), 15 Ch. D. 501; *Upmann* v. *Forester* (1883), 24 Ch. D. 231; *Wittman* v. *Oppenheim* (1884), 27 Ch. D. 260; *Goodhart* v. *Hyett* (1883), 25 Ch. D. 182; *Ruskin* v. *Robinson* (1885), 2 T. L. R. 18; *Lipman* v. *Pulman & Sons, Ltd.* (1904), 91 L. T. 132; compare *American Tobacco Co.* v. *Guest*, [1892] 1 Ch. 630; *Walter* v. *Steinkopf*, [1892] 3 Ch. 489; *Re Pople, Ex parte Baker* (1889), 40 Ch. D. 589, 592.

(*f*) *Elms* v. *Hedges* (1906), 95 L. T. 145; *Beaumont* v. *Senior*, [1903] 1 K. B. 282; and see *Re Halston, Ewen* v. *Halston*, [1912] 1 Ch. 435 (where in a summons by executors for construction of a will a successful respondent was held entitled to his costs against a contesting and unsuccessful respondent). A successful defendant cannot be deprived of his costs because of some misconduct not connected with the issues between the parties (*King & Co.* v. *Gillard & Co.*, [1905] 2 Ch. 7, C. A.). As to misconduct justifying an order depriving the defendant of his costs, see *Estcourt* v. *Estcourt Hop Essence Co.* (1875), 10 Ch. App. 276. A defendant whose interest has ceased pending the action cannot obtain payment of costs (*Wymer* v. *Dodds* (1879), 11 Ch. D. 436); and see title MALICIOUS PROSECUTION AND PROCEDURE, Vol. XIX., p. 690, note (*l*).

(*g*) *Harris* v. *Petherick* (1879), 4 Q. B. D. 611, C. A.; *Fane* v. *Fane* (1879), 13 Ch. D. 228; see *Macgregor* v. *Clay and Caminada* (1888), 4 T. L. R. 715, C. A.; *Myers* v. *Financial News* (1888), 5 T. L. R. 42; *Whitmore* v. *O'Reilly*, *supra*; *Young* v. *Thomas*, [1892] 2 Ch. 134, C. A.; *American Tobacco Co.* v. *Guest*, *supra*; *Jenkins* v. *Price*, [1907] 2 Ch. 229; *Evans* v. *Levy*, [1910] 1 Ch. 452.

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by way of penalty beyond the costs of the claim and counter-claim (*h*).

Unsuccessful defendant paying costs of successful defendant.

325. If there are two or more defendants, and the plaintiff succeeds against one or more but fails as to another or others, the unsuccessful defendant may be ordered to pay the costs not only of the plaintiff, but also of the successful defendant or defendants (*i*).

Extent of discretion.

326. The discretion as to costs, unless there are statutory provisions to the contrary, may be exercised as regards the scale or amount of costs (*k*).

By whom discretion exercised.

327. The discretion as to costs must be exercised by the judge himself; it cannot be delegated (*l*).

Appeal.

328. If the judge exercises his discretion as to costs and there are materials upon which he can exercise it, no appeal lies from his order as to costs except with leave (*m*). But an appeal lies if the judge affects to exercise a discretion and there are no materials upon which a discretion can be exercised, or if he is influenced by considerations, which ought not to affect the exercise of his discretion, or if he does not exercise his discretion in a case in which he ought to do so (*a*).

(iii.) *Costs to Follow the Event.*

Costs following the event.

329. The costs of any action which is tried with a jury follow the event (*b*), unless the judge by whom the action is tried or the court for good cause otherwise orders (*c*).

(*h*) *Wilmott* v. *Barker* (1881), 17 Ch. D. 772, C. A.; see *Bradford Corporation* v. *Pickles*, [1894] 3 Ch. 53. As to the question of costs when there is a counter-claim, see p. 181, *post*.

(*i*) *Child* v. *Stenning* (1879), 11 Ch. D. 82, C. A.; *Bullock* v. *London General Omnibus Co.*, [1907] 1 K. B. 264, C. A.; *Sanderson* v. *Blyth Theatre Co.*, [1903] 2 K. B. 533, C. A.; *Mullen* v. *London County Council* (1906), 51 Sol. Jo. 82; see *The Milwall*, [1905] P. 155, C. A.; *Beaumont* v. *Senior*, [1903] 1 K. B. 282; and see note (*f*), p. 179, *ante*.

(*k*) *Neaves* v. *Spooner* (1888), 36 W. R. 257, C. A. As to scales of costs, see title SOLICITORS.

(*l*) *Corticene Floor Covering Co.* v. *Tull, Glanville & Co.* (1879), 27 W. R. 373, C. A.; compare *Re Leigh, Rowcliffe* v. *Leigh* (1878), 26 W. R. 729, C. A.; *Musman* v. *Boret* (1892), 40 W. R. 352.

(*m*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 49; *Re Leigh, Rowcliffe* v. *Leigh* (1878), 26 W. R. 729, C. A.; *Snelling* v. *Pulling* (1885), 29 Ch. D. 85, C. A.

(*a*) *Civil Service Co-operative Society* v. *General Steam Navigation Co.*, [1903] 2 K. B. 756, C. A.; *Edmund* v. *Martell* (1907), 24 T. L. R. 25, C. A.; see *Metropolitan Asylum District* v. *Hill* (1880), 5 App. Cas. 582.

(*b*) R. S. C., Ord. 65, r. 1. "The event" means here the final judgment which determines the litigation (*Forster* v. *Farquhar*, [1893] 1 Q. B. 564, C. A.; *Collins* v. *Welch* (1879), 5 C. P. D. 27; *Creen* v. *Wright* (1877), 2 C. P. D. 354, C. A.; *Field* v. *Great Northern Rail. Co.* (1878), 3 Ex. D. 261; *Brotherton* v. *Metropolitan District Joint Committee*, [1894] 1 Q. B. 666, C. A.; *Waring* v. *Pearman* (1884), 32 W. R. 429; *Parsons* v. *Tinling* (1877), 2 C. P. D. 119). The word "event" as used in the rule has a collective meaning, and in one action there may be several events. The party who gets judgment is entitled to the general costs of the action, unless the judge or the court otherwise orders, but, if the opposite party succeeds on part of the claim, such party is entitled to the costs

(*c*) For note (*c*) see next page.

of the part on which he succeeds (*Myers* v. *Defries* (1880), 5 Ex. D. 180, C. A.; *Lund* v. *Campbell* (1885), 14 Q. B. D. 821; *Hawke* v. *Brear* (1885), 14 Q. B. D. 841, C. A.; *Jones* v. *Curling* (1884), 13 Q. B. D. 262, C. A.; *Ellis* v. *Desilva* (1881), 6 Q. B. D. 521, C. A.; *Waring* v. *Pearman* (1884), 32 W. R. 429; *Abbott* v. *Andrews* (1882), 8 Q. B. D. 648; *Hoyes* v. *Tate*, [1907] 1 K. B. 656, C. A.; *Slatford* v. *Erlebach* (1911), 106 L. T. 61, C. A.). As to probate actions, see *Davies* v. *Jones*, [1899] P. 161. As to what is "the event" when money is paid into court, see *McCarthy* v. *Capital and Counties Bank*, [1911] 2 K. B. 1088, C. A.; and see p. 150, *ante*. If there is a claim and a counterclaim and the plaintiff succeeds on the claim and the defendant on the counterclaim, the plaintiff is entitled to the costs of the action and the defendant to the costs of the counterclaim (*Shrapnel* v. *Laing* (1888), 20 Q. B. D. 234, C. A.; *Blake* v. *Appleyard* (1878), 3 Ex. D. 195; *Hewitt* v. *Blumer* (1886), 3 T. L. R. 221, C. A.; *Potter* v. *Chambers* (1878), 4 C. P. D. 69; *Davidson* v. *Gray* (1879), 40 L. T. 192; *Wight* v. *Shaw* (1887), 19 Q. B. D. 396, C. A.; *Wilts, Dorset and Somerset Dairy Produce Supply Association* v. *Hammond* (1889), 5 T. L. R. 196, C. A.; *Atlas Metal Co.* v. *Miller*, [1898] 2 Q. B. 500, C. A.; *Sharpe* v. *Haggith* (1912), 106 L. T. 13, C. A.). If there are several defendants and they all fail, they are all equally liable to pay costs, unless extra costs are incurred by the proceedings of one defendant which are not attributable to the other defendants (*Stumm* v. *Dixon* (1889), 22 Q. B. D. 529, C. A.; *Dansk Rekylriffel Syndikat Aktieselskab* v. *Snell*, [1908] 2 Ch. 127). If two defendants are represented by the same solicitor, and one defendant succeeds and the other fails, unless there is some agreement to the contrary as to the way in which the costs are to be borne, each defendant is liable to his solicitor for one-half of the costs of the defence, and that is the amount which the plaintiff has to pay the successful defendant (*Beaumont* v. *Senior*, [1903] 1 K. B. 282). As to the costs of an action by two plaintiffs, see *Gort* (*Viscount*) v. *Rowney* (1886), 17 Q. B. D. 625, C. A.

(*c*) R. S. C., Ord. 65, r. 1. "Good cause" may be misconduct in commencing proceedings, or some miscarriage in the procedure, or an oppressive or vexatious way of conducting the proceedings, or making an exorbitant claim through carelessness or recklessness, or the fact that injustice would be caused by the allowance of ordinary costs. As to what is and what is not "good cause," see *Jones* v. *Curling* (1884), 13 Q. B. D. 262, C. A.; *Pool* v. *Lewin, Crawcour & Co.* (1884), 1 T. L. R. 165, C. A.; *Forster* v. *Farquhar*, [1893] 1 Q. B. 564, C. A.; *Huxley* v. *West London Extension Rail. Co.* (1889), 14 App. Cas. 26. For examples of "good cause," see *Harnett* v. *Vise* (1880), 5 Ex. D. 307, C. A. (conduct prior to action); *Moore* v. *Gill* (1888), 4 T. L. R. 738, C. A.; *Myers* v. *Financial News* (1888), 5 T. L. R. 42; *Wood* v. *Cox* (1889), 5 T. L. R. 272, C. A.; *Williams* v. *Ward* (1886), 55 L. J. (Q. B.) 566, C. A.; *Tipping* v. *Jepson* (1906), 22 T. L. R. 743, C. A. (where nominal damages only were given; but see *Macalister* v. *Steedman* (1911), 27 T. L. R. 217); *Harris* v. *Petherick* (1879), 4 Q. B. D. 611, C. A.; *Roberts* v. *Jones*, [1891] 2 Q. B. 194 (failure as to the substantial cause of action); *Macgregor* v. *Clay and Caminada* (1888), 4 T. L. R. 715, C. A. (carrying on action vexatiously); *O'Connor* v. *Star Newspaper Co.* (1893), 68 L. T. 146, C. A.; *Barnes* v. *Maltby* (1889), 5 T. L. R. 207 (oppressive conduct); *Pearman* v. *Burdett-Coutts* (*Baroness*), (1887), 3 T. L. R. 719, C. A. (untrue statements with object of increasing the damages); *Rooke* v. *Czarnikow* (1888), 4 T. L. R. 669 (denial of liability by one of two defendants); *Bostock* v. *Ramsey Urban Council*, [1900] 2 Q. B. 616, C. A. (conduct on defendant's part which caused action to be brought); and see *Sutcliffe* v. *Smith* (1886), 2 T. L. R. 881, C. A.; *Marriage* v. *Wilson* (1889), 53 J. P. 120; *Whitmore* v. *O'Reilly*, [1906] 2 I. R. 357, C. A.; *East* v. *Berkshire County Council* (1911), 106 L. T. 65. The following are examples of matters held not to be "good cause":—*Westgate* v. *Crowe*, [1908] 1 K. B. 24 (neglect to inform plaintiff of proper party to sue); *Granville* v. *Firth* (1903), 72 L. J. (K. B.) 152, C. A. (setting up Gaming Act as defence); *Elms* v. *Hedges*, [1906] W. N. 114 (setting up Statute of Limitations); *Beckett* v. *Stiles* (1888), 5 T. L. R. 88, C. A. (refusal to go to arbitration); *Canning* v. *Turner* (1887), 3 T. L. R. 684, C. A. (conduct of which plaintiff was ignorant); see also *Wilts, Dorset and Somerset Dairy Produce Supply Association* v. *Hammond*, *supra*; *Edmund* v. *Martell* (1907), 24 T. L. R. 25, C. A.; *Wight* v. *Shaw* (1887), 19 Q. B. D. 396, C. A. As to the nature of the orders which for such "good cause" may be made, see *supra*.

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330. An appeal lies as to the existence of good cause, but, if there is good cause, no appeal lies as to the exercise of the judge's discretion (*d*).

Appeal.

(iv.) *Actions which might have been commenced in the County Court.*

County court actions.

331. If a plaintiff brings in the High Court an action which might have been commenced in the county court (*e*), and recovers less than £20 in an action founded on contract (*f*) and less than £10 in an action founded on tort (*f*), he is not, without a special certificate or order, entitled to any costs; if he recovers more than £20 but less than £100 in an action founded on contract, or more than £10 but less than £20 in an action founded on tort, he is not entitled, unless he gets a special certificate, to any more costs than he would have been entitled to if the action had been brought in a county court (*g*).

(*d*) *Huxley* v. *West London Extension Rail. Co.* (1889), 14 App. Cas. 26; *Rooke* v. *Czarnikow* (1888), 4 T. L. R. 669; *O'Connor* v. *Star Newspaper Co.* (1893), 68 L. T. 146; and see *Kinnell* v. *Walker* (1911), 27 T. L. R. 257, C. A.

(*e*) An action which might have been commenced in the county court means an action over which the county court had jurisdiction, *e.g.*, an action where the amount claimed is beyond the county court limit but the amount recovered is within it (*Solomon* v. *Mulliner*, [1901] 1 K. B. 76, C. A., where *Lovejoy* v. *Cole*, [1894] 2 Q. B. 861, was followed and *Goldhill* v. *Clarke* (1893), 68 L. T. 414, disapproved); see *Chatfield* v. *Sedgwick* (1879), 4 C. P. D. 459, C. A.; *Holborow* v. *Jones* (1868), L. R. 4 C. P. 14; *Pellas* v. *Breslauer* (1871), L. R. 6 Q. B. 438; *Blair* v. *Eisler* (1888), 21 Q. B. D. 185; *Saygood* v. *Cross* (1885), 14 Q. B. D. 53; *Okins* v. *Morrison* (1912), 133 L. T. Jo. 9. As to the jurisdiction of the county court generally, see title COUNTY COURTS, Vol. VIII., pp. 428 *et seq.*

(*f*) As to actions founded on contract and on tort, see title ACTION, Vol. I., p. 48.

(*g*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 116; County Courts Act, 1903 (3 Edw. 7, c. 42), s. 3. If the plaintiff's claim is reduced below the specified sum by any matter which can be pleaded or proved by way of defence or set-off, the provision stated in the text, *supra*, applies (*Potter* v. *Chambers* (1878), 4 C. P. D. 457; *Neale* v. *Clarke* (1879), 4 Ex. D. 286; *Turner* v. *Berry* (1850), 5 Exch. 858; *Emmett & Co.* v. *Heyes* (1887), 36 W. R. 237; *Lovejoy* v. *Cole*, [1894] 2 Q. B. 861). If the plaintiff's claim is brought below the specified sum by payment after action brought, the provision does not apply (*Pearce* v. *Bolton*, [1902] 2 K. B. 111); but it does apply when less than the specified sum is paid into court and accepted in satisfaction (*Boulding* v. *Tyler* (1863), 3 B. & S. 472; *Parr* v. *Lillicrap* (1862), 1 H. & C. 615; *Utal* v. *May & Co.* (1899), 15 T. L. R. 307, C. A.). The provision has no application to a counterclaim (*Blake* v. *Appleyard* (1878), 3 Ex. D. 195; *Amon* v. *Bobbett* (1889), 22 Q. B. D. 543, C. A.; *Lewin* v. *Trimming* (1888), 21 Q. B. D. 230; *Wood's Patent Brick Co.* v. *Cloke* (1896), 40 Sol. Jo. 390). If the plaintiff recovers less than the specified amount from one defendant jointly with other defendants, but a larger amount from the other defendants in respect of a separate cause of action, the provision applies as to the plaintiff's costs as against the one defendant (*Duxbury* v. *Barlow*, [1901] 2 K. B. 23, C. A.). If a plaintiff in an action to which the provision applies recovers less than the specified amount, he is entitled to High Court costs, if a judge of the High Court or an official referee (not an under-sheriff (*Cox* v. *Hill* (1892), 67 L. T. 26), or a master (*Haycocks, Ltd.* v. *Mulholland*, [1904] 1 K. B. 145)) certifies that there was sufficient reason for bringing the action in that court, or if a judge of the High Court at chambers (not a master (*Haycocks, Ltd.* v. *Mulholland, supra*)) by order allows such costs, or if, in an action founded on contract, the plaintiff within twenty-one days after the service of the writ, or within such further time as may be ordered by the High Court or a judge (not a master), obtains an order under R. S. C., Ord. 14, empowering him to enter judgment for a sum of £20 or more; see

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Taxed costs.

332. The costs the payment of which the judge in an action has power to order are in general the taxed costs. A judge has power to assess the costs and fix the sum to be paid or to order the payment of part of the taxed costs, but the usual course is simply to give judgment for the successful litigant with costs to be taxed, and the costs are then taxed by an officer of the court (*h*). There is no power to award in respect of costs anything more than the taxed costs (*i*).

Party and party costs.

Solicitor and client costs.

333. In general the costs are taxed as between party and party (*k*). In matters of equitable jurisdiction (*l*), and in cases where there is express statutory provision to that effect (*m*), and, in cases where there is an obligation to indemnify or contribute (*n*), costs to be taxed as between solicitor and client may be awarded; but in general there is no power to award such costs (*o*).

Higher and lower scales.

334. In the taxation of party and party costs there are two scales, a higher and a lower, and the court or a judge at the trial or hearing or further consideration of a cause or matter, or of any application therein, may allow costs on the higher scale, if there are special grounds for such allowance arising out of the nature and importance or difficulty or urgency of the case (*p*).

Barker v. *Hempstead* (1889), 23 Q. B. D. 8. But there is no power in the High Court to make such a certificate or order when the action is remitted to the county court (*Dunn* v. *Appleton*, [1898] 1 Q. B. 564, C. A.; *Harris* v. *Judge*, [1892] 2 Q. B. 565, C. A.). For instances of such an order being made, see *Williams* v. *Allen* (1889), 60 L. T. 103; *Reeve* v. *Gibson*, [1891] 1 Q. B. 652, C. A.; *Okins* v. *Morrison* (1912), 133 L. T. Jo. 9; of its being refused, *Holborow* v. *Jones* (1868), L. R. 4 C. P. 14. There is no appeal from the decision of the judge allowing or disallowing High Court costs (*Bazett* v. *Morgan* (1889), 24 Q. B. D. 48). As to a county court dealing with the costs in remitted actions, see *Mentors, Ltd.* v. *Evans*, [1912] 1 K. B. 254; affirmed *sub nom. Mentors, Ltd.* v. *White* (1912), 56 Sol. Jo. 502, C. A.; title COUNTY COURTS, Vol. VIII., pp. 586 *et seq.*

(*h*) As to such officers, see title SOLICITORS.

(*i*) See *Garnett* v. *Bradley* (1878), 3 App. Cas. 944, 957; R. S. C., Ord. 65, rr. 8, 23; *ibid.*, App. N. As to awarding county court costs, see p. 182, *ante*. A judgment awarding costs is drawn up generally in the form "that the recover against the costs to be taxed"; see R. S. C., App. F, Forms of Judgment.

(*k*) As to taxation of costs, see *ibid.*, Ord. 65, rr. 18, 19, 22, 27; title SOLICITORS.

(*l*) *Andrews* v. *Barnes* (1887), 39 Ch. D. 133, C. A.; *Re Davies, Jenkins* v. *Davies* (1891), 64 L. T. 824; *Re Medland, Eland* v. *Medland* (1889), 41 Ch. D. 476, C. A.

(*m*) *E.g.*, under the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1 (b); see title PUBLIC AUTHORITIES AND PUBLIC OFFICERS; see also title PATENTS AND INVENTIONS, Vol. XXII., pp. 225, 226.

(*n*) See *Gerson* v. *Simpson*, [1903] 2 K. B. 197, C. A.; titles EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 326, 352; GUARANTEE, Vol. XV., p. 486.

(*o*) *Cockburn* v. *Edwards* (1881), 18 Ch. D. 449, C. A.; *Andrews* v. *Barnes* (1888), 39 Ch. D. 133, C. A.; *Sturrock* v. *Littlejohn* (1898), 68 L. J. (Q. B.) 165. As to double costs, see Limitations of Actions and Costs Act, 1842 (5 & 6 Vict. c. 97), ss. 1, 2; Prison Act, 1865 (28 & 29 Vict. c. 126), s. 49; Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 2; *Reeve* v. *Gibson*, [1891] 1 Q. B. 652, C. A.; *Garnett* v. *Bradley* (1878), 3 App. Cas. 944, 957; *Avery* v. *Wood*, [1891] 3 Ch. 115, C. A.

(*p*) R. S. C., Ord. 65, r. 9; *ibid.*, App. N; see *Paine* v. *Chisholm*,

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335. When costs are awarded to a successful litigant, the costs which are allowed are the reasonable costs of the proceedings of such party in the action, including the costs incurred in the obtaining the assistance of solicitors and counsel, the expenses of the various steps in the action, of any interlocutory proceedings of the trial itself, and of the proceedings up to the signing of judgment (*q*).

Taxation of costs.

All such costs, charges, and expenses are to be allowed by the taxing master as appear to him necessary or proper for the attainment of justice or for defending the rights of any party, but, save as against the party who incurred the same, no costs are to be allowed which appear to have been incurred or increased through over-caution, negligence, or by mistake, or by payment of special fees to counsel or special charges or expenses to witnesses or other persons, or by other unusual expenses (*r*).

[1891] 1 Q. B. 531, C. A.; *Williamson* v. *North Staffordshire Rail. Co.* (1886), 32 Ch. D. 399, C. A.; *Rivington* v. *Garden*, [1901] 1 Ch. 561; *Edgington* v. *Fitzmaurice* (1884), 32 W. R. 848. Instances of special grounds are *Davies* v. *Davies* (1887), 36 Ch. D. 359, C. A.; *Re Leeuw, Rein* v. *Wrathall* (1892), 93 L. T. Jo. 333; *Marriott* v. *Cobbett* (1894), 38 Sol. Jo. 620; *Rivington* v. *Garden*, *supra* (trial occupying considerable time and raising matters of great importance to both sides); *The Robin*, [1892] P. 95 (number of scientific witnesses essential); *Moseley* v. *Victoria Rubber Co.* (1887), 57 L. T. 142 (case requiring special knowledge); see also *Fraser* v. *Province of Brescia Steam Tramways Co.* (1887), 56 L. T. 771; *Turton* v. *Turton* (1889), 42 Ch. D. 128, 149, C. A.; *Pooley's Trustee* v. *Whetham* (1886), 33 Ch. D. 76, 111, C. A.; *Re Chaytor's Settled Estates Act* (1884), 25 Ch. D. 651. For instances of cases held not to show special grounds, see *Williamson* v. *North Staffordshire Rail. Co.*, *supra* (case lasting five days); *Assets Development Co.* v. *Close*, [1900] 2 Ch. 717 (allegation of fraud); *A.-G.* v. *Edwards*, [1891] 1 Ch. 194; *Sheffield and South Yorkshire Building Society* v. *Aizlewood* (1889), 44 Ch. D. 412; *Stamford* (*Earl*) v. *Dawson* (1867), L. R. 4 Eq. 352 (points of difficulty raised). An appeal lies from an order allowing costs on the higher scale on the question whether there are special grounds, but not on the mode in which discretion has been exercised (*Paine* v. *Chisholm*, [1891] 1 Q. B. 531, C. A.; and see *Automatic Weighing Machine Co.* v. *Knight* (1889), 6 R. P. C. 297, 310).

(*q*) For the special allowances and general regulations which apply to all proceedings and all taxations in the Supreme Court, see, as to writs of summons, special cases, pleadings, affidavits in answer to interrogatories and admissions under R. S. C., Ord. 32, r. 4, *ibid.*, Ord. 65, r. 27 (1); as to drawing and copy of pleading or other document, *ibid.*, r. 27 (2); as to instructions to sue or defend and the preparation of brief, *ibid.*, r. 27 (3); as to affidavits, *ibid.*, r. 27 (4); as to instructions and drawing affidavits, in answer to interrogatories, *ibid.*, r. 27 (5); as to delivery of pleadings, service and notices, *ibid.*, r. 27 (6); as to perusals, *ibid.*, r. 27 (7); as to when the same solicitor is acting for two or more defendants, *ibid.*, r. 27 (8); as to evidence, *ibid.*, r. 27 (9); as to agency correspondence, *ibid.*, r. 27 (10); as to attendance upon registrar in the Chancery Division, *ibid.*, r. 27 (11); as to attendance at judge's chambers, *ibid.*, r. 27 (12); as to costs occasioned by non-attendance, *ibid.*, r. 27 (13); as to counsel, *ibid.*, r. 27 (15), (16); as to inspection of documents, *ibid.*, r. 27 (17); as to taking copies of documents, *ibid.*, r. 27 (18); as disallowance of unnecessary costs, *ibid.*, r. 27 (20); as to set-off, *ibid.*, r. 27 (21); as to unnecessary appearance, *ibid.*, r. 27 (22); as to applications as to time, *ibid.*, r. 27 (23).

As to the details of the items in a bill of costs and the amount allowed, see *ibid.*, App. N; and see, generally, title SOLICITORS. As to the taxation of costs, see title SOLICITORS. As to lodgment of bills of costs for taxation, and as to review of taxation, see *ibid.*; as to the procedure to enable a litigant to obtain an order for a bill of costs delivered to him by his own solicitor, see Solicitors Act, 1843 (6 & 7 Vict. c. 73), ss. 37, 38; title SOLICITORS.

(*r*) R. S. C., Ord. 65, r. 27 (29); see also *ibid.*, r. 27 (20), as to the disallowance of improper, vexatious, and unnecessary costs. As to witnesses, such

336. When the costs have been taxed, the taxing master gives his certificate or allocatur for the amount of the costs, and an entry of the amount of the costs is made on the judgment (*s*).

just and reasonable charges and expenses as appear to have been properly incurred in procuring evidence and the attendance of witnesses are allowed; see R. S. C., Ord. 65, r. 27 (9). The matter is one for the discretion of the taxing master (*Turnbull* v. *Janson* (1878), 3 C. P. D. 264; *East Stonehouse Local Board* v. *Victoria Brewery Co.*, [1895] 2 Ch. 514; *Windham* v. *Bainton* (1888), 21 Q. B. D. 199; *Bright's Trustees* v. *Sellar*, [1904] 1 Ch. 369. A party who is a necessary witness may be allowed expenses and compensation for loss of time whether the witness is a witness of fact or an expert witness called to give his opinion (Practice Note, Hilary, 1902; see *Howes* v. *Barber* (1852), 18 Q. B. 588; *Dowdell* v. *Australian Royal Mail Co.* (1854), 3 E. & B. 902; *Ansett* v. *Marshall* (1853), Bail Ct. Cas. 147); and as to travelling expenses, see *Calvert* v. *Scinde Rail. Co.* (1865), 18 C. B. (N. S.) 306); see title EVIDENCE, Vol. XIII., pp. 578, 583. As to allowances to scientific or expert witnesses, see *Smith* v. *Buller* (1875), L. R. 19 Eq. 473; *Batley* v. *Kynock* (1875), L. R. 20 Eq. 632; *Mackley* v. *Chillingworth* (1877), 2 C. P. D. 273; *Thompson* v. *Moore* (1890), 25 L. R. Ir. 98; *Leonhardt* v. *Kalle*, [1895] W. N. 97; *Beaufort* (*Duke*) v. *Ashburnham* (*Lord*) (1863), 13 C. B. (N. S.) 598; *Stanger Leathes* v. *Stanger Leathes*, [1879] W. N. 86; *Drew* v. *Josolyne* (1888), 4 T. L. R. 717; *A.-G.* v. *Birmingham etc. Drainage Board* (1908), 52 Sol. Jo. 855. As to witnesses brought from abroad, see *Tremain* v. *Barrett* (1815), 6 Taunt. 88; *Seymour* v. *Saunders* (1872), 20 W. R. 832; *Shrewsbury* (*Earl*) v. *Trappes* (1862), 31 L. J. (CH.) 680; *Picasso* v. *Maryport Harbour Trustees*, [1884] W. N. 85; *The City of Lucknow* (1884), 51 L. T. 907. As to costs of examining witnesses abroad, see *Wentworth* v. *Lloyd* (1865), 34 Beav. 455; *Wentworth* v. *Lloyd* (1866), L. R. 2 Eq. 607. As a rule, where a witness has been rejected by the judge, his expenses are disallowed (*Galloway* v. *Keyworth* (1854), 15 C. B. 228; *Booth* v. *Booth* (1838), 1 Beav. 125, 130; *Harvey* v. *Mount* (1845), 8 Beav. 439; *Farrow* v. *Rees* (1840), 4 Beav. 18, 23); but the mere fact that a witness was not examined at the trial is not sufficient ground for disallowing his expenses (*O'Meara* v. *Barry*, [1895] 2 I. R. 454; *Gregg & Co.* v. *Gardner*, [1897] 2 I. R. 122; *Wicksteed* v. *Biggs* (1885), 52 L. T. 428; *Levetus* v. *Newton* (1883), 28 Sol. Jo. 166; *London, Chatham and Dover Rail. Co.* v. *South Eastern Rail. Co.* (1889), 60 L. T. 753). The expenses of witnesses brought up for cross-examination should ordinarily be allowed (*Richards* v. *Goddard* (1875), 10 Ch. App. 288; *Clark* v. *Malpas* (No. 2) (1863), 31 Beav. 554). The travelling and hotel expenses of witnesses are in the discretion of the taxing master (*Thomas* v. *Parry*, [1880] W. N. 184; *Commissioner for Railways* v. *Rourke*, [1896] A. C. 594, P. C.; *Potter* v. *Rankin* (1870), L. R. 5 C. P. 518; *The Bahia* (1865), L. R. 1 A. & E. 14; *The City of Lucknow*, *supra*). Costs of the shorthand notes of the evidence are not in general allowed on party and party taxation, unless there is an agreement to that effect, or unless there is a special order made allowing them (*Osmond* v. *Mutual Cycle and Manufacturing Supply Co.*, [1899] 2 Q. B. 488, C. A.; *Kirkwood* v. *Webster* (1878), 9 Ch. D. 239; *Bigsby* v. *Dickinson* (1876), 4 Ch. D. 24, 32, C. A.; *Glasier* v. *Rolls* (1889), 59 L. J. (CH.) 63, C. A.; *Re Day, Ex parte Steed* (1884), 33 W. R. 80; *Ungar* v. *Sugg* (1892), 9 R. P. C. 113, C. A.; *Singer Manufacturing Co.* v. *Loog* (1883), 52 L. J. (CH.) 288, C. A.; *Re De Nicols, De Nicols* v. *Curlier* (1906), 51 Sol. Jo. 47; *Re Nation, Nation* v. *Hamilton* (1887), 57 L. T. 648; *East London Rail. Co.* v. *River Thames Conservators* (1904), 48 Sol. Jo. 492; *Re Blyth and Fanshawe* (1882), 10 Q. B. D. 207, C. A.; *Re Norman* (1885), 16 Q. B. D. 673, C. A.; *Rymill* v. *Neal* (1886), 2 T. L. R. 879, C. A; *Ashworth* v. *Outram* (1878), 9 Ch. D. 483, C. A.; *Hill* v. *Metropolitan District Asylum Managers* (1880), 49 L. J. (Q. B.) 668, C. A.; *De la Warr* (*Earl*) v. *Miles* (1881), 19 Ch. D. 80, C. A.; *The Turret Court* (1901), 84 L. T. 331; *Lee Conservancy Board* v. *Button* (1879), 12 Ch. D. 383, C. A.; *Watson* v. *Great Western Rail. Co.* (1880), 6 Q. B. D. 163; *Re Morse, Ex parte Latimer, Clarke, Muirhead & Co.* (1891), 65 L. T. 552; *Re Hilleary and Taylor* (1887), 36 Ch. D. 262, C. A.; *Barber* v. *Burt*, [1894] 2 Q. B. 437; *Jones* v. *Llanrwst Urban Council*, [1911] 1 Ch. 393). As to the allowance of counsel's fees, see title BARRISTERS, Vol. II., p. 418. As to other costs, see title SOLICITORS.

(*s*) See R. S. C., App. F, Forms of Judgment; and see title SOLICITORS.

SECT. 2.

Sect. 2.—*Actions by and against Paupers.*

Actions by and against Paupers.

Paupers.

337. A person may be admitted to sue or defend as a pauper on proof that he is not worth £25 apart from his wearing apparel and the subject-matter of the cause or matter (*t*).

How leave to sue *in formâ pauperis* obtained.

338. Before a person is admitted to sue as a pauper, he must obtain an opinion from counsel that he has reasonable grounds for proceeding. The case laid before counsel and his opinion (*a*), with an affidavit of the party or his solicitor that the case contains a full and true statement of all the material facts to the best of his knowledge and belief, must be produced at chambers, and an application (*b*) for leave to sue *in formâ pauperis* made (*c*).

Sect. 3.—*Originating Summons.*

SUB-SECT. 1.—*When Applicable.*

Originating summons.

339. Every summons other than one in a pending cause or matter is an originating summons (*d*).

Applications by originating summons.

Applications for the determination of questions of construction arising under deeds or other instruments (*e*) and certain applications under the Trustee Act, 1893 (*f*), applications for the determination of certain questions arising in the administration of

As to interim certificates, see R. S. C., Ord. 65, r. 27 (17) (b); Ord. 52, r. 26.

(*t*) *Ibid.*, Ord. 16, r. 22; *M'Cabe* v. *Bank of Ireland* (1889), 14 App. Cas. 413; *Re Cobbett* (1858), 27 L. J. (EX.) 199; *Clements* v. *London and North Western Rail. Co.*, [1894] 2 Q. B. 482, C. A.; *Mulleneisen* v. *Coulson* (No. 2) (1888), 21 Q. B. D. 3; and, as to procedure *in formâ pauperis* generally, see titles BARRISTERS, Vol. II., pp. 372 (pauper litigant's right of audience), 379 (counsel's opinion necessary), 386 (assigning counsel); HUSBAND AND WIFE Vol. XVI., pp. 505 (matrimonial causes), 562 (appeal to House of Lords); INFANTS AND CHILDREN, Vol. XVII., p. 135 (next friend suing *in formâ pauperis*); MASTER AND SERVANT, Vol. XX., p. 240 (appeal to House of Lords in workmen's compensation cases *in formâ pauperis*); PARLIAMENT, Vol. XXI., p. 647 (petition to sue *in formâ pauperis*).

(*a*) A person who wishes to defend as a pauper need not lay a case before counsel (*Handford* v. *Clarke* (*George*), *Ltd.*, [1907] 1 K. B. 18, C. A.). As to inspection of the case laid before counsel, see *Sloane* v. *Britain Steamship Co.*, [1897] 1 Q. B. 185, C. A.

(*b*) The application must be supported by an affidavit as to the means of the applicant; see *Kydd* v. *Liverpool Watch Committee*, [1908] W. N. 26, C. A.; *Re Atkin's Trusts*, *Smith* v. *Atkin*, [1909] 1 Ch. 471; *Re Roberts*, *Kiff* v. *Roberts* (1886), 33 Ch. D. 265, C. A.

(*c*) R. S. C., Ord. 16, rr. 23, 24. No fee is to be payable by a pauper to his counsel or solicitor (*ibid.*, r. 24). As to the order giving leave, see *Fray* v. *Voules* (1868), L. R. 3 Q. B. 214; *Drennan* v. *Andrew* (1866), 1 Ch. App. 300. As to the official solicitor acting for a pauper defendant, see title COURTS, Vol. IX., p. 71.

(*d*) R. S. C., Ord. 71, r. 1A.

(*e*) *Ibid.*, Ord. 54A; see *Re Nobbs*, *Nobbs* v. *Law Reversionary Interest Society*, [1896] 2 Ch. 830; *Lewis* v. *Green*, [1905] 2 Ch. 340; *Mason* v. *Schuppisser* (1899), 81 L. T. 147; *Nicholls* v. *Nicholls* (1899), 81 L. T. 811; *Hunt* v. *Hunt* (1907), 97 L. T. 822, C. A.; *Re Freme's Contract*, [1895] 2 Ch. 256; *Bossert* v. *Jones* (1904), 48 Sol. Jo. 636; *Morgan's Brewery Co.* v. *Crosskill*, [1902] 1 Ch. 898; *Re Amalgamated Society of Railway Servants*, *Addison* v. *Pilcher*, [1910] 2 Ch. 547; title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 433.

(*f*) 56 & 57 Vict. c. 53; see R. S. C., Ord. 54B; title TRUSTS AND TRUSTEES.

SECT. 3. Originating Summons.

an estate or trust (*g*), and applications for the ascertainment of the heir-at-law or any devisee or legatee (*h*) for the purposes of the Land Transfer Act, 1897 (*i*), may be commenced by originating summons.

In chambers.

Applications may be made by originating summons in chambers in the Chancery Division in matters which fall within the scope of the business transacted in those chambers (*k*).

SUB-SECT. 2.—*Form and Issue of Originating Summons.*

Form etc. of summons.

340. An originating summons must be in a prescribed form, with such variations as circumstances may require (*l*). It is prepared by the applicant or his solicitor and sealed in the Central Office, and when so sealed is deemed to be issued (*m*).

SUB-SECT. 3.—*Service.*

Mode of service.

341. An originating summons, or a concurrent originating summons, should be served personally in the same way as a writ of summons is served (*n*), unless there is an undertaking by a solicitor to accept service or unless an order for substituted service is made (*o*). An originating summons or a notice of such summons may by leave be served out of the jurisdiction (*p*).

Persons to be served.

342. In certain applications directions may be given as to the persons to be served with the summons (*q*). Persons who are interested in the subject-matter of the application should be served, unless service is dispensed with by order (*r*).

SUB-SECT. 4.—*Appearance.*

Appearance.

343. Some originating summonses require appearance, some do not (*s*). In the case of the former, the parties served with the

(*g*) R. S. C., Ord. 55, r. 3; see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 334. An application for the declaration of a resulting trust, on the failure of the specific trusts of an instrument, on the ground of illegality, cannot be made by originating summons (*Re Amalgamated Society of Railway Servants, Addison* v. *Pilcher*, [1910] 2 Ch. 547).

(*h*) R. S. C., Ord. 55, r. 4A; see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 335.

(*i*) 60 & 61 Vict. c. 65.

(*k*) See p. 189, *post*; R. S. C., Ord. 55, r. 2. As to proceeding by petition instead of by summons, see *Re Bethlehem and Bridewell Hospitals* (1885), 30 Ch. D. 541; *Re Hargreave's Trusts, Ex parte Bradford Corporation* (1888), 58 L. T. 367; *Re Martin and Varlow* (1894), 43 W. R. 247; *Ex parte Finsbury and City of London Savings Bank Trustees*, [1886] W. N. 150.

(*l*) R. S. C., Ord. 54, r. 4B. For forms, see *ibid.*, App. K, Forms Nos. 1A, 1B, 1G, 1H.

(*m*) R. S. C., Ord. 54, rr. 4B, 11; Practice Masters Rules, r. 7.

(*n*) See p. 115, *ante*.

(*o*) R. S. C., Ord. 4, r. 4; see *ibid.*, Ord. 9, r. 2; *ibid.*, Ord. 6, rr. 1A, 2A (July, 1911). As to substituted service, see p. 117, *ante*; *Townend* v. *Brandenburg* (1893), 39 Sol. Jo. 151.

(*p*) R. S. C., Ord. 11, r. 8A; and see pp. 117, 118, *ante*; and as to service of summons on an arbitrator acting for a party out of the jurisdiction, see *Denny, Mott, and Dickson* v. *Standard Export Lumber Co., Ltd.*, [1912] 2 K. B. 542, C. A.

(*q*) R. S. C., Ord. 54A, r. 2; Ord. 54B, r. 4 (2).

(*r*) See *ibid.*, Ord. 54C, r. 7; and see *Taylor* v. *Denny, Mott, & Dickson*, [1912] W. N. 186, H. L.

(*s*) Appearance is not required to the originating summonses specified in *ibid.*, Ord. 54, r. 4F.

SECT. 3. Originating Summons.

summons must enter appearances at the Central Office (*t*). A party served may enter an appearance at any time before the hearing of the summons; if he appears at any time after the time limited by the summons for appearance, he is not, unless it is otherwise ordered, entitled to any further time for any purpose than if he had appeared according to the summons (*a*).

SECT. 4.—*Proceedings Peculiar to the Chancery Division* (*b*).

SUB-SECT. 1.—*Motions.*

Motions.

344. In the Chancery Division an application to a judge in court is made by motion (*c*). Such a motion may be made in an action, or it may itself be an originating motion commencing proceedings (*d*). With certain exceptions (*e*), no motion can be made without notice to the parties affected (*f*).

Hearing of motions.

345. In the Chancery Division, motions are not usually set down, but are heard on the ordinary motion days. Counsel are called upon to move according to their seniority, and each counsel called upon has the right to make two opposed motions before the next counsel is called upon (*g*). The evidence in support of the motion is generally given by affidavit, but oral evidence may be heard (*h*).

SUB-SECT 2.—*Petitions.*

Petitions.

346. Petitions may be presented in an action or may themselves originate an action (*i*).

(*t*) R. S. C., Ord. 54, r. 4C. As to cases where an appearance is not required by a respondent to an originating summons, see *ibid.*, r. 4F.

(*a*) *Ibid.*, r. 4C.

(*b*) As to the registrars of the Chancery Division, and as to their duties, see titles COURTS, Vol. IX., p. 68; JUDGMENTS AND ORDERS, Vol. XVIII., pp. 109 *et seq.*, 204.

(*c*) R. S. C., Ord. 52, r. 1.

(*d*) See *ibid.*, Ord. 5, r. 9 (c). A notice of an originating motion must be served in the same way as a writ of summons (*ibid.*, Ord. 4, r. 4; and see p. 115, *ante*); as to the procedure in the Chancery Division, see *Re Abbott's Trademark* (1904), 48 Sol. Jo. 351; *Re King & Co.'s Trademark*, [1892] 2 Ch. 462, C. A.

(*e*) *E.g.*, motions for an order of course, an order which may be made absolute in the first instance, or an order to show cause, motion to make an order of the House of Lords an order of the High Court, or application for mandamus, injunction or receiver; see Yearly Practice of the Supreme Court, 1912, pp. 730, 731.

(*f*) R. S. C., Ord. 52, r. 3. Two clear days' notice must be given, unless there is special leave to the contrary (*ibid.*, r. 5). As to the judge ordering notice to be given to persons who have not had notice, see *ibid.*, r. 6. In cases under *ibid.*, r. 4, the grounds of the application must be stated in general terms. As to placing an originating motion in the non-witness list, see *Re Watson & Co.'s Application* (1911), 28 R. P. C. 167.

(*g*) See title BARRISTERS, Vol. II., p. 414.

(*h*) In cases under R. S. C., Ord. 52, r. 4, a copy of the affidavit intended to be used must be served with the notice of motion. As to a motion supported by affidavits being ordered to be heard with witnesses, see *Chester* (*Dean and Chapter*) v. *Smelting Corporation*, [1902] W. N. 5.

(*i*) Petitions of right may be brought in any division; see title CROWN PRACTICE, Vol. X., p. 26; petitions in matrimonial matters are brought in the Probate, Divorce, and Admiralty Division; see title HUSBAND AND WIFE, Vol. XVI., pp. 497 *et seq.*; other petitions are in practice confined

347. At the foot of every petition, not being a "petition of course" (*j*), presented to the court and of every copy a statement must be made of the persons, if any, intended to be served (*k*).

A petition, unless leave is given to the contrary, must be served at least two clear days before the day appointed for the hearing (*l*).

SUB-SECT. 3.—*Procedure in Chambers.*

Service of petitions.

348. Every application at chambers not made *ex parte* must be made by summons (*m*).

Application.

Every application for payment or transfer out of court, and every other application made *ex parte* in which the judge or proper officer thinks fit so to require, must be made by summons (*n*).

Business.

349. The business in chambers of the judges of the Chancery Division is carried on in conjunction with their court business (*o*).

The business in chambers in the Chancery Division includes the following matters (*p*):—

(1) Applications for payment or transfer to any persons of any cash or securities standing to the credit of any cause or matter, where there has been a judgment or order declaring the rights or where the title depends only upon proof of the identity or birth, marriage, or death of any person (*q*);

(2) Applications for payment or transfer of any cash or securities standing to the credit of any cause or matter, where the cash does not exceed £1,000 or the securities are of a nominal value not exceeding £1,000 (*r*);

to the Chancery Division. As to petitions and petitioners, see Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 100; R. S. C., Ord. 19, rr. 4, 9; Ord. 52, rr. 16—18; Ord. 61, r. 19; Ord. 62, r. 18. Many applications which were formerly made by petition may now be made by originating summons; see *ibid.*, Ord. 55, r. 2; Ord. 54B. As to a petition for an order determining the class of person entitled to an unclaimed fund in court, see *Wilson* v. *Church* (1911), 106 L. T. 31.

(*j*) A petition which does not require to be answered is called a "petition of course"; see R. S. C., Ord. 62, r. 18. Other petitions are called "special petitions."

(*k*) *Ibid.*, Ord. 52, r. 16.

(*l*) *Ibid.*, Ord. 52, r. 17. An originating petition must be served like a writ of summons (*ibid.*, Ord. 4, r. 4); see p. 115, *ante*. It may be served out of the jurisdiction (R. S. C., Ord. 11, r. 8A); see pp. 117, 118, *ante*. As to cases where service may be dispensed with, see *Alexander* v. *Macgowski* (1898), 105 L. T. Jo. 154; Practice Note, [1907] W. N. 44.

(*m*) R. S. C., Ord. 54, r. 1.

(*n*) *Ibid.*, r. 2. As to the form of a summons which is not an originating summons, see *ibid.*, r. 10; App. K, Form 1. Summonses are not to be altered after they are sealed except upon application at chambers.

(*o*) *Ibid.*, Ord. 55, r. 1. As to counsel in chambers, see *ibid.*, r. 1A; title BARRISTERS, Vol. II., p. 419.

(*p*) R. S. C., Ord. 55, r. 1.

(*q*) *Ibid.*, r. 2 (1). Application is ordinarily made by summons, but where a question of construction is involved, a petition should be presented (*Re Hicks, Ex parte North Eastern Rail. Co.* (1894), 63 L. J. (CH.) 568). So also, where the fund in question exceeds £1,000 and difficult questions arise (*Re Birkin, Birkin* v. *Birkin*, [1901] W. N. 33), though the mere fact that the fund exceeds £1,000 is not enough (*Bates* v. *Moore* (1888), 38 Ch. D. 381; *Re Broadwood* (1886), 55 L. J. (CH.) 646; *Re Rhodes* (1886), 31 Ch. D. 499). As to the practice in the case of a fund not dealt with for a long period, see *Wilson* v. *Church* (1912), 133 L. T. Jo. 282.

(*r*) R. S. C., Ord. 55, r. 2 (2).

SECT. 4. Proceedings Peculiar to the Chancery Division.

(3) Applications for payment to any person of the dividend or interest on any securities standing to the credit of any cause or matter (*a*);

(4) Applications under the Parliamentary Deposits Act, 1846 (*b*), or any other Act relating to parliamentary deposits, for investment, payment of dividends, and payment out of court (*c*);

(5) Applications for interim and permanent investment and for payment of dividends under the Lands Clauses Consolidation Act, 1845 (*d*), and any other Act whereby the purchase-money of any property sold is directed to be paid into court (*e*);

(6) Applications on behalf of infants under the Infants' Property Act, 1830 (*f*), where the infant is a ward of court, or the administration of the estate of the infant or the maintenance of the infant is under the direction of the court (*g*);

(7) Applications under the Infant Settlements Act, 1855 (*h*), for the settlement of any property of any infant on marriage (*i*);

(8) Applications under the Copyhold Acts respecting any securities or money in court (*k*);

(9) Applications as to the guardianship and maintenance or advancement of infants (*l*);

(10) Applications connected with the management of property (*m*);

(11) Applications for or relating to the sale by auction or private contract of property (*n*);

(12) All applications under the Solicitors Act, 1843 (*o*) (not being

(*a*) R. S. C., Ord. 55, r. 2 (3).

(*b*) 9 & 10 Vict. c. 20.

(*c*) R. S. C., Ord. 55, r. 2 (6); see Parliamentary Deposits and Bonds Act, 1892 (55 & 56 Vict. c. 27); Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 18; Board of Trade Rules, January, 1892, under the Tramways Act, 1870 (33 & 34 Vict. c. 78); Yearly Practice of the Supreme Court, 1912, p. 1530; Light Railways Act, 1896 (59 & 60 Vict. c. 48); see titles PARLIAMENT, Vol. XXI., p. 735, note (*w*); TRAMWAYS AND LIGHT RAILWAYS.

(*d*) 8 & 9 Vict. c. 18, s. 69.

(*e*) R. S. C., Ord. 55, r. 2 (7); see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 114.

(*f*) 11 Geo. 4 & 1 Will. 4, c. 65, ss. 12, 16, 17. These provisions deal with leases of infants' land which can also be granted under the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), and the Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 59, 60; see Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 41; and see title INFANTS AND CHILDREN, Vol. XVII., pp. 98, 100.

(*g*) R. S. C., Ord. 55, r. 2 (9); see *Re Letchford* (1876), 2 Ch. D. 719; *Re Clark* (1866), 1 Ch. App. 292; *Re Griffiths* (1885), 29 Ch. D. 248.

(*h*) 18 & 19 Vict. c. 43; see title INFANTS AND CHILDREN, Vol. XVII., p. 103.

(*i*) R. S. C., Ord. 55, r. 2 (10); see *De Stacpoole* v. *De Stacpoole* (1888), 37 Ch. D. 139; *Re Sampson and Wall, Infants* (1884), 25 Ch. D. 282, C. A.; *Re Phillips* (*an Infant*) (1887), 34 Ch. D. 467; *Seaton* v. *Seaton* (1888), 13 App. Cas. 61; *Re Potter* (1869), L. R. 7 Eq. 484; *Re Scott, Scott* v. *Hanbury* [1891] 1 Ch. 298.

(*k*) R. S. C., Ord. 55, r. 2 (11); Copyhold Act, 1894 (57 & 58 Vict. c. 46), ss. 32, 33; see title COPYHOLDS, Vol. VIII., p. 122.

(*l*) R. S. C., Ord. 55, r. 2 (12); see Supreme Court Funds Rules, 1905, r. 61 (c); title INFANTS AND CHILDREN, Vol. XVII., pp. 89 *et seq.*, 125 *et seq.*

(*m*) R. S. C., Ord. 55, r. 2 (13).

(*n*) *Ibid.*, r. 2 (14).

(*o*) 6 & 7 Vict. c. 73; see title SOLICITORS.

applications for orders of course), for the taxation and delivery of bills of costs and the delivery by any solicitor of deeds, documents and papers (*p*);

(13) Applications for an order on the further consideration of any cause or matter, where the order to be made is for the distribution of an insolvent estate, or of the estate of an intestate, or of a fund among creditors or debenture-holders (*q*);

(14) Applications for time to plead, for leave to amend pleadings, for discovery and production of documents, and generally all applications relating to the conduct of causes (*r*);

(15) Applications for relief by mortgagor or mortgagee (*s*);

(16) Applications by a judgment creditor for an order for sale of his judgment debtor's interest in land (*t*);

(17) Applications under the Finance Act, 1894 (*u*), for the determination of disputes as to estate duty (*a*);

(18) Applications under the Charitable Trusts Act, 1853 (*b*);

(19) Applications to the court under the Settled Land Act, 1882 (*c*), the Vendor and Purchaser Act, 1874 (*d*), the Conveyancing and Law of Property Act, 1881 (*e*), the Married Women's Property Act, 1882 (*f*), the Charitable Trusts (Recovery) Act, 1891 (*g*), the Mortmain and Charitable Uses Act, 1891 (*h*), the Judicial Trustees Act, 1896 (*i*), the Land Transfer Act, 1897 (*j*), the Public Trustee Act, 1906 (*k*), the Companies (Consolidation) Act, 1908 (*l*);

(20) Such other matters as the judge may think fit to dispose of at chambers (*m*).

(*p*) R. S. C., Ord. 55, r. 2 (15).

(*q*) *Ibid.*, r. 2 (16).

(*r*) *Ibid.*, r. 2 (17).

(*s*) *Ibid.*, r. 5A; see title MORTGAGE, Vol. XXI., pp. 151, 261, 283.

(*t*) Judgments Act, 1864 (27 & 28 Vict. c. 112); R. S. C., Ord. 55, r. 9B; *Re Harrison and Bottomley*, [1899] 1 Ch. 465, C. A.; *Re Nixon*, [1886] W. N. 191; see titles EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 71; JUDGMENTS AND ORDERS, Vol. XVIII., p. 220.

(*u*) 57 & 58 Vict. c. 30.

(*a*) R. S. C., Ord. 55, r. 9C; see title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., pp. 226, 227.

(*b*) 16 & 17 Vict. c. 137; see R. S. C., Ord. 55, r. 13; see title CHARITIES, Vol. IV., pp. 267, 335.

(*c*) 45 & 46 Vict. c. 38; Settled Land Act, 1882, Rules, r. 2; Yearly Practice of the Supreme Court, 1912, p. 1548; *Re Torry Hill Estate, Pemberton* v. *Pemberton*, [1908] 1 Ch. 468.

(*d*) 37 & 38 Vict. c. 78, s. 9; and see *Re Martin, Ex parte Dixon* v. *Tucker* (1912), 106 L. T. 381.

(*e*) 44 & 45 Vict. c. 41, ss. 5, 9, 24 (6), 39, 42, 69 (3).

(*f*) 45 & 46 Vict. c. 75, s. 11.

(*g*) 54 & 55 Vict. c. 17; see Charitable Trusts (Recovery) Act, 1891, Rules, r. 2; Yearly Practice of the Supreme Court, 1912, p. 1555.

(*h*) 54 & 55 Vict. c. 73, s. 8.

(*i*) 59 & 60 Vict. c. 35; see Judicial Trustee Rules, 1897, r. 2; Yearly Practice of the Supreme Court, 1912, p. 1589.

(*j*) 60 & 61 Vict. c. 65; see Land Transfer Rules, 1903, r. 301; Yearly Practice of the Supreme Court, 1912, p. 1604.

(*k*) 6 Edw. 7, c. 55, ss. 10, 13 (7).

(*l*) 8 Edw. 7, c. 69, s. 120; see *Re Clarke (John) & Co., Ltd.*, [1912] 1 I. R. 24.

(*m*) R. S. C., Ord. 55, r. 2 (18); *Re Tweedy* (1885), 28 Ch. D. 529, C. A.; *Re Hicks, Ex parte North Eastern Rail. Co.* (1894), 63 L. J. (CH.) 568; *Re Evans* (1886), 54 L. T. 527; *Re Moate's Trust* (1883), 22 Ch. D. 635.

SECT. 4. **Proceedings Peculiar to the Chancery Division.**

Procedure in chambers.

350. Summonses in chambers in the Chancery Division come before the master in the first instance, and the procedure before him is the same as in an ordinary summons (*a*).

351. An application on a summons is supported by such evidence as the judge may require (*b*), and the judge may pronounce such judgment as the nature of the case may require (*c*).

Part II.—In the Court of Appeal.

SECT. 1.—*In General.*

General procedure in case of: (i.) trial without a jury; (ii.) trial with a jury.

352. Where there has been a trial by a judge without a jury, a motion for a new trial or to set aside a verdict, finding, or judgment must be made by appeal to the Court of Appeal (*d*).

Where there has been a trial of a cause or of any issue therein with a jury, a motion for a new trial or to set aside a verdict, finding, or judgment must be entered in the Court of Appeal in the same way as a motion by way of appeal is entered, where there has been a trial without a jury (*e*). Such a motion is brought before the Court of Appeal in like manner as an appeal, and on the hearing of such motion the Court of Appeal has all the powers exercisable by it on the hearing of an appeal (*e*).

Nature of motions to Court of Appeal.

353. In actual practice, where the trial was without a jury, the motion is known as a final appeal; but, if the trial was with a jury, the motion is known as an application for a new trial. The Rules of the Supreme Court, however, provide for an application for a new trial where the trial was by a judge alone (*f*), and an order for a new trial is occasionally made in such cases.

Again, although a final appeal and an application for a new trial are to some extent governed by different Orders of the Supreme Court (*g*), the Court of Appeal has substantially the same powers in

(*a*) See p. 131, *ante*.

(*b*) R. S. C., Ord. 55, r. 7.

(*c*) *Ibid.*, r. 8. As to adjournment, see *ibid.*, Ord. 54, r. 8. As to proceedings *ex parte*, if any of the parties fail to attend, see *ibid.*, r. 5. As to determining the questions between the parties without an administration order, see *ibid.*, Ord. 55, r. 31. As to directing executors etc. to render a proper statement of their accounts, see *ibid.*, r. 3 (c). As to special directions touching the carriage or execution of the judgment, or service of it upon persons not parties, see R. S. C., Ord. 55, r. 9.

(*d*) *Ibid.*, Ord. 39, r. 1; Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 19. The procedure in an appeal under R. S. C., Ord. 39, r. 1, is regulated by R. S. C., Ord. 58, p. 200, *post*. For the constitution of the Court of Appeal, see title COURTS, Vol. IX., pp. 62 *et seq.*

(*e*) R. S. C., Ord. 39, r. 1A; Judicature Act, 1890 (53 & 54 Vict. c. 44). As to these powers of the Court of Appeal, see R. S. C., Ord. 58, p. 200, *post*; *Rickaby* v. *Rickaby*, [1901] P. 134, C. A.; *Radam's (William) Microbe Killer Co.* v. *Leather*, [1892] 1 Q. B. 85, C. A.

(*f*) R. S. C., Ord. 39, r. 1.

(*g*) *Ibid.*, Ord. 58 (appeal); *ibid.*, Ord. 39 (new trial).

both cases, and has power to enter judgment where the application is only for a new trial (*h*).

SECT. 2.—*When Appeal Lies.*

Appeal from final judgment or order.

354. There is a right of appeal (*i*) from a final judgment or order given on the trial of an action in the High Court in any civil case, as well as a right to apply for a new trial of such action or to set aside the verdict given therein; but there is no such right where there has been a judgment or order by consent (*k*) or an undertaking not to appeal (*l*), or where the judge has given a decision as an arbitrator (*m*); nor does any appeal lie from a judgment in the High Court in any criminal cause or matter (*n*).

Appeal by leave only.

There is a right of appeal to the Court of Appeal from any other final order of the High Court, except in cases where the right is excluded (*o*). An appeal does not, except with leave, lie from the judgment of the Divisional Court given on an appeal from an inferior court (*p*); nor does an appeal, except in certain cases (*q*),

(*h*) R. S. C., Ord. 40, r. 10; and see p. 200, *post*.

(*i*) As to the jurisdiction of judges of the Court of Appeal, see title COURTS, Vol. IX., p. 62.

(*k*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 49.

(*l*) *Re West Devon Great Consols Mine* (1888), 38 Ch. D. 51, C. A.; *Re Hull and County Bank, Trotter's Claim* (1879), 13 Ch. D. 26, C. A.; *Jones* v. *Victoria Graving Dock Co.* (1877), 2 Q. B. D. 314, C. A.

(*m*) *Burgess* v. *Morton*, [1896] A. C. 136.

(*n*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 47; see titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 432; CROWN PRACTICE, Vol. X., p. 73; *R.* v. *Wiltshire Justices, Ex parte Jay*, [1912] 1 K. B. 566, C. A.; *Scott* v. *Scott*, [1912] W. N. 198, C. A. No appeal lies to the Court of Appeal from an order discharging a prisoner under a *habeas corpus* (*Cox* v. *Hakes* (1890), 15 App. Cas. 506).

(*o*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 19; Judicature (Procedure) Act, 1894 (57 & 58 Vict. c. 16), s. 1.

(*p*) When there is a right of appeal to the High Court from any other court or person, the appeal is determined by the Divisional Court, and there is no appeal from the decision of the Divisional Court except by leave of the Divisional Court or the Court of Appeal; see *Wynne-Finch* v. *Chaytor*, [1903] 2 Ch. 475, C. A.; *McHarg* v. *Universal Stock Exchange*, [1895] 2 Q. B. 81; *Moore, Nettlefold & Co.* v. *Singer Manufacturing Co.*, [1904] 1 K. B. 820, C. A.; *Fraser* v. *Fraser*, [1905] 1 K. B. 368, C. A.; and see title INTERPLEADER, Vol. XVII., p. 618 (summary decision of Divisional Court). No appeal lies to the Court of Appeal from the decision of a judge as to the sufficiency of a stamp on a document (*Blewitt* v. *Tritton*, [1892] 2 Q. B. 327, C. A.).

(*q*) *I.e.*, (i.) where the liberty of the subject or the custody of infants is concerned (*Bowden* v. *Yoxall*, [1901] 1 Ch. 1, C. A.); (ii.) granting or refusing an injunction, or appointing a receiver (*Bright* v. *River Plate Construction Co.* (1901), 17 T. L. R. 708, C. A.); (iii.) a decision determining the claim of a creditor, or the liability of a contributory or of a director or other officer under the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), in respect of misfeasance or otherwise; (iv.) any decree *nisi* in a matrimonial cause, and any judgment or order in an Admiralty action determining liability; (v.) any order on a special case stated under the Arbitration Act, 1889 (52 & 53 Vict. c. 49); (vi.) such other cases to be prescribed by Rules of Court as may, in the opinion of the authority for making such Rules, be of the nature of final decisions; see *Chillingworth* v. *Chambers* (No. 2), [1895] W. N. 135, 136; Judicature (Procedure) Act, 1894 (57 & 58 Vict. c. 16), s. 1 (1) (b).

SECT. 2. When Appeal Lies.

lie from any interlocutory order or judgment by a judge, without the leave of the judge or of the Court of Appeal (*r*); nor, except by leave, does an appeal lie from an order as to costs only, which are by law left to the discretion of the court (*s*), or from an order allowing extension of time for appealing from a judgment or order (*t*) or from an order giving unconditional leave to defend an action (*u*).

Matters of practice and procedure.

355. In matters of practice and procedure every appeal from a judge is to the Court of Appeal (*v*).

Jurisdiction.

356. The Court of Appeal has appellate jurisdiction and certain original jurisdiction incident to the determination of an appeal (*a*).

(*r*) Judicature (Procedure) Act, 1894 (57 & 58 Vict. c. 16), s. 1 (1) (b). An order refusing unconditional leave to defend an action is not an interlocutory order within this provision. As to what are interlocutory orders, see title JUDGMENTS AND ORDERS, Vol. XVIII., pp. 178—181.

(*s*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 49; see p. 180, *ante*.

(*t*) Judicature (Procedure) Act, 1894 (57 & 58 Vict. c. 16), s. 1 (1) (a).

(*u*) *Ibid.*, s. 1 (3).

(*v*) *Ibid.*, s. 1 (4). Instances of applications held to be matters of practice and procedure are *Re Oddy*, [1895] 1 Q. B. 392, C. A. (summons to review taxation of a solicitor's bill of costs); *McHarg* v. *Universal Stock Exchange*, [1895] 2 Q. B. 81 (summons for an interim injunction); *Hockley* v. *Ansah*, (1896), 44 W. R. 666 (application for a garnishee order); *Re Portland Urban District Council and Tilley & Co.*, [1896] 2 Q. B. 98 (application for leave to revoke a submission to arbitration); *Cannon Brewery Co.* v. *Gilby* (1896), 75 L. T. 407, C. A. (application for leave to enter final judgment under R. S. C., Ord. 14); *Hood Barrs* v. *Cathcart* (1895), 11 T. L. R. 262, C. A. (application to appoint a receiver); *Wilson* v. *Parker* (1895), 39 Sol. Jo. 180, C. A. (application for leave to issue a writ of execution); *Black* v. *Dawson*, [1895] 1 Q. B. 848, C. A. (application for leave to issue writ for service out of the jurisdiction); *Yonge* v. *Toynbee*, [1910] 1 K. B. 215, C. A. (application that the solicitors for the defendants should be ordered personally to pay the plaintiff's costs); see also *Honduras Banking Co.* v. *La Compagnie Générale etc.* (1896), 40 Sol. Jo. 288, 289, C. A. Instances of matters held not to be matters of practice and procedure are *Watson* v. *Petts*, [1899] 1 Q. B. 54, C. A.; *Morton* v. *Emanuel* (1898), 43 Sol. Jo. 97 (application for writ of prohibition to restrain an inferior court from exceeding its jurisdiction); *Long* v. *Great Northern and City Railway*, [1902] 1 K. B. 813, C. A. (order under the Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 41); *Re Frere and Staveley, Taylor & Co. and North Shore Mill Co.*, [1905] 1 K. B. 366, C. A. (order directing arbitrator to state a case; compare *Re Colman and Watson* (1907), 97 L. T. 857, C. A.); *Re Marchant*, [1908] 1 K. B. 998, C. A. (order made on originating summons to compel a solicitor to pay a sum of money in pursuance of his undertaking).

(*a*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 4; see title COURTS, Vol. IX., p. 63. The Court of Appeal, for the purposes of and incidental to the hearing and determination of any appeal within its jurisdiction and the amendment, execution, and enforcement of any judgment or order made on any such appeal, has all the power, authority and jurisdiction vested by the Judicature Act, 1873 (36 & 37 Vict. c. 66), in the High Court (*ibid.*, s. 19; see *ibid.*, ss. 23, 24); Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 22; and see *Re Dunraven Adare Coal and Iron Co.* (1875), 24 W. R. 37, C. A.; *Allan* v. *United Kingdom Electric Telegraph Co.* (1876), 24 W. R. 898, C. A.; *Re Whitehead* (1885), 28 Ch. D. 614, C. A.; *Polini* v. *Gray*, *Sturla* v. *Freccia* (1879), 12 Ch. D. 438, C. A.; *Hyde* v. *Warden* (1876), 1 Ex. D. 309, C. A. As to appeals to the Court of Appeal in particular matters or proceedings, see titles ADMIRALTY, Vol. I., pp. 125, 126; AGRICULTURE, Vol. I., p. 265 (award in compensation matters);

SECT. 3.—*Who may Appeal.*

SECT. 3. Who may Appeal.

Appellant.

357. Any of the parties to an action and any persons served with notice of judgment may appeal without leave, unless the appeal does not lie except with leave. A person, who is not a party to an action and who has not been served with notice of the judgment, cannot appeal without leave, but a person who might properly have been a party may obtain leave to appeal (*b*).

Bankrupt appellant.

A party who has become bankrupt may proceed with the appeal, if it involves a question as to his status (*c*), or if the order appealed from prevents him from earning his living (*d*).

Death of appellant.

358. If an appellant dies, his legal personal representative may prosecute the appeal on obtaining an order to carry on the proceedings (*e*).

Appeal by one of several parties.

An appeal may be brought by one of several plaintiffs or defendants, although the others will not join (*f*).

ARBITRATION, Vol. I., pp. 481 (reference out of court), 492 (reference under order of court); BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 303, 304; COMPANIES, Vol. V., pp. 548 *et seq.*, 609; COUNTY COURTS, Vol. VIII., pp. 650 *et seq.*; CROWN PRACTICE, Vol. X., pp. 12, 26, 73, 74, 123, 124, 139, 189; DAMAGES, Vol. X., pp. 349, 350; ELECTIONS, Vol. XII., p. 256; ESTATE AND OTHER DEATH DUTIES, Vol. XIII., pp. 226, 227; EXECUTION, Vol. XIV., p. 124; EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 157 (probate matters); HUSBAND AND WIFE, Vol. XVI., pp. 557 *et seq.* (matrimonial causes); INCOME TAX, Vol. XVI., p. 682; JUDGMENTS AND ORDERS, Vol. XVIII., pp. 180, 181; MAGISTRATES, Vol. XIX., p. 666; MASTER AND SERVANT, Vol. XX., p. 300 (workmen's compensation); MAYOR'S COURT, LONDON, Vol. XX., p. 300; REVENUE; SHIPPING AND NAVIGATION.

(*b*) If a person alleging himself to be aggrieved by the judgment or order can make out a *primâ facie* case why he should have leave, he will, as a rule, get it (*Re Securities Insurance Co.*, [1894] 2 Ch. 413, C. A.; *Re Markham, Markham* v. *Markham* (1880), 16 Ch. D. 1, C. A.; *A.-G.* v. *Ailesbury* (*Marquis*) (1885), 16 Q. B. D. 408, 412, C. A.; *Re Madras Irrigation and Canal Co., Wood* v. *Madras Irrigation and Canal Co.* (1883), 23 Ch. D. 248, C. A.). But leave will not be given where the applicant could not have been a party (*Re Youngs, Doggett* v. *Revett* (1885), 30 Ch. D. 421, C. A.; *Crawcour* v. *Salter* (1882), 30 W. R. 329; *The Millwall*, [1905] P. 155, 162, C. A.). A plaintiff who lets judgment go against him by default cannot appeal, but should apply to the court which gave judgment to have the case restored and heard (*Walker* v. *Budden* (1879), 5 Q. B. D. 267, C. A.; *Vint* v. *Hudspith* (1885), 29 Ch. D. 322, n., C. A.; see *Allum* v. *Dickinson* (1882), 9 Q. B. D. 632, C. A.). A defendant who does not appear may, it seems, appeal (*Re Grove* (1888), 4 T. L. R. 272, C. A.). In a representative action a member of a class represented by the plaintiff cannot appeal from an order obtained by the plaintiff, but should apply to the court below to be added as defendant (*Watson* v. *Cave* (No. 1) (1881), 17 Ch. D. 19, C. A.); see p. 104, *ante*. If the defendant in a test action refuses to appeal, the court may allow a defendant in one of the other actions to appeal on his own behalf (*Briton Medical and General Life Assurance* v. *Jones* (1889), 60 L. T. 637).

(*c*) *G.* v. *M.* (1885), 10 App. Cas. 171; *Dence* v. *Mason* (1879), 41 L. T. 573, C. A.

(*d*) *United Telephone Co.* v. *Bassano* (1886), 31 Ch. D. 630, C. A. As to security for costs, see p. 199, *post*.

(*e*) R. S. C., Ord. 17, r. 4; *Ranson* v. *Patton* (1881), 17 Ch. D. 767, C. A.

(*f*) *Beckett* v. *Attwood* (1881), 18 Ch. D. 54, C. A.

SECT. 4. Time for Appeal.

SECT. 4.—*Time for Appeal.*

Time for appeal.

359. No appeal to the Court of Appeal from any interlocutory order or from any order, whether final or interlocutory, in any matter not being an action (*g*), can be brought after the expiration of fourteen days, and no other appeal can be brought after the expiration of three months (*h*); but the Court

(*g*) For instances of appeals from orders "in any matter not being an action," see *Austin Friars Steamship Co.* v. *Strack*, [1906] 2 K. B. 499, C. A.; *Re Arbenz' Application* (1887), 35 Ch. D. 248, 257, C. A.; *Re Baillie's Trusts* (1877), 4 Ch. D. 785, C. A.; *Re Blyth and Young* (1880), 13 Ch. D. 416, C. A.; *Re Ricketts and Avent's Contract*, [1890] W. N. 16; *Re Walker and Oakshott's Contract*, [1902] W. N. 147, C. A.).

(*h*) R. S. C., Ord. 58, r. 15. This is subject to the powers of the court to enlarge the time under *ibid.*, Ord. 64, r. 7. As to the calculation of the time, see *ibid.*, r. 12; and see, generally, title TIME. The periods mentioned are to be calculated, in the case of an appeal from an order in chambers, from the time when the order was pronounced, or when the appellant first had notice, and in all other cases from the time when the judgment and order is signed, entered, or otherwise perfected, or, in the case of the refusal of an application, from the date of the refusal (*ibid.*, Ord. 58, r. 15); and see title JUDGMENTS AND ORDERS, Vol. XVIII., p. 206. As to what is an interlocutory and what is a final judgment, see title JUDGMENTS AND ORDERS, Vol. XVIII., pp. 178—181; and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 335. In the Chancery Division, unless the judge gives leave to appeal direct, or certifies that he does not wish to hear the case further argued, an appeal from an order made at chambers must be preceded by a motion to discharge the order (*Rigg* v. *Hughes* (1884), 9 P. D. 68, C. A.; *Dickson* v. *Harrison* (1878), 9 Ch. D. 243, C. A.; *Holloway* v. *Cheston* (1882), 19 Ch. D. 516; *Re Pearce*, [1899] W. N. 114, C. A.; *Re Giles, Real and Personal Advance Co.* v. *Mitchell* (1890), 43 Ch. D. 391, C. A.; *Re Hardwidge* (1884), 52 L. T. 40; *Re Harry (J. H.) & Co., Ltd.* (1906), 121 L. T. Jo. 63; *Forrester* v. *Jones*, [1899] W. N. 78). If an application is simply refused, the applicant knows it at the time the application is disposed of, and the time for appealing therefore runs from the refusal, but if the application is only partly granted, it is reasonable that he should know the precise terms of the order drawn up before deciding whether he will appeal (*Berdan* v *Birmingham Small Arms and Metal Co.* (1877), 7 Ch. D. 24, C. A.). The same rule applies to the dismissal of an action (*International Financial Society* v. *City of Moscow Gas Co.*, *City of Moscow Gas Co.* v. *International Financial Society* (1877), 7 Ch. D. 241, 243, C. A.), and where the order refusing the application contains provisions as to costs which necessitates it being drawn up and entered (*Swindell* v. *Birmingham Syndicate*, *Birmingham Syndicate* v. *Swindell* (1876), 3 Ch. D. 127, 131, C. A.; *Re Smith*, *Hooper* v. *Smith* (1884), 26 Ch. D. 614, C. A.; *Jones* v. *Andrews* (1888), 58 L. T. 601, C. A.; *Re Roberts*, [1890] W. N. 23). Where several distinct claims are joined in one application and some are refused, the rule applies so far as an appeal from the refusal is concerned (*Trail* v. *Jackson* (1876), 4 Ch. D. 7, C. A.; *Berdan* v. *Birmingham Small Arms and Metal Co.*, *supra*); but it does not apply where there is but one claim and relief is granted as to part and refused as to part (*Shelfer* v. *City of London Electric Lighting Co.*, *Meux's Brewery Co.* v. *City of London Electric Lighting Co.*, [1895] 1 Ch. 287, 307, C. A.); nor does it apply where the order refusing the application contains a declaration which binds the rights of the parties (*Re Clay and Tetley* (1880), 16 Ch. D. 3, 7, C. A.; *Re Roberts*, *supra*), nor to a refusal at the trial to allow an amendment of the pleadings (*Laird* v. *Briggs* (1881), 16 Ch. D. 663, C. A.). As to appeal against an order made on further consideration and on hearing of the summons to vary the certificate on which the order was made, see R. S. C., Ord. 58, r. 15A

of Appeal has power to enlarge the above-mentioned times for appealing (*i*).

Ex parte applications.

360. Where an *ex parte* application has been refused by the court below, an application for a similar purpose may be made to the Court of Appeal *ex parte* within four days from the date of such refusal, or within such enlarged time as a judge of the court below or of the Court of Appeal may allow (*k*).

SECT. 5.—*Notice and Entry of Appeal.*

Notice of motion.

361. All appeals to the Court of Appeal are by notice of motion. The appellant may by the notice of motion appeal from the whole or any part of any judgment or order, and the notice of motion should specify whether the whole or part only of such judgment or order is complained of, and what is the point complained of (*l*).

Length of notice of appeal.

362. Notice of appeal from any judgment, whether final or

Marsland v. *Hole* (1889), 40 Ch. D. 110, C. A.; *Saunders Davies* v. *Baillie*, [1907] W. N. 237, C. A.

(*i*) R. S. C., Ord. 58, r. 15, as altered by R. S. C., May, 1909, and *ibid.*, Ord. 64, r. 7. As to the extension of time, see *Nicholson* v. *Piper* (1907), 24 T. L. R. 16, C. A.; *International Financial Society* v. *City of Moscow Gas Co.*, *City of Moscow Gas Co.* v. *International Financial Society* (1877), 7 Ch. D. 241, 247, C. A.; *Highton* v. *Treherne* (1878), 48 L. J. (Q. B.) 168, C. A.; *Collins* v. *Paddington Vestry* (1880), 5 Q. B. D. 368, C. A.; *Curtis* v. *Sheffield* (1882), 21 Ch. D. 1, 5, C. A.; *McAndrew* v. *Barker* (1878), 7 Ch. D. 701, C. A.; *Re Blyth and Young* (1880), 13 Ch. D. 416, 420, C. A.; *Re New Callao* (1882), 22 Ch. D. 484, 492, C. A.; *Re Manchester Economic Building Society* (1883), 24 Ch. D. 488, 500, C. A.; *Re Bradshaw*, *Bradshaw* v. *Bradshaw*, [1906] W. N. 86, C. A.; *Weldon* v. *De Bathe* (1887), 3 T. L. R. 445, C. A.; *Cusack* v. *London and North Western Rail. Co.*, [1891] 1 Q. B. 347, C. A.; *Illingworth* v. *Melbourne Parish Council* (1902), 18 T. L. R. 775, C. A. As to special grounds for extension of time, see *Re Bradshaw*, *Bradshaw* v. *Bradshaw*, *supra*; *Cray* v. *Phillips* (1877), 7 Ch. D. 249, C. A. (doubtful point of law); *Re Gilbert*, *Ex parte Viney* (1877), 4 Ch. D. 794, C. A.; *Re Mansel*, *Rhodes* v. *Jenkins* (1878), 7 Ch. D. 711, C. A.; *Re Helsby*, *Ex parte Trustee*, [1894] 1 Q. B. 742, 745, C. A.; *Re Coles and Ravenshear*, [1907] 1 K. B. 1, C. A.; *Nicholson* v. *Piper*, *supra*; *Baker* v. *Faber*, [1908] W. N. 9, C. A.; *Rumbold* v. *London County Council* (1909), 100 L. T. 259, C. A.; *Highton* v. *Treherne*, *supra*; *Haydon* v. *Cartwright*, [1902] W. N. 163, C. A. (mistake of solicitor or counsel); *Re Blyth and Young*, *supra* (formal notice not given in time, but informal notice given); *Esdaile* v. *Payne* (1889), 40 Ch. D. 520, 533, C. A. (successful appeal by one of several defendants); *Re Padstow Total Loss and Collision Assurance Association* (1882), 20 Ch. D. 137, C. A.; *Re Tucker*, *Ex parte Tucker* (1879), 12 Ch. D. 308, C. A. (appeal by non-parties); *Re Lamb* (1889), 23 Q. B. D. 477, C. A. (non-appearance of appellant). Leave cannot be granted by a judge at chambers or by any court other than the Court of Appeal (*Sellar* v. *Bright & Co.* (1904), 20 T. L. R. 586, C. A.), and no appeal lies to the House of Lords from refusal by the Court of Appeal to grant leave (*Lane* v. *Esdaile*, [1891] A. C. 210). The affidavits in support of the application must show clearly the nature of the reason for the delay and the circumstances under which it arose (*Weldon* v. *De Bathe*, *supra*). The application must be by notice of motion, which must be served on the respondent, and cannot be made *ex parte* (*Re Lawrence*, *Evennett* v. *Lawrence* (1876), 4 Ch. D. 139, C. A.).

(*k*) R. S. C., Ord. 58, r. 10; see *Re Clook* (1890), 15 P. D. 132, C. A.

(*l*) R. S. C., Ord. 58, r. 1.

SECT. 5. Notice and Entry of Appeal.

interlocutory, must be a fourteen days' notice, and notice of appeal from an interlocutory order must be a four days' notice (*m*).

Service.

363. The notice of appeal must be served on all parties directly affected by the appeal, but parties not so affected need not be served (*n*).

Notice of motion for new trial.

364. The application for a new trial is made by notice of motion, which must state the grounds of the application, and whether all or part only of the verdict or findings is complained of (*o*).

The notice of motion must be a fourteen days' notice, and must be served within ten days after the trial, or where further consideration has been adjourned within ten days after judgment has been given: the time of the vacations is not reckoned in the computation of the time for service (*p*).

(*m*) R. S. C., Ord. 58, r. 3; Ord. 39, r. 4; see *ibid.*, Ord. 64, r. 12; *Re National Stores, Ltd.*, [1900] 1 Ch. 27, C. A. The notice of appeal must be given and the appeal entered, it seems, within the time specified (*Re Taylor, Ex parte Bolton*, [1909] 1 K. B. 103; *Re Railway Sleepers Supply Co.* (1885), 29 Ch. D. 204). A notice given for a day not in the sittings may be good (*Re Coulton, Hamling* v. *Elliott* (1886), 34 Ch. D. 22; *Williams* v. *de Boinville* (1886), 17 Q. B. D. 180).

(*n*) R. S. C., Ord. 58, r. 2. Where a defendant appealed against an order discharging a rule for a new trial after a verdict against him and in favour of his co-defendant, the court required the co-defendant to be served (*Purnell* v. *Great Western Rail. Co.* (1876), 1 Q. B. D. 636, C. A.). So also where any one of several persons may be held entitled under a will, notice of appeal by one must be served on all the others (*Hunter* v. *Hunter* (1876), 24 W. R. 504, C. A.). A party who is affected, but has not been served, may still appear and be allowed his costs (*Re New Callao* (1882), 22 Ch. D. 484, C. A.). A third party (see p. 162, *ante*) need not be served with notice of appeal by the plaintiff in the action, but the defendant may apply for leave to serve him (*Re Salmon, Priest* v. *Uppleby* (1890), 42 Ch. D. 351, C. A.). Mere service does not necessarily entitle parties not affected to the costs of appearance (*Ex parte Webster* (1882), 22 Ch. D. 136; *Re Barry's Trusts, Barry* v. *Smart*, [1906] W. N. 153; *Harbin* v. *Masterman*, [1896] 1 Ch. 351, C. A.). The court generally allows the appeal to stand over where notice has not been served on persons who it considers ought to have been served; see *Hunter* v. *Hunter* (1876), 24 W. R. 504, C. A.; *Purnell* v. *Great Western Rail. Co.*, *supra*. The court has full discretion to allow an amendment of the notice of appeal; for instances, see *Re Stockton Iron Furnace Co.* (1879), 10 Ch. D. 335, C. A.; *Re Crosley, Munns* v. *Burn* (1887), 34 Ch. D. 664, C. A.

(*o*) R. S. C., Ord. 39, r. 3; see *Murfett* v. *Smith* (1887), 12 P. D. 116; *Taplin* v. *Taplin and Holland* (1888), 13 P. D. 100; *Pfeiffer* v. *Midland Rail. Co.* (1886), 18 Q. B. D. 244; *Hughes* v. *Dublin United Tramways Co.*, [1911] 2 I. R. 114. As to amending the notice, see R. S. C., Ord. 39, r. 5; *Pfeiffer* v. *Midland Rail. Co.*, *supra*; *Murfett* v. *Smith*, *supra*. As to the contents of the notice, see *Hughes* v. *Dublin United Tramways Co.*, *supra*.

(*p*) R. S. C., Ord. 39, r. 4 (altered to its present form in May, 1909, to meet the case of *Greene* v. *Croome*, [1908] 1 K. B. 277, C. A., which case, it seems, is no longer an authority); *Baker* v. *Faber*, [1908] W. N. 9, C. A.; *Fryer* v. *Church Agency, Ltd.* (1903), 47 Sol. Jo. 361, C. A.; *Murfett* v. *Smith*, *supra*; *Radam's (William) Microbe Killer Co.* v. *Leather*, [1891] 1 Q. B. 85, C. A. As to extension of time, see R. S. C., Ord. 64, r. 7; *Rumbold* v. *London County Council* (1909), 100 L. T. 259; *Peckett* v. *Short* (1884), 42 W. R. 123.

365. The appeal must be entered within the time limited for bringing it (*q*). Entry of appeal.

SECT. 6.—*Cross-Appeal.*

366. A respondent to an appeal need not give a notice of motion by way of cross-appeal, but if he intends, on the hearing of the appeal, to contend that the decision of the court below should be varied, he must give notice of his intention to any parties who may be affected by the contention (*a*). Cross-appeal

SECT. 7.—*Security for Costs of Appeal.*

367. The Court of Appeal in special circumstances may order security to be given by deposit or otherwise for the costs of an appeal (*b*). Security for costs.

(*q*) *Re Taylor, Ex parte Bolton*, [1909] 1 K. B. 103; *Re Dallmeyer* (1906), [1909] 1 K. B. 105, n., C. A. As to entering an appeal, see R. S. C., Ord. 58, r. 8; App. G, No. 23.

(*a*) *Ibid.*, Ord. 58, r. 6. The notice is an eight days' notice for an appeal from a final judgment and a two days' notice for an appeal from an interlocutory order (*ibid.*, r. 7). It is enough if the notice is given eight days before the case is heard (*Jaeger's Sanitary Woollen System Co.* v. *Walker & Sons* (1897), 41 Sol. Jo. 695; *Re Fox, Walker & Co., Ex parte Bishop* (1880), 15 Ch. D. 400, C. A.). A cross-notice can only be given under this rule in relation to the subject-matter of the action, and cannot be extended to matters not the subject of the action (*National Society for the Distribution of Electricity by Secondary Generators* v. *Gibbs*, [1900] 2 Ch. 280, C. A.), nor does it apply where the respondent seeks to vary the order on a point which does not concern the appellant (*Re Cavander's Trusts* (1881), 16 Ch. D. 270, C. A.). If a cross-notice has been given, the appellant cannot prevent the respondent having the point argued by withdrawing his notice of appeal (*ibid.*; *The Beeswing* (1884), 10 P. D. 18, C. A.). If a cross-notice has been given, the appellant can raise points not mentioned in his notice of appeal (*Cracknall* v. *Janson* (1879), 11 Ch. D. 1, 20, C. A.). A respondent may give a cross-notice to a co-respondent as well as to the appellant (*Re Cross, Ex parte Payne* (1879), 11 Ch. D. 539, C. A.). Where cross-notice is given, the respondent is in the same position as though he had brought a cross-appeal (*Harrison* v. *Cornwall Minerals Rail. Co.* (1881), 18 Ch. D. 334, 346, C. A.; *How* v. *Winterton (Earl)*, [1896] 2 Ch. 626, 641, C. A.; *The Lauretta* (1879), 4 P. D. 265, C. A.; *Robinson* v. *Drakes* (1883), 23 Ch. D. 98, C. A.; *Johnstone* v. *Cox* (1881), 19 Ch. D. 17, 21, C. A.).

(*b*) R. S. C., Ord. 58, r. 15. Security for costs is generally ordered when the respondent shows that the appellant, if unsuccessful, will be unable through poverty to pay the costs of the appeal (*Hall* v. *Snowden, Hubbard & Co.*, [1899] 1 Q. B. 593, C. A.; *Re Ivory, Hankin* v. *Turner* (1878), 10 Ch. D. 372, C. A.; *Re Spencer, Spencer* v. *Hart* (1881), 45 L. T. 396, C. A. (not following *Usil* v. *Brearley* (1878), 3 C. P. D. 206, C. A.)). This rule applies to motions for new trial (*Wightwick* v. *Pope*, [1902] 2 K. B. 99, C. A. (not following *Hecksher* v. *Crosley*, [1891] 1 Q. B. 224, C. A.); *Rickaby* v. *Rickaby*, [1901] P. 134, C. A.; see also *Harlock* v. *Ashberry* (1881), 19 Ch. D. 84, C. A.; *Farrer* v. *Lacy, Hartland & Co.* (1885), 28 Ch. D. 482, C. A.; *Rourke* v. *White Moss Colliery Co.* (1876), 1 C. P. D. 556; *Re Briton Medical and General Life Association* (1886), 2 T. L. R. 409, C. A.; *Thomas* v. *Doughty*, [1887] W. N. 51; *Clarke* v. *Roche* (1877), 25 W. R. 309). Security is ordered if the appellant is out of the jurisdiction (*Grant* v. *Banque Franco-Egyptienne* (1877), 2 C. P. D. 430, C. A.; *Re Musical Compositions, called "Kathleen Mavourneen" and "Dermot Astore,"* [1878] W. N. 215, C. A.; *Baird* v. *Hecquard* (1889), 5 T. L. R. 576, C. A.; *Re Indian, Kingston and Sandhurst Gold Mining Co.* (1882), 22 Ch. D. 83,

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SECT. 8.—*Powers on the Hearing of the Appeal.*

368. The Court of Appeal has all the powers and duties as to amendment and otherwise of the High Court, and full discretionary power to receive further evidence upon questions of fact (*c*).

General powers of Court of Appeal.

C. A.), but not if the appellant has goods within the jurisdiction which could be seized in execution (*Re Apollinaris Co.'s Trade-mark*, [1891] 1 Ch. 1, 3, C. A.). If there has been great delay in prosecuting the appeal, security may be ordered (*Smith* v. *White*, [1879] W. N. 203, C. A.). Security is not ordered where the liberty of the applicant is in question (*Hood-Barrs* v. *Heriot*, [1896] 2 Q. B. 375, C. A.), or where a solicitor appeals from an order to strike him off the rolls (*Re Strong* (1885), 31 Ch. D. 273, C. A.). As to an appeal in respect of a mere step in procedure, see *Baird* v. *Hecquard* (1889), 5 T. L. R. 576, C. A.; *Willmott* v. *Freehold House Property Co.*, [1885] W. N. 65, C. A. The application for security, which should be by notice of motion (R. S. C., Ord. 58, r. 18; *Grills* v. *Dillon* (1876), 2 Ch. D. 325, C. A.), and should be made promptly (*Saltash Corporation* v. *Goodman* (1880), 43 L. T. 464; *Re Indian, Kingston and Sandhurst Gold Mining Co.* (1882), 22 Ch. D. 83, C. A.; *Grant* v. *Banque Franco-Egyptienne* (1876), 1 C. P. D. 143, C. A.; *Pooley's Trustee* v. *Whetham* (1886), 33 Ch. D. 76, C. A.; *Ellis* v. *Stewart* (1887), 35 Ch. D. 459; *Re Clough, Bradford Commercial Banking Co.* v. *Cure* (1887), 35 Ch. D. 7, C. A.; *Morgan* v. *Hardisty* (1889), 6 T. L. R. 17, C. A.). Before application is made to the court, an application to give security should be made to the respondent (*The Constantine* (1879), 4 P. D. 156, C. A.; *Aberdare and Plymouth Co.* v. *Hankey* (1888), 32 Sol. Jo. 644). The order generally is that security should be given within a specified time, and that in default the appeal should be dismissed without further order and that the appellant pay the respondent's costs of the appeal. As to the amount of the security, see *Aberdare and Plymouth Co.* v. *Hankey*, *supra*; *Morecroft* v. *Evans*, [1882] W. N. 189, C. A. The order may be for the payment of money into court or for a bond to the satisfaction of the master (*Phosphate Sewage Co.* v. *Hartmont* (1876), 2 Ch. D. 811, C. A.; *Usil* v. *Brearley* (1878), 3 C. P. D. 206, C. A.; *Re Knight, Knight* v. *Gardner* (1888), 32 Sol. Jo. 305, C. A.). As to security for costs in bankruptcy appeals, see Bankruptcy Rules, 1886, r. 131; *Re Dallmeyer* (1906), [1909] 1 K. B. 105, n., C. A.; *Ex parte Burke* (1888), 4 T. L. R. 362, C. A.; *Re Grépe, Ex parte Grépe*, [1887] W. N. 83, C. A.; *Re McHenry* (1886), 17 Q. B. D. 351, C. A.; *Re Baum, Ex parte Isaacs* (1878), 9 Ch. D. 271, C. A.; *Re Phillips, Ex parte Treboeth Brick Co.*, [1896] 2 Q. B. 122; title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 307.

(*c*) R. S. C., Ord. 58, r. 4. It is doubtful whether the Court of Appeal can allow an amendment by adding third parties as defendants for the purpose of getting relief against them which was not asked for at the trial (*Edison and Swan United Electric Light Co.* v. *Holland* (1889), 41 Ch. D. 28, C. A.). The record may be amended if it has been wrongly drawn up (*Clack* v. *Wood* (1882), 9 Q. B. D. 276, C. A.). An objection to the jurisdiction can be taken at any time (*Norwich Corporation* v. *Norwich Electric Tramway Co.*, [1906] 2 K. B. 119, 129, C. A.), but not an objection to the procedure. An objection to procedure must be raised in the court below (*Davis* v. *Galmoye* (1889), 39 Ch. D. 322, C. A.; *Willmott* v. *London Celluloid Co.* (1886), 34 Ch. D. 47, C. A.).

A question of law upon the construction of documents or upon admitted facts may be raised for the first time in the Court of Appeal (*Connecticut Insurance Co.* v. *Kavanagh*, [1892] A. C. 473, 480, C. A.; *Montefiore* v. *Guedalla*, [1903] 2 Ch. 26, 31, C. A.; *The "Tasmania"* (*Owners*) v. *"City of Corinth"* (*Owners*), *The "Tasmania"* (1890), 15 App. Cas. 223, 225).

Further evidence may be given before the Court of Appeal either by oral examination in court, or by affidavit, or by deposition taken before an examiner or commissioner (R. S. C., Ord. 58, r. 4; *Re National Debenture and Assets Corporation*, [1891] 2 Ch. 505, 516, C. A.). It may be given without special leave on interlocutory applications, or in any case as to

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The Court of Appeal has also power to draw inferences of fact and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require (*d*).

matters which have occurred after the date of the decision from which the appeal is brought. On appeals from a judgment after trial or hearing of any cause or matter upon the merits, such further evidence (save as aforesaid) is admitted only on special grounds and with special leave (R. S. C., Ord. 58, r. 4; *Re National Debenture and Assets Corporation*, [1891] 2 Ch. 505, 516, C. A.; *Re Compton, Norton* v. *Compton* (1884), 27 Ch. D. 392, C. A.). The grounds on which the court may exercise its discretion vary considerably, and each case depends upon its own circumstances (*Re Neath Harbour Smelting and Rolling Works* (1885), 2 T. L. R. 94, C. A.); but the court acts with great caution in exercising its discretion (*Shoe Machinery Co.* v. *Cutlan*, [1896] 1 Ch. 108, 116, C. A.), and will not allow parties to bolster up their case by further evidence except in special cases (*Evans* v. *Benyon* (1887), 37 Ch. D. 329, 345, C. A.). The appellant should have brought forward his whole case at the trial (*Re Phœnix Bessemer Steel Co., Ex parte Carnforth Hæmatite Iron Co.* (1876), 4 Ch. D. 116, C. A.; *Re New York Exchange* (1888), 39 Ch. D. 415, 420, C. A.; *Weston's Case* (1879), 10 Ch. D. 579, 582, C. A.; *Taylor* v. *Grange* (1880), 15 Ch. D. 166). But if the court thinks the case has been decided upon insufficient evidence and the proposed fresh evidence is material and sufficient, it will admit the evidence (*Re Copiapo Mining Co., Ex parte Mashita* (1894), 10 T. L. R. 180, C. A.; *Re National Debenture and Assets Corporation, supra*, at p. 516). So also the court may allow evidence to be taken over again, where the note of the evidence taken in the court below has been lost (*Re Cowburn, Ex parte Firth* (1882), 19 Ch. D. 419, C. A.). Where no evidence at all has been given in the court below, the case is probably not within the rule at all (*Arnison* v. *Smith* (1889), 41 Ch. D. 98, 100, C. A.); but this does not apply where counsel for the defendant does not call evidence because the judge at the trial was prepared to order judgment in his favour at the close of the plaintiff's case (*Re Pincoffs, Ex parte Jacobson* (1882), 22 Ch. D. 312, C. A.). The court may allow fresh evidence in a case of surprise or confusion or error by which the court below has been deceived (*Bigsby* v. *Dickinson* (1876), 4 Ch. D. 24, C. A.; *Re Chennell, Jones* v. *Chennell* (1878), 8 Ch. D. 492, C. A.; *Sanders* v. *Sanders* (1881), 19 Ch. D. 373, 380, C. A.). Where a point is not taken in the court below and evidence could have been adduced there which, had it been taken, would have prevented the appeal from succeeding, the Court of Appeal does not allow the point to be taken in that court (*Re Cowburn, Ex parte Firth, supra; The "Tasmania" (Owners)* v. *"City of Corinth" (Owners), The "Tasmania"* (1890), 15 App. Cas. 223, 225; *Re Walton, Ex parte Reddish* (1877), 5 Ch. D. 882, C. A.; *Re O'Shea's Settlement, Courage* v. *O'Shea*, [1895] 1 Ch. 325, C. A.); but see *Misa* v. *Currie* (1876), 1 App. Cas. 554.

It is not necessary, though it is a convenient practice, to give a separate notice of motion for leave to adduce further evidence. It is generally sufficient to give notice that leave will be asked, when the case comes on before the court (*Re Chennell, Jones* v. *Chennell, supra*, at p. 505; *Justice* v. *Mersey Steel and Iron Co.* (1875), 24 W. R. 199, C. A.; *Hastie* v. *Hastie* (1876), 1 Ch. D. 562, C. A.; *Dicks* v. *Brooks* (1880), 13 Ch. D. 652, C. A.). If the respondent intends to object to the production of fresh evidence, he should merely wait till the hearing and apply, if necessary, for time to answer the evidence if it is allowed (*Mitchell* v. *Condy*, [1881] W. N. 83, C. A.). If a postponement is desired on the ground of the discovery of fresh evidence, a substantive application should be made before the case comes on (*Exchange and Discount Bank* v. *Billinghurst*, [1880] W. N. 2, C. A.). If leave to adduce further evidence has not been given, the costs of a witness attending to give such evidence, but who is not called, are not allowed (*Leeds Forge Co., Ltd.* v. *Deighton's Patent Flue and Tube Co., Ltd.*, [1903] 1 Ch. 475).

(*d*) R. S. C., Ord. 58, r. 4.

SECT. 8.

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Number of judges.

369. Appeals in an interlocutory matter may be heard before two judges of the Court of Appeal; final appeals must be heard before three judges, unless all parties to the appeal, before the hearing, file a consent to the appeal being heard before two judges (*e*).

Powers on hearing of application for new trial.

370. On the hearing of an application for a new trial, after trial with a jury, the Court of Appeal may give judgment for the appellant, without sending the case back for a new trial, where it has before it the materials necessary for finally determining the question in dispute between the parties, or for awarding the relief sought (*f*). If, however, the facts are not clear, judgment is not given (*g*). Again, if, on the hearing of an appeal, where the trial was without a jury, it appears to the Court of Appeal that a new trial should be had, the Court of Appeal may order a new trial (*h*).

Principles on which court acts on hearing appeals.

371. In hearing appeals where the trial has been without a jury the Court of Appeal acts on different principles, and is less bound by the decision of the court below on questions of fact than it is on hearing applications for a new trial where the trial has been with a jury, but still the presumption is that the decision appealed against is right, and the appellant must satisfactorily make out that the judge below was wrong (*i*). As, however, the duty of the court is to rehear the case, since every appeal is by way of rehearing (*k*), it

(*e*) Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 12; Judicature Act, 1899 (62 & 63 Vict. c. 6), s. 1; *Haworth* v. *Pilbrow*, [1912] W. N. 6, C. A.; and see title COURTS, Vol. IX., p. 64.

(*f*) R. S. C., Ord. 40, r. 10; *Hamilton* v *Johnson* (1880), 5 Q. B. D. 263, C. A.; *Bryant* v. *North Metropolitan Tramways Co.* (1890), 6 T. L. R. 396; *Chapleo* v. *Brunswick Building Society* (1881), 6 Q. B. D. 696, 714, C. A.; *Yorkshire Banking Co.* v. *Beatson* (1880), 5 C. P. D. 109, 127, C. A.; *Bobbett* v. *South Eastern Rail. Co.* (1882), 9 Q. B. D. 424, 431; *Daun* v. *Simmins* (1879), 40 L. T. 556.

(*g*) *Morton* v. *Palmer* (1881), 51 L. J. (Q. B.) 7, 11, C. A.; *Clark* v. *Molyneux* (1877), 3 Q. B. D. 237; *Milissich* v. *Lloyds* (1877), 46 L. J. (Q. B.) 404; *Brewster* v. *Durrand*, [1880] W. N. 27; *Perkins* v. *Dangerfield*, [1879] W. N. 172.

(*h*) R. S. C., Ord. 58, r. 5.

(*i*) *Savage* v. *Adam*, [1895] W. N. 109, C. A.; *Colonial Securities Trust Co.* v. *Massey*, [1896] 1 Q. B. 38, C. A.; and see *Khoo Sit Hoh* v. *Lim Thean Tong*, [1912] A. C. 323, P. C., as to the duty of the Court of Appeal with regard to the findings of the judge below based on verbal testimony.

(*k*) R. S. C., Ord. 58, r. 1. The Court of Appeal grants relief according to the law as it is when the appeal is heard (*Quilter* v. *Mapleson* (1882), 9 Q. B. D. 672, C. A.; but see *Eyre* v. *Wynn-Mackenzie*, [1896] 1 Ch. 135, C. A.). The Court of Appeal has no power to rehear an appeal after its order has been passed and entered (*Flower* v. *Lloyd* (1877), 6 Ch. D. 297, C. A.; compare *Birmingham and District Land Co.* v. *London and North Western Rail. Co.* (1886), 34 Ch. D. 261, 277, C. A.; *Re Hooper, Ex parte Banco de Portugal* (1880), 14 Ch. D. 1, C. A., which seem to suggest that possibly an appeal might in some cases be re-argued). If a judgment of the Court of Appeal has been obtained by fraud an action may be brought to set it aside (*Cole* v. *Langford*, [1898] 2 Q. B. 36; *Birch* v. *Birch*, [1902] P. 130, C. A.; and see title JUDGMENTS AND ORDERS, Vol. XVIII., pp. 212, 216). As to the rectification or discharge of an order for the payment of money in court, see *Cloutte* v. *Storey*, [1911] 1 Ch. 18, C. A.; *Re Williams' Settled Estates*, [1910] 2 Ch. 481.

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considers the materials which were before the judge below, and the additional materials, if any, before the court itself, and then makes up its own mind, carefully weighing and considering the judgment appealed against, and overruling it if, on full consideration, it comes to the conclusion that such judgment was wrong (*l*). Where the only question is as to the inferences to be drawn from evidence admitted to be true, the Court of Appeal is in as good a position to decide as the court below (*m*).

Effect of interlocutory order.

372. No interlocutory order or rule from which there has been no appeal operates so as to bar or prejudice the court from giving such decision upon the appeal as may be just (*n*).

Practice as to bringing evidence before the Court of Appeal.

373. When any question of fact is involved in an appeal, the evidence taken in the court below is, subject to any special order, brought before the Court of Appeal as follows (*o*):—If evidence was taken by affidavit, printed copies of such of the affidavits as have been printed and office copies of such as have not been printed are produced (*a*): if evidence was given orally, a copy of the judge's notes (*b*) is produced or such other materials as the court may deem expedient (*c*).

(*l*) *Coghlan* v. *Cumberland*, [1898] 1 Ch. D. 704, C. A.; *The Glannibanter* (1876), 1 P. D. 283, C. A.; *Bigsby* v. *Dickinson* (1876), 4 Ch. D. 24, C. A.; *Smith* v. *Land and House Property Corporation* (1884), 28 Ch. D. 7, 15, C. A.; *Re Wagstaff, Wagstaff* v. *Jalland* (1907), 98 L. T. 149, C. A.

(*m*) *Montgomerie & Co., Ltd.* v. *Wallace-James*, [1904] A. C. 73.

(*n*) *White* v. *Witt* (1877), 5 Ch. D. 589, C. A.; *Sugden* v. *St. Leonards* (*Lord*) (1876), 1 P. D. 209, C. A.

(*o*) R. S. C., Ord. 58, r. 11.

(*a*) See R. S. C., Ord. 36, r. 30; Ord. 66 (printed affidavits); Ord. 61, r. 7 (office copies); *Crawford* v. *Hornsea Steam Brick and Tile Works Co.* (1876), 24 W. R. 422, C. A.; *Sickles* v. *Norris* (1875), 45 L. J. (Q. B.) 148, C. A.

(*b*) Application must be made to the judge for a copy of his notes. As to the form, see Yearly Practice of the Supreme Court, 1912, p. 910. The appeal is not allowed to proceed till a copy of the judge's notes is produced (*Lewis* v. *Cory*, [1906] W. N. 95, C. A.; *Bailey* v. *Thurston & Co.* (1902), 47 Sol. Jo. 69; *Ellington* v. *Clark* (1888), 38 Ch. D. 332, C. A.). As to the practice of using the judge's notes, see (1912) 56 Sol. Jo. 540 (observations of VAUGHAN WILLIAMS, L.J.).

(*c*) The judge's notes, when supplemented by counsel's notes, if necessary, are sufficient, and, in the absence of agreement or special order, costs of the transcript of a shorthand writer's notes of the evidence are not allowed on taxation (*De la Warr* (*Earl*) v. *Miles* (1881), 19 Ch. D. 80, C. A.; *Glasier* v. *Rolls* (1890), 59 L. J. (CH.) 63, C. A.; *Pilling* v. *Joint Stock Institute* (1895), 73 L. T. 570, C. A.; *Rymill* v. *Neal* (1886), 2 T. L. R. 879, C. A.; see also *Bailey* v. *Thurston & Co.*, *supra*; *Yorkshire Laundries Co.* v. *Pickles*, [1901] W. N. 28, C. A.; title SOLICITORS); but where a transcript of the shorthand notes is indispensable, the costs are allowed (*Re Sprange, Ex parte Official Receiver* (1898), 77 L. T. 808; *Huddleston* v. *Furness Rail. Co.* (1899), 43 Sol. Jo. 295, C. A.; *Goldberg* v. *Liverpool Corporation* (1900), 82 L. T. 362, C. A.; *Castner Kellner Alkali Co.* v. *Commercial Development Corporation*, [1899] 1 Ch. 803, C. A.; *Re Duchess of Westminster Silver Lead Ore Co.* (1878), 10 Ch. D. 307; *Re Sharp, Ex parte Sharp* (1893), 10 Morr. 114). Shorthand notes taken by the clerk to one of the solicitors cannot be referred to (*Ellington* v. *Clark* (1888), 38

SECT. 8.
Powers on the Hearing of the Appeal.

If, on the hearing of an appeal, a question arises as to the ruling or direction of the judge to a jury or assessors, the court must have regard to verified notes or other evidence, and such other materials as the court may deem expedient (*d*).

SECT. 9.—*When New Trial will be Granted.*

By reason of course taken by judge at the trial.

374. A new trial may be ordered (*e*) if some substantial wrong has been occasioned at the trial by the judge misdirecting the jury (*f*), or improperly admitting or rejecting evidence (*g*), or if the judge did not leave to the jury a question which he was asked to leave to them, and which he ought to have left to them, or improperly left a case to the jury when there was no evidence in support of it (*h*), or if he gave judgment for the defendant upon the

Ch. D. 332, C. A.). The costs of a shorthand note of the judge's summing up to the jury are generally allowed without any special direction by the court (*Pilling* v. *Joint Stock Institute* (1895), 73 L. T. 570, C. A.; *Walley* v. *Great Central Railway* (1905), unreported, Yearly Practice of the Supreme Court, 1912, p. 911; *Andrews* v. *Mockford* (1876), 73 L. T. 730, C. A., is not followed in practice). The costs of a transcript of shorthand notes of the judgment are allowed in the absence of any direction to the contrary (*Re de Falbe, Ward* v. *Taylor*, [1901] 1 Ch. 523, C. A.; and see *Re McConnell, Saunders* v. *McConnell* (1885), 29 Ch. D. 76, C. A.). It is the duty of the appellant to bring before the court the evidence on which the order appealed against was founded, and if he does not do so the appeal may be dismissed (*Re Cowburn, Ex parte Firth* (1882), 19 Ch. D. 419, C. A.) or ordered to stand over at his expense (*Ellington* v. *Clark* (1888), 38 Ch. D. 332, C. A.), or he may be deprived of costs (*Re McConnell, Saunders* v. *McConnell, supra*), or the solicitor may be ordered to pay the costs personally (*Bailey* v. *Thurston & Co.* (1902), 47 Sol. Jo. 69; *Lewis* v. *Cory*, [1906] W. N. 95, C. A.). As to the costs of printing evidence, see R. S. C., Ord. 58, r. 12.

(*d*) *Ibid.*, r. 13. The best evidence as to the judge's ruling is the note of counsel (*Ex parte Skerratt* (1884), 28 Sol. Jo. 376).

(*e*) A new trial may be ordered on any question without interfering with the finding or decision upon any other question (R. S. C., Ord. 39, r. 7; *Marsh* v. *Isaacs* (1876), 45 L. J. (Q. B.) 505; *Purnell* v. *Great Western Rail. Co.* (1876), 1 Q. B. D. 636, C. A.). A new trial must not be ordered by reason of the ruling of any judge that any document is sufficiently stamped or does not require a stamp (R. S. C., Ord. 39, r. 8; *Blewitt* v. *Tritton*, [1892] 2 Q. B. 327, C. A.; *Lowe* v. *Dorling* (1905), 74 L. J. (K. B.) 794).

(*f*) *Bray* v. *Ford*, [1896] A. C. 44; *Anthony* v. *Halstead* (1877), 37 L. T. 433; *Jenoure* v. *Delmege*, [1891] A. C. 73, P. C.; *Smith* v. *Dart & Son* (1884), 14 Q. B. D. 105; *Jones* v. *Spencer* (1898), 77 L. T. 536; *Dakhyl* v. *Labouchere* (1907), [1908] 2 K. B. 325, n., H. L.; *Hunt* v. *Star Newspaper Co., Ltd.*, [1908] 2 K. B. 309, C. A.; *Anderson* v. *Calvert* (1908), 24 T. L. R. 399, C. A.

(*g*) *Manley* v. *Palache* (1895), 73 L. T. 98; *Faund* v. *Wallace* (1876), 35 L. T. 361; *Tait* v. *Beggs*, [1905] 2 I. R. 525, C. A.; *Maclaren & Sons* v. *Davis* (1890), 6 T. L. R. 372; *Evans* v. *Merthyr Tydfil Urban Council*, [1899] 1 Ch. 241, C. A.; *Ratcliffe* v. *Evans*, [1892] 2 Q. B. 524, C. A.; *Re Maplin Sands* (1894), 71 L. T. 56, C. A.; see *Wright* v. *Doe* d. *Tatham* (1837), 7 Ad. & El. 313, Ex. Ch.; *Crease* v. *Barrett* (1835), 1 Cr. M. & R. 919.

(*h*) *Nevill* v. *Fine Art and General Insurance Co.*, [1897] A. C. 68, 76; *Young* v. *Hoffman Manufacturing Co., Ltd.*, [1907] 2 K. B. 646, C. A.; see *Weiser* v. *Segar*, [1904] W. N. 93, C. A.; *Seaton* v. *Burnand*, *Burnand* v. *Seaton*, [1900] A. C. 135, 143; R. S. C., Ord. 39, r. 6.

SECT. 9.
When New Trial will be Granted.

plaintiff's opening without the plaintiff's consent, and without allowing him to call evidence (*i*), or if he improperly withdrew the case from the jury (*j*), or if he improperly allowed or refused to allow an amendment, postponement, or adjournment (*k*).

By reason of verdict or misconduct of jury.

375. A new trial may be ordered if the jury gave a verdict which was against the weight of evidence, and such that a jury reviewing the whole of the evidence reasonably could not properly find, or if the jury gave a perverse verdict (*l*), or awarded excessive and unreasonable damages (*m*) or damages which were too small (*n*), or arrived at their verdict by improper means (*o*), or were guilty of misconduct during (*p*) or before trial (*q*) which was of a nature to affect their verdict.

By reason of position or act of a party.

376. A new trial may be ordered, if a substantially wrong verdict has been given owing to one party having been taken by surprise (*r*), or owing to the misconduct of a party or his solicitor (*s*), or owing

(*i*) *Fletcher* v. *London and North Western Rail. Co.*, [1892] 1 Q. B. 122, C. A.; *Isaac* v. *Evans* (1900), 16 T. L. R. 480, C. A.

(*j*) *Brearley* v. *London and North Western Rail. Co.* (1899), 15 T. L. R. 237, C. A.; *Metropolitan Rail. Co.* v. *Jackson* (1877), 3 App. Cas. 193; *Kingston Race Stand* v. *Kingston Corporation*, [1897] A. C. 509, P. C.

(*k*) *Wilkin* v. *Read* (1854), 15 C. B. 192, 196.

(*l*) *Metropolitan Rail. Co.* v. *Wright* (1886), 11 App. Cas. 152; *Phillips* v. *Martin* (1890), 15 App. Cas. 193; *Hampson* v. *Guy* (1891), 64 L. T. 778, C. A.; *Allcock* v. *Hall*, [1891] 1 Q. B. 444 C. A.; *Jones* v. *Spencer* (1898), 77 L. T. 536; *Brown* v. *Railways Commissioner* (1890), 15 App. Cas. 240, P. C.; *Brisbane Municipality* v. *Martin*, [1894] A. C. 249, P. C.; *Webster* v. *Friedberg* (1886), 17 Q. B. D. 736, C. A.; *Ferrand* v. *Bingley Township Local Board* (1891), 8 T. L. R. 70, C. A.; *Seaton* v. *Sheridan* (1896), 12 T. L. R. 285, C. A.; *Mills* v. *Chesters* (1907), *Times*, 16th October; *Metropolitan Asylum Managers* v. *Hill* (1882), 47 L. T. 29; *Fachris* v. *De Rustafjaell* (1908), *Times*, 14th February; *Toronto Railway* v. *King*, [1908] A. C. 260, P. C.; and compare *Bradshaw* v. *House* (1912), 1 L. J. County Courts Reporter, 53.

(*m*) *Praed* v. *Graham* (1889), 24 Q. B. D. 53, C. A.; *Johnston* v. *Great Western Railway*, [1904] 2 K. B. 250, C. A.; *Anderson* v. *Calvert* (1908), 24 T. L. R. 399, C. A. A verdict may be set aside if the jury were misled (*e.g.*, by inflammatory speeches or material statements not supported by evidence), or took into consideration matters which they ought not to have considered or applied a wrong measure of damages (*Johnston* v. *Great Western Railway*, *supra*; *Praed* v. *Graham*, *supra*). The Court of Appeal cannot without the consent both of plaintiff and defendant reduce the damages or order a new trial unless the plaintiff consents to a reduction (*Watt* v. *Watt*, [1905] A. C. 115).

(*n*) *Phillips* v. *London and South Western Rail. Co.* (1879), 5 Q. B. D. 78, C. A.

(*o*) *E.g.*, by lot (*Harvey* v. *Hewitt* (1840), 8 Dowl. 598), or a compromise (*Hall* v. *Poyser* (1845), 13 M. & W. 600); *Falvey* v. *Stanford* (1874), L. R. 10 Q. B. 54.

(*p*) *Hughes* v. *Budd* (1840), 8 Dowl. 315; and see *Biggs* v. *Evans* (1912), 132 L. T. Jo. 606 (county court jury).

(*q*) *Allum* v. *Boultbee* (1854), 9 Exch. 738; *Campbell* v. *Hackney Furnishing Co., Ltd.* (1906), 22 T. L. R. 318.

(*r*) *Hartwright* v. *Badham* (1822), 11 Price, 383; *Dow* v. *Dickinson*, [1881] W. N. 52, C. A.; *Dillon* v. *City of Cork Steam Packet Co.* (1875), 9 I. R. C. L. 118; *Dickenson* v. *Fisher* (1887), 3 T. L. R. 459, C. A.; *Fachris* v. *De Rustafjaell*, *supra*.

(*s*) *Wolff* v. *Goldring* (1875), 44 L. J. (C. P.) 214.

SECT. 9. When New Trial will be Granted.

to the absence of a party or his solicitor or counsel (*t*), or owing to the discovery of fresh evidence which could not with reasonable diligence have been discovered before the trial (*a*), or owing to some inadvertence, mistake, or slip in the proceedings (*b*).

Where new trial not granted.

377. A new trial cannot be granted on the ground of misdirection, or the improper admission or rejection of evidence, or because the verdict of the jury was not taken upon a question which the judge at the trial was not asked to leave to them, unless in the opinion of the Court of Appeal some substantial wrong or miscarriage was thereby occasioned in the trial (*c*). A new trial will not be granted on a point which was not taken at the trial or not till after the case was closed (*c*).

Contradictory verdicts in cross-actions.

378. Where there are contradictory verdicts in cross actions, separately tried, which involve the same questions of law and fact, and the evidence at each trial is fairly balanced, a new trial of the actions together should be ordered (*d*).

Costs.

379. The costs of an application for a new trial are in the discretion of the Court of Appeal (*e*).

Notice of new trial and re-entry.

380. If a new trial is ordered, a fresh notice of trial must be given and the action re-entered for trial (*f*).

(*t*) *Williams* v. *Williams* (1833), 2 Dowl. 350; *Townley* v. *Jones* (1860), 29 L. J. (C. P.) 299; *Wolff* v. *Goldring* (1875), 44 L. J. (C. P.) 214.

(*a*) *Anderson* v. *Titmas* (1877), 36 L. T. 711; *Young* v. *Kershaw* (1900), 81 L. T. 531; *Turnbull & Co.* v. *Duval*, [1902] A. C. 429, P. C.

(*b*) *Germ Milling Co.* v. *Robinson* (1886), 3 T. L. R. 71, C. A.; *Groom* v. *Shuker* (1893), 69 L. T. 293; *Burrows* v. *London General Omnibus Co.* (1894), 10 T. L. R. 298, C. A.; *Stokes* v. *Latham* (1888), 4 T. L. R. 305, C. A.; *Neale* v. *Gordon Lennox*, [1902] A. C. 465; *Richardson* v. *Fisher* (1823), 1 Bing. 145.

(*c*) R. S. C., Ord. 39, r. 6. As to the principles which govern the application of the rule, see *Bray* v. *Ford*, [1896] A. C. 44, 47, 48, 53; *Floyd* v. *Gibson* (1909), 100 L. T. 761, C. A.; *Anderson* v. *Calvert* (1908), 24 T. L. R. 399, C. A.; *Allen* v. *Allen*, [1894] P. 248, 255, C. A.; *Eyre* v. *New Forest Union Highway Board* (1892), 8 T. L. R. 648, C. A.; *Page* v. *Bowdler* (1894), 10 T. L. R. 423; *Graham & Sons* v. *Huddersfield Corporation* (1895), 12 T. L. R. 36, C. A. The rule that there is no appeal upon any question of law not raised in the court below, and that an application should first be made to the judge for a new trial, only applies to points of law arising in the course of the case and not to misdirection in summing up (*Cresswell* v. *Jones and Andrews, Johnson* v. *Refuge Assurance* (1912), 1 L. J. County Courts Reporter, 28).

(*d*) *Australasian Steam Navigation Co.* v. *Smith & Sons* (1889), 14 App. Cas. 321, P. C. A judge may be asked during the summing up to correct any misstatement of fact; but should not be interrupted on any question of law (*Cresswell* v. *Jones and Andrews, Johnson* v. *Refuge Assurance*, *supra*).

(*e*) R. S. C., Ord. 65, r. 1; *Hamilton* v. *Seal*, [1904] 2 K. B. 262, C. A.; *Jones* v. *Richards* (1899), 15 T. L. R. 398, C. A.; *Metropolitan Asylum Managers* v. *Hill* (1882), 47 L. T. 29; *Field* v. *Great Northern Rail. Co.* (1878), 3 Ex. D. 261. If a new trial is ordered, the costs of the first trial usually abide the result of the second trial (*Jones* v. *Richards*, *supra*), and the costs of the application for a new trial are given to the party who is successful in the application (*Hamilton* v. *Seal*, *supra*).

(*f*) See p. 175, *ante*; *Robarts* v. *French* (1895), 43 W. R. 258, C. A.

SECT. 10. Costs of Appeal.

SECT. 10.—*Costs of Appeal.*

381. The Court of Appeal has power to make such order as to the whole or any part of the costs of the appeal as may be just (*g*). Costs.

(*g*) R. S. C., Ord. 58, r. 4. "Costs of the appeal" means additional expense incurred by reason of the appeal, not costs incurred in the court below; see *Kevans* v. *Joyce*, [1892] 1 I. R. 1, 5, C. A. The costs of an appeal are in the discretion of the Court of Appeal (Judicature Act, 1890 (53 & 54 Vict. c. 44), s. 5; R. S. C., Ord. 65, r. 1). The general rule is that a successful appellant gets his costs (Memorandum of Judges (1875), 1 Ch. D. 41, C. A.; *Olivant* v. *Wright* (1875), 45 L. J. (CH.) 1, C. A.; *The Gipsy Queen*, [1895] P. 176, C. A.; *The Toscana*, [1905] P. 148, C. A.; *The London*, [1905] P. 152, C. A.). The successful appellant may, however, if the court thinks fit, be deprived of his costs where the appellant has succeeded on a point not taken in the court below (*Hussy* v. *Horne-Payne* (1878), 8 Ch. D. 670, C. A.; *Goddard* v. *Jeffreys* (1882), 46 L. T. 904, C. A.; *Dye* v. *Dye* (1884), 13 Q. B. D. 147, C. A.; *Chard* v. *Jervis* (1882), 9 Q. B. D. 178, C. A.; *Arnot's Case* (1887), 36 Ch. D. 702, 710, C. A.; *Re O'Shea's Settlement, Courage* v. *O'Shea*, [1895] 1 Ch. 325, C. A.; but see *Re O. C. S.*, [1904] 2 K. B. 161, C. A.), or where he has failed to prove allegations of fraud (*Re Baum, Ex parte Cooper* (1878), 10 Ch. D. 313), or when there are several points and he has succeeded on one point only (*Elliot* v. *Rokeby* (*Lord*) (1882), 7 App. Cas. 43), or on fresh evidence (*Re Hemingway, Ex parte Hauxwell* (1883), 23 Ch. D. 626, C. A.), or where all the necessary materials have not been supplied to the court (*Re McConnell, Saunders* v. *McConnell* (1885), 29 Ch. D. 76, C. A.). A successful respondent may likewise be deprived of his costs, where his conduct has justified the appeal (*Paterson* v. *St. Andrews* (*Provost etc.*) (1881), 6 App. Cas. 833), or he has failed to give his opponent proper notices (*Re Blyth and Young* (1880), 13 Ch. D. 416, C. A.; *Re Speight, Ex parte Brooks* (1884), 13 Q. B. D. 42; compare *Re Mundy, Ex parte Shead* (1885), 15 Q. B. D. 338, C. A.), or where the court thinks the defence discreditable (*Jones* v. *Merionethshire Building Society*, [1892] 1 Ch. 173, C. A.; *Chard* v. *Jervis*, *supra*, at p. 183; *Re Cooper, Cooper* v. *Vesey* (1882), 20 Ch. D. 611, 636, C. A.; *Borthwick* v. *Evening Post* (1888), 37 Ch. D. 449, 465, C. A.), or where the appellant could not safely have abstained from taking the opinion of the Court of Appeal (*Re Levy, Ex parte Walton* (1881), 17 Ch. D. 746, 758, C. A.), or where the case was a novel one of general importance and difficulty (*Re Mersey Rail. Co.* (1888), 37 Ch. D. 610, 619, C. A.). If neither side wholly succeeds or wholly fails, there should be no costs of the appeal (*Jones* v. *Richards* (1899), 15 T. L. R. 398, C. A.; *Hamilton* v. *Seal*, [1904] 2 K. B. 262, C. A.). If an appeal is successful, the order of the court below as to costs and damages is set aside, and the general rule is to allow the costs of the appellant in the court below as well as in the Court of Appeal. As to the repayment of costs that have been paid, see *Hood-Barrs* v. *Heriot*, [1896] 1 Q. B. 610, C. A.; *Edge & Sons* v. *Gallon & Son*, [1899] W. N. 137; *Ashworth* v. *English Card Clothing Co., Ltd.* (No. 2), [1904] 1 Ch. 704; *Re Geipel's Patent*, [1904] 1 Ch. 239, C. A.; *Schweppes, Ltd.* v. *Gibbens*, [1904] W. N. 208, C. A.; *Griffiths* v. *Benn* (1911), 27 T. L. R. 346, C. A.

PRECATORY TRUSTS.

See EQUITY; GIFTS; TRUSTS AND TRUSTEES.

PREFERENCE.

See BANKRUPTCY AND INSOLVENCY; COMPANIES.

PRELIMINARY ACT.

See ADMIRALTY; SHIPPING AND NAVIGATION.

PREMIUM.

See INSURANCE.

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See CONSTITUTIONAL LAW.

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See COMMONS AND RIGHTS OF COMMON; EASEMENTS AND PROFITS À PRENDRE; FERRIES; FISHERIES; HIGHWAYS, STREETS, AND BRIDGES; MINES, MINERALS, AND QUARRIES; WATERS AND WATERCOURSES.

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Part I.—Formal Requirements.

SECT. 1.—*Registration of Newspapers* (*a*).

SUB-SECT. 1.—*Obligation to Register.*

Duty of printers and publishers.

382. The printers and publishers for the time being of every newspaper (*b*) must, during the month of July, make or cause to be made an annual return (*c*), containing certain statutory particulars, to the Registrar of Newspaper Returns (*d*), to be entered by him in the Register of Newspaper Proprietors (*e*).

(*a*) For registration for postal purposes, see title POST OFFICE, Vol. XXII., p. 646. As to the law of libel in relation to publication in registered newspapers, see title LIBEL AND SLANDER, Vol. XVIII., pp. 665, 666, 744 *et seq.*

(*b*) For the definition of "newspaper," see p. 211, *post.*

(*c*) Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60), s. 9. For form of the return, see *ibid.*, Sched. A. A separate return is required for each paper. The registration required by this Act is quite distinct from that required both for postal purposes and for the purpose of copyright. For the law relating to the latter, see title COPYRIGHT AND LITERARY PROPERTY, Vol. VIII., p. 154.

(*d*) Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60), s. 9. The word "registrar" is defined by *ibid.*, s. 1, to mean the registrar for the time being of joint stock companies (see title COMPANIES, Vol. V., pp. 59 *et seq.*), or such other person as the Board of Trade may for the time being authorise in that behalf. The business of registration is carried on at Somerset House, London, W.C., Room No. 7, where the Register may be inspected.

(*e*) Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60), s. 13. The provision as to fees is contained in *ibid.*, s. 14, by which the Board of Trade, with the approval of the Treasury, may impose such fees as are necessary to meet the expenses of registration. The fees which the Board of Trade has, with the approval of the Treasury, directed to be paid are as follows:—

	£	s.	d.
For the registration for the first time of any "representative proprietor"	1	0	0
On registration in other cases	0	10	0
On the rendering of subsequent returns under the same title	0	5	0
For inspection	0	1	0
For a copy of a return	0	1	0

and a further fee of 4*d.* per folio if the copy exceeds three folios. The prescribed forms on which the returns are to be made will be sent, either stamped with the requisite fee stamps or unstamped, on application to the Registrar, Companies' Registration Office, Somerset House, London, W.C. No charge is made for the forms, but when stamped forms are required a postal order for the amount of the fee must accompany the application.

SECT. 1. Registration of Newspapers.

Any person, upon payment of a fee, may search the Register and obtain a certified copy of any entry (*f*).

SUB-SECT. 2.—*Newspapers of which Registration is Required.*

Inspection of Register.

Newspapers which must be registered.

383. Registration is required in the case of any paper containing public news, intelligence or occurrences, or any remarks or observations thereon, printed for sale and published periodically, or in parts or numbers, at intervals not exceeding twenty-six days between the publication of any two such papers, parts, or numbers, and also in the case of any paper printed in order to be dispersed, and made public weekly or oftener, or at intervals not exceeding twenty-six days, containing only or principally advertisements (*g*).

Exceptions.

No registration is required in the case of a newspaper which belongs to an incorporated joint stock company (*h*).

SUB-SECT. 3.—*Particulars Required.*

Name or title to be registered.

384. The first of the particulars required to be registered is the name or title of the newspaper (*i*). In the case of the subsequent annual returns, the name or title must be exactly the same as that originally registered, unless some other name has been adopted which it is desired to register.

Any name may be selected as the title of a newspaper, and registration confers no right to the exclusive use of such name (*k*).

Registration of proprietorship.

385. The other particulars required are the full names of all the proprietors, together with their respective occupations, places of business, and places of residence (*l*).

Definition of "proprietor."

The word "proprietor" means either the sole proprietor or, where the proprietorship is divided, the persons who, as partners or otherwise, represent or are responsible for any share or interest in the paper as between themselves and the persons similarly representing or responsible for the other shares or interests (*m*).

Registration of representative proprietors.

But where in the opinion of the Board of Trade it would be inconvenient to register the names of all the proprietors owing to the shares being minutely subdivided, or to other special circumstances, the Board may authorise a registration in the name or names of one or more responsible representative proprietors (*n*).

(*f*) Newspaper Libel and Registration Act, 1881 (44 & 45 Vict c. 60), s. 13.

(*g*) *Ibid.*, s. 1.

(*h*) *Ibid.*, s. 18.

(*i*) *Ibid.*, s. 9.

(*k*) As to the property in the name or title of a newspaper, see p. 219, *post*.

(*l*) Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60), s. 9. The phrase "place of residence" includes the street, square, or place where the person to whom it refers resides, and the number (if any) or other designation of the house in which he so resides (*ibid.*, s. 1).

(*m*) *Ibid.*, s. 1.

(*n*) *Ibid.*, s. 7. Where it is desired to make a return of "representative proprietors" a statement should be sent to the Registrar setting forth the circumstances which render it inconvenient to register the names of all

SECT. 1. Registration of Newspapers.

Registration of change of proprietorship.

386. There is no obligation upon anyone to register a change of proprietorship which occurs between any two annual returns, but any party to a transfer of or dealing with any share or interest, whereby anyone ceases to be a proprietor or any new proprietor is introduced, may make a return setting out the names of the persons ceasing to be proprietors and the names of the new proprietors, together with their occupations and places of business and residence (*o*).

Returns for registration.

387. Returns must be signed by the person making them (*p*), and any person wilfully making a false or incomplete return is liable to a penalty not exceeding £100, which may be recovered summarily (*q*). The same penalty is imposed upon any proprietor knowingly permitting the insertion in a return of any particulars relating to himself which are misleading (*r*).

SUB-SECT. 4.—*Omission to Register.*

Penalty for omission to register.

388. If no return be made within one month from the appointed time, then each printer and publisher is liable to a penalty not exceeding £25, recoverable in a summary manner (*q*), and may be directed by a summary order to make the return within a specified time (*s*).

SUB-SECT. 5.—*Proof of Entries in the Register.*

Proof of entries.

389. An entry in the Register may be proved in all proceedings, civil or criminal, by the production of a copy of the entry, certified by the Registrar or his deputy, or under the official seal of the Registrar, without proof of the signature to the certificate or of the seal (*t*).

Certified copy as evidence.

A certified copy of an entry is sufficient *primâ facie* evidence of everything it contains (*u*).

SECT. 2.—*Necessity for Name of Printer to Appear.*

Obligation to print name of printer.

390. Every printed paper or book which at the time it is printed is meant to be published or dispersed must have upon the front of such paper, if it be printed upon one side only, or upon the first and last leaf if it consist of more than one leaf, the name and address of the printer (*v*), but books or papers printed at the University

the proprietors, and giving such information as will show that the proposed representatives are well able to meet any claims that may arise for libel or otherwise in connection with the management of the paper.

(*o*) Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60), s. 11. For form of return, see *ibid.*, Sched. B.

(*p*) The forms issued by the Registrar contain a space for the signature of the printer and publisher, doubtless to facilitate proceedings under *ibid.*, s. 12.

(*q*) As to the recovery of penalties in courts of summary jurisdiction, see title MAGISTRATES, Vol. XIX., pp. 602 *et seq.*

(*r*) Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60), s. 12.

(*s*) *Ibid.*, s. 10.

(*t*) *Ibid.*, s. 15.

(*u*) *Ibid.*; and see title EVIDENCE, Vol. XIII., p. 474.

(*v*) Newspapers, Printers, and Reading Rooms Repeal Act, 1869 (32 & 33 Vict. c. 24), s. 1, Sched. II., re-enacting stat. (1839) 2 & 3 Vict. c. 12, s. 2.

Press of Oxford, or the Pitt Press of Cambridge, must bear, instead of the name of the printer, the words "Printed at the University Press, Oxford," or "The Pitt Press, Cambridge," as the case may be (*a*).

SECT. 2. Necessity for Name of Printer to Appear.

The penalty for assisting to publish or disperse any paper or book which does not comply with the above provision is a sum of not more than £5 (*b*), but proceedings for its recovery must be commenced in the name of the law officers of the Crown (*c*).

Penalty for offence.

391. The obligation referred to in the preceding paragraph (*d*) does not apply to any papers printed by the authority and for the use of either House of Parliament, or to the impression of any engraving, or to the printing by letter-press of the name, or the name and address or business or profession, of any person and the articles in which he deals, or to any papers for the sale of estates or goods by auction or otherwise (*e*), or to a bank-note of the Bank of England, or to a bill of exchange or promissory note, or to any bond or other security for payment of money, or to any bill of lading, policy of insurance, letter of attorney, deed, agreement, or to any transfer or assignment of any public stocks, funds, or other securities, or to any transfer or assignment of the stocks of any public corporation or company, authorised or sanctioned by Act of Parliament, or to any dividend warrant of or for such public or other stocks, funds, or securities, or to any receipt for money or goods, or to any proceeding in any court of law, or to any warrant, order, or other papers printed by the authority of any public board or officer in the execution of the duties of their respective offices (*f*).

Exceptions to rule.

SECT. 3.—*Preservation of Copies.*

392. Every person who prints any paper for hire, reward, gain, or profit must preserve at least one copy for a period of six months, and on it he must write, or cause to be written or printed, in legible characters, the name and address of the person who employed him

Obligation to preserve copies.

If the printer fails to comply with this provision he cannot sue for the price of the materials and labour expended (*Bensley* v. *Bignold* (1822), 5 B. & Ald. 335).

(*a*) Newspapers, Printers, and Reading Rooms Repeal Act, 1869 (32 & 33 Vict. c. 24), s. 1, Sched. II., re-enacting stat. (1839) 2 & 3 Vict. c. 12, s. 3.

(*b*) See note (*v*), p. 212, *ante*.

(*c*) Newspapers, Printers, and Reading Rooms Repeal Act, 1869 (32 & 33 Vict. c. 24), s. 1, Sched. II., re-enacting stat. (1839) 2 & 3 Vict. c. 12, ss. 2, 4.

(*d*) See the text, *supra*.

(*e*) Newspapers, Printers, and Reading Rooms Repeal Act, 1869 (32 & 33 Vict. c. 24), s. 1, Sched. II., re-enacting the Unlawful Societies Act, 1798 (39 Geo. 3, c. 79), ss. 28, 31.

(*f*) Newspapers, Printers, and Reading Rooms Repeal Act, 1869 (32 & 33 Vict. c. 24), s. 1, Sched. II., re-enacting stat. (1811) 51 Geo. 3, c. 65, s. 3. It will be noticed that this exemption only applies to the obligation to put the printer's name and residence upon any printed matter which is intended for publication (see the text, *supra*), and does not touch the duty to preserve a copy (see the text, *infra*). As to the necessity for printing the name of the printer and publisher on election posters etc., see title ELECTIONS, Vol. XII., pp. 296, 297, 348.

SECT. 3. Preservation of Copies.

to do the work (*g*). Within this period of six months the printer must produce such copy to any justice of the peace who requires to see it (*g*).

Penalty for offence.

The penalty for neglecting to preserve such copy or to write upon it the particulars required, or to produce it when required, is the fixed sum of £20 (*g*); no proceedings can be taken to recover these penalties except in the name of the law officers of the Crown (*h*).

SECT. 4.—*Delivery of Copies.*

Obligation to deliver published copies.

393. The publisher of every book (which expression includes a newspaper) (*i*) is bound, subject to penalties, to deliver a complete copy to the British Museum within one month after publication (*j*). Furthermore, if written demand is made before the expiration of twelve months after publication, the publisher must deliver a copy within one month after the receipt of the demand, or if the demand is made before publication, then within one month after publication, to some depôt in London to be named in the demand for, or in accordance with the direction of the authority having control of, each of the following libraries, namely: the Bodleian Library, Oxford, the University Library, Cambridge, the Library of the Faculty of Advocates, Edinburgh, the Library of Trinity College, Dublin, and the National Library of Wales. In the case of newspapers, magazines or works published in a series of numbers, or parts, a separate demand is not necessary for each part; one demand may include all numbers or parts which may be subsequently published (*j*). With regard to the National Library of Wales, the duty of delivering copies does not apply in the case of publications of such classes as may be specified in regulations to be made by the Board of Trade (*j*).

Delivery of copies to libraries.

Part II.—Publishers, Editors, and Authors.

SECT. 1.—*Publishers.*

Definition of "publisher."

394. A publisher is a person who puts forth a work to the public (*k*). In the case of literary works the publisher is the intermediary between the public and the author.

(*g*) Newspapers, Printers, and Reading Rooms Repeal Act, 1869 (32 & 33 Vict. c. 24), re-enacting the Unlawful Societies Act, 1798 (39 Geo. 3, c. 79), s. 29. Unless this requirement is complied with, the charge for printing cannot be recovered (*Bensley* v. *Bignold* (1882), 5 B. & Ald. 335).

(*h*) Newspapers, Printers, and Reading Rooms Repeal Act, 1869 (32 & 33 Vict. 24), s. 1, Sched. II., re-enacting the Seditious Meeting Act, 1846 (9 & 10 Vict. c. 33), s. 1.

(*i*) Copyright Act, 1911 (1 & 2 Geo. 5, c. 46), s. 15; *Walter* v. *Howe* (1881), 17 Ch. D. 708; and see title COPYRIGHT AND LITERARY PROPERTY, Vol. VIII., p. 142, note (*u*).

(*j*) Copyright Act, 1911 (1 & 2 Geo. 5, c. 46), s. 15; and see title COPYRIGHT AND LITERARY PROPERTY, Vol. VIII., pp. 174, 175. The penalty for breach of this provision is a fine, recoverable on summary conviction, not exceeding £5 and the value of the book (Copyright Act, 1911 (1 & 2 Geo. 5, c. 46), s. 15 (6)).

(*k*) See *McFarlane* v. *Hulton*, [1899] 1 Ch. 884. As to publishers in relation to authors, see also p. 215, *post*. As to the statutory duties of publishers of newspapers, see pp. 210 *et seq.*, *ante*.

SECT. 1. Publishers.

395. The relation between a publisher and an author is determined by the contract between them (*l*). In some cases the author employs a publisher to publish his works, in other cases the publisher purchases the work from the author, and in others the publication is a matter of joint adventure between them. The most usual form of contract is that in which the publisher undertakes to bear the whole cost of the publication, including printing and advertising, and to pay to the author either a percentage of the profits or a fixed sum or royalty on each copy sold (*l*). Relation between publisher and author.

396. Literary works are usually issued to the public in editions. Any fresh issue or publication of a work is an edition (*m*). It does not seem necessary that the type should be set up anew, or even that fresh copies should be printed, the essential factor being that there should be a determination to reissue the work to the public (*m*). Publication of editions.

397. It is a common practice for publishers, in order to minimise the risk of loss, to enter into contracts with other publishers or parties to take a number of copies of a book when published. If the contract is not to be performed within one year from the making thereof it must be in writing (*n*). Subscriptions.

SECT. 2.—*Editors.*

SUB-SECT. 1.—*In General.*

398. Generally speaking, an editor is a person who superintends the publication of any literary work. Definition of "editor."

In the case of newspapers and periodicals, such a person is usually appointed by the proprietor to be responsible for the literary part of the journal, but no general statement can be made as to his duties or authority, because these must depend upon the contract entered into in each individual case. The mere fact that a person is appointed editor of a newspaper does not give him control of the conduct of the paper or of the matter to be inserted therein, and, in the absence of special stipulations in the contract giving him control, he is subject to the directions of the proprietor (*o*). On the other hand, any undue interference with a person who holds a general appointment as editor in the performance of his duties may amount to a breach of contract (*p*). Nature of duties and powers

The question whether a person is discharging editorial duties or is merely a contributor is a question of fact depending upon the terms of the contract of engagement, the nature of the work done, and the mode of payment (*q*).

(*l*) As to contracts between publishers and authors, see p. 217, *post*.

(*m*) *Reade* v. *Bentley* (1858), 4 K. & J. 656.

(*n*) Statute of Frauds (29 Car. 2, c. 3), s. 4; and see title CONTRACT, Vol. VII., pp. 361 *et seq.*

(*o*) *Crookes* v. *Petter* (1860), 3 L. T. 225.

(*p*) But in neither case is it a matter for an injunction; "the matter resolves itself into this if the defendants" (the proprietors) "unduly interfere with the functions of the editor, or he improperly introduces matter which is injurious to the journal, the best course is to have it settled by an action at law, and to leave it to a jury to determine the amount of the damages" (*Crookes* v. *Petter*, *supra*, *per* ROMILLY, M.R., at p. 227).

(*q*) *Landa* v. *Greenberg* (1908), 24 T. L. R. 441.

SECT. 2. **Editors.**

SUB-SECT. 2.—*Authority as Agent of Proprietor.*

Authority as agent:

(i.) as to selection of matter;

399. The authority of an editor as agent of the proprietor of a newspaper or similar publication depends upon the terms of his employment; the position itself confers no authority upon its holder, but the editor is presumed to be acting as agent of the proprietor in the selection of matter to be inserted in the publication (*r*).

(ii.) as to contracts with contributors.

Usually the editor is empowered to make contracts with contributors, but such contracts are made on behalf of the proprietor, and the benefit belongs to him, and all manuscripts and letters received from correspondents and contributors which come into the hands of the editor are the property of the proprietor (*s*).

SUB-SECT. 3.—*Liabilities.*

Liabilities of editor and proprietor.

400. The editor is responsible for all illegal matter which appears in his paper (*t*), so also is the proprietor. Therefore, if proceedings are commenced against the editor, it is a matter of common interest between them and the proprietor may undertake the defence (*u*). On the other hand, no damages can be recovered from an editor by a proprietor for injuries sustained through the insertion in his paper of illegal matter without his knowledge (*v*).

SUB-SECT. 4.—*Termination of Employment.*

Notice required.

401. In the absence of express terms in the contract of employment, there seems some doubt as to the length of notice which is necessary to terminate the employment. The usual notice, in the case of important daily newspapers, appears to be a year, but it is doubtful whether this custom extends to monthly periodicals or reviews or to new publications (*w*). In case of dispute, the question depends upon the evidence of journalists. An editor entering into a contract inconsistent with his duties may be dismissed without notice (*x*).

(*r*) *R.* v. *Walter* (1799), 3 Esp. 21.

(*s*) *Hogg* v. *Kirby* (1803), 8 Ves. 215; *Lamb* v. *Evans*, [1892] 3 Ch. 462.

(*t*) See pp. 221 *et seq.*, *post*. As to the effect of an agreement between the editor and printer of a publication for the indemnification of the latter against claims for publication of libellous matter, see *Smith* (*W. H.*) *& Son* v. *Clinton* (1908), 25 T. L. R. 34; title GUARANTEE, Vol. XV., pp. 446, 453.

(*u*) *Breay* v. *Royal British Nurses' Association*, [1897] 2 Ch. 272, C. A.; see title ACTION, Vol. I., p. 53.

(*v*) See *Colburn* v. *Patmore* (1834), 1 Cr. M. & R. 73; *Sharpe* v. *Feeney & Co.* (1898), 14 T. L. R. 185.

(*w*) *Holcroft* v. *Barber* (1843), 1 Car. & Kir. 4; *Baxter* v. *Nurse* (1844), 6 Man. & G. 935; see also *Fox-Bourne* v. *Vernon & Co., Ltd.* (1894), 10 T. L. R. 647 (where the jury found that six months' notice was sufficient, refusing to accept evidence of a custom of giving twelve months' notice); *Brennan* v. *Gilbart-Smith* (1892), 8 T. L. R. 284 (where the custom of giving twelve months' notice was not disputed); and *Chamberlain* v. *Bennett* (1892), 8 T. L. R. 234 (where the jury accepted evidence of a custom entitling a sub-editor to six months' notice); and see, further, the cases cited in title MASTER AND SERVANT, Vol. XX., p. 97, note (*p*).

(*x*) *Devenish* v. *Waters* (1892), *Times*, 27th January.

SECT. 3.—*Authors.*

SUB-SECT. 1.—*Contract to Write Specified Work (y).*

Nature of contract.

402. The contract between an author and a publisher is a personal contract, and cannot be assigned by the publisher without the author's consent (*z*), and this applies equally if the publisher is a limited company (*a*).

Determination of contract.

403. If a contract, which contemplates the issue of several editions of a work, is silent as to rights of determination, the publisher is entitled to determine at any time, but the author can only determine it if no expense has been incurred by the publisher in preparing a new edition (*b*).

Price of publication.

404. If, by the contract, the publisher is liable to bear all the expenses of publication, he is entitled to fix the price of the book, unless of course the matter is dealt with in the contract (*c*).

Failure to supply manuscript.

405. Where an author contracts to write a specified work, failure to supply the manuscript gives rise to a cause of action, the measure of damages being the estimated profit (*d*), but the court cannot enforce the performance of the contract (*e*).

Contract for second edition.

406. A contract to allow a publisher to publish a work, by which all expenses are to be borne by the publisher, does not, without specific terms, prevent the author from contracting with another publisher for the publication of a second edition (*f*).

Contract for appearance in particular publication.

407. A contract to accept an article to appear in a particular magazine is not fulfilled by publication in another magazine or separately in book form, so that the discontinuance of the magazine contracted for is a breach of contract, and the author is not obliged to complete the work, but may sue for damages at once (*g*).

Custody of manuscript.

408. In the case of manuscript which is submitted voluntarily to an editor in the hope of its being accepted, the editor is not, in the absence of circumstances showing an acceptance of the manuscript for publication, responsible for its safe custody, and if the manuscript is lost the author cannot recover its value (*h*). The editor, however, is liable should he withhold it from the author

(*y*) For copyright and analogous rights, see title COPYRIGHT AND LITERARY PROPERTY, Vol. VIII., pp. 136 *et seq.*

(*z*) *Stevens* v. *Benning* (1854), 1 K. & J. 168; *Hole* v. *Bradbury* (1879), 12 Ch. D. 886.

(*a*) *Griffith* v. *Tower Publishing Co., Ltd. and Moncrieff*, [1897] 1 Ch. 21.

(*b*) *Reade* v. *Bentley* (1858), 4 K. & J. 656.

(*c*) *Reade* v. *Bentley* (1857), 3 K. & J. 271.

(*d*) *Gale* v. *Leckie* (1817), 2 Stark. 107; and see title WORK AND LABOUR.

(*e*) *Clarke* v. *Price* (1819), 2 Wils. (CH.) 157; but a clause in a contract by which the author agrees not to write for anyone else will be enforced (*Morris* v. *Colman* (1812), 18 Ves. 437); and see titles INJUNCTION, Vol. XXII., p. 242; SPECIFIC PERFORMANCE.

(*f*) *Warne* v. *Routledge* (1874), L. R. 18 Eq. 497.

(*g*) *Planché* v. *Colburn* (1831), 5 C. & P. 58; and see title CONTRACT, Vol. VII., pp. 438 *et seq.*

(*h*) See *Reeve* v. *Palmer* (1858), 5 C. B. (N. S.) 84, affirmed *ibid.* 91; *Goodman* v. *Boycott* (1862), 2 B. & S. 1; *Howard* v. *Harris* (1884), Cab. & El. 253; and see title BAILMENT, Vol. I., pp. 528, 533. The bailee is not an insurer; see *ibid.*, p. 533.

SECT. 3. Authors.

after demand has been made for its return, and he is also liable for improper use of the manuscript for his own purposes (*i*).

In the case of manuscript which is submitted to an editor in response to an express invitation, or of articles ordered to be written and sent to him for approval, the standard of care required of the editor is that which a prudent man would take of similar property of his own (*k*), and if he proves that such care has been taken, the burden of proof is discharged and he is not bound to account for the cause of the loss.

SUB-SECT. 2.—*Property in Articles Supplied for Purpose of Reproduction.*

Rights with regard to manuscript.

409. The manner in which an editor or publisher is entitled to deal with manuscript supplied by an author for the purpose of reproduction in pursuance of a contract depends on the terms of the contract. In the absence of express stipulation, if the article is to be published in such a way that persons reading it will be informed of the identity of the author, no material alterations may be made which would misrepresent the views or bring discredit upon the reputation of the author. This rule applies even where the article has been bought outright (*l*).

When, however, matter is supplied to a publisher in such a form as to enable him to publish it as his own, then no question of injury to reputation arises, and the publisher is entitled to deal with the manuscript as he pleases (*m*).

SECT. 4.—*Journalists.*

Relationship with proprietor of newspaper.

410. The relation between the proprietor of a newspaper and a journalist is that of master and servant (*n*).

Right to *nom de plume*.

411. A journalist who has contributed to a periodical under a *nom de plume* which has become identified with his work has a right to the use of the pseudonym as against the proprietor (*o*).

(*i*) See title TROVER AND DETINUE.

(*k*) *Bullen* v. *Swan Electric Engraving Co.* (1906), 22 T. L. R. 275, affirmed (1907), 23 T. L. R. 258, C. A., in which case, on appeal, FARWELL, L.J., at p. 259, stated that, if correctly reported, *Powell* v. *Graves* (1886), 2 T. L. R. 663 (a case of a lost picture), could hardly be supported in view of the absence of any plea or proof that reasonable care had been taken; and see, further, titles BAILMENT, Vol. I., pp. 531 *et seq.*; NEGLIGENCE, Vol. XXI., p. 430.

(*l*) *Archbold* v. *Sweet* (1832), 5 C. & P. 219. No action lies if the publication is unlikely to injure the author's reputation (*Gilbert* v. *Boosey & Co.* (1889), 87 L. T. Jo. 355).

(*m*) *Cox* v. *Cox* (1853), 11 Hare, 118.

(*n*) See, generally, title MASTER AND SERVANT, Vol. XX., pp. 61 *et seq.* An overseer in a printing office is an artificer within the meaning of the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 1, Sched. I., which exempts contracts of hiring from the stamp duty of 6*d.*; see *Bishop* v. *Letts* (1858), 1 F. & F. 401; title MASTER AND SERVANT, Vol. XX., p. 78. As to the notice required to determine contracts for the employment of foreign correspondents of a newspaper and journalists, see title MASTER AND SERVANT, Vol. XX., pp. 97, 98, note (*p*). As to the reasonableness of a clause, in an agreement for the employment of a reporter, restricting him, after the termination of such employment, from being connected with any other newspaper business within a certain radius, see *Lang* (*Sir W. C.*) *& Co., Ltd.* v. *Andrews*, [1909] 1 Ch. 763, C. A.; titles MASTER AND SERVANT, Vol. XX., pp. 74, 88 *et seq.*; TRADE AND TRADE UNIONS.

(*o*) *Landa* v. *Greenberg* (1908), 24 T. L. R. 441.

Part. III.—Property in Newspapers.

SECT. 1.—*In General.*

SECT. 1. In General.

412. Speaking generally, the expression "property" with regard to a newspaper may include several things. It may include the copyright in numbers already published and the right of reproduction, or it may include the plant and materials necessary for its production, but, for the purpose of this part of the title, the expression applies only to the right of publication under a particular name (*p*). Definition of "property."

413. Although there is no property in the words selected as the title of a newspaper, and registration (*q*) confers no right to the exclusive use of such name, it is a common law fraud to use the name of a well-known publication with the object of inducing the public to purchase the new publication in mistake for that already established (*r*), and such use may be restrained by injunction (*s*). No injunction will, however, be granted unless the right to the exclusive use of certain words as applying to a particular newspaper has been acquired by such user as leads to reputation (*t*). To determine exactly when this right arises may be difficult, and must depend upon the facts of each particular case (*u*). No property in title. Use of particular name.

Apart from fraud, the use of a name will be restrained if it leads to confusion in the minds of the public so as to cause injury to the proprietors of the established publication. Such injury may affect the reputation of a newspaper or occasion pecuniary loss to its proprietors, and the confusion may arise in the minds not only of the persons who desire to purchase the newspapers, but of advertisers and contributors. But some injury or probability of injury must be proved, otherwise no injunction will be granted even where the names are identical (*v*).

If the title selected is not an ordinary word or combination of words, but has necessitated originality or invention on the part of its author, such title could, of course, be the subject of copyright (*w*). Copyright in name.

414. This right of publication under a particular name is property and subject to the ordinary law of property (*x*). It is personal Right of publication as property.

(*p*) It may, of course, in particular instances, include the premises where the paper is printed and published, but these are matters which do not come within the scope of this title.

(*q*) As to registration, see p. 210, *ante*.

(*r*) *Dicks* v. *Yates* (1881), 18 Ch. D. 76, C. A. No question of copyright arises in the case of the title of a newspaper unless it is composed of some literary invention of its author; see title COPYRIGHT AND LITERARY PROPERTY, Vol. VIII., p. 143.

(*s*) See title INJUNCTION, Vol. XVII., p. 271.

(*t*) *Licensed Victuallers Newspaper Co.* v. *Bingham* (1888), 38 Ch. D. 139, C. A.; *Maxwell* v. *Hogg*, *Hogg* v. *Maxwell* (1867), 2 Ch. App. 307.

(*u*) *Licensed Victuallers Newspaper Co.* v. *Bingham*, *supra*.

(*v*) *Borthwick* v. *Evening Post* (1888), 37 Ch. D. 44, C. A.; *Outram* (*G.*) *& Co., Ltd.* v. *London Evening Newspapers Co., Ltd.* (1911), 27 T. L. R. 231.

(*w*) See title COPYRIGHT AND LITERARY PROPERTY, Vol. VIII., p. 143.

(*x*) *Kelly* v. *Hutton* (1868), 3 Ch. App. 703; *Longman* v. *Tripp* (1805),

SECT. 1. In General.

property, and as such, on the bankruptcy (*y*) or death of the proprietor (*z*), passes to the trustee in bankruptcy or to the legal personal representative, as the case may be.

Ownership.

415. The property in a newspaper may belong to a number of persons, not, of course, exceeding twenty, or to a company; but it must belong to a definite person or body of persons (*a*).

Rights of co-owners.

The legal relations between joint proprietors in a newspaper do not differ from those of partners in other enterprises, so that a majority of partners may not use the partnership property for purposes inimical to the welfare of the partnership newspaper, even in cases where by the partnership deed the majority may bind the minority (*b*).

The right of publication being a partnership asset, no partner, on a dissolution of the partnership, has the right to announce that publication is about to be discontinued; if necessary, such right must be sold for the benefit of all the partners (*c*).

Licence to use printing material.

416. Long-continued usage, not founded upon contract, by one newspaper of the matter and type of another confers no rights upon the proprietors of the former paper, and any such arrangement is terminable at any moment at the pleasure of either party (*d*).

Competitive business.

417. A newspaper is published (*e*) when and where it is offered to the public by the proprietors, and it may be published in more than one place or town simultaneously. On the sale of a newspaper, therefore, care must be taken to see that any provisions in the contract of sale which are intended to prevent the vendors from carrying on other printing or publishing business within a certain area are not unduly restrictive (*f*).

2 Bos. & P. (N. R.) 67; *Re Baldwin, Ex parte Foss* (1858), 2 De G. & J. 230, C. A.

(*y*) *Longman* v. *Tripp* (1805), 2 Bos. & P. (N. R.) 67; *Re Baldwin, Ex parte Foss, supra;* and see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 160.

(*z*) *Gibblett* v. *Read* (1744), 9 Mod. Rep. 459; and see titles EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 217 *et seq.;* PERSONAL PROPERTY, Vol. XXII., p. 409.

(*a*) *Nazarbell* v. *Sevasley* (1896), *Times*, 5th December; and see titles COMPANIES, Vol. V., pp. 44, 45; PARTNERSHIP, Vol. XXII., p. 16. A newspaper cannot belong to an indefinite collection or society of persons, although it may be published for their benefit or to propagate their views. In such case it is considered to belong to the person who pays for its publication.

(*b*) See title PARTNERSHIP, Vol. XXII., pp. 47 *et seq.*, 81.

(*c*) *Bradbury* v. *Dickens* (1859), 27 Beav. 53.

(*d*) *Platt* v. *Walter* (1867), 17 L. T. 157.

(*e*) As to publication, see pp. 212 *et seq.*, *ante.*

(*f*) See *McFarlane* v. *Hulton*, [1899] 1 Ch. 884 (where on the sale of *Bell's Life in London*, a sporting paper, the vendors agreed with the purchasers not to print or publish any sporting paper within ten miles of Bouverie Street; the defendants carried on a newspaper publishing business in Manchester, but distributed copies in London, some of these being sold from an office in Fleet Street: held that the agreement had been broken: injunction granted).

SECT. 2.—*Assignment.*

SECT. 2. Assignment.

418. Property (*g*) in a newspaper is a chattel interest capable of assignment (*h*), and a contract to assign shares may be specifically enforced (*i*). Assignment.

The value of the property being in its title and reputation, the whole title upon assignment becomes the property of the assignee, even if it includes the name of the assignor (*j*). The assignor may be restrained from publishing notices or advertisements likely to damage the property he has assigned, although he may publish a statement that he has ceased to be connected with the publication (*k*). Effect of assignment.

The fact that the name of the editor is usually printed beneath the title does not make the name part of the title (*l*).

SECT. 3.—*Mortgage.*

419. Property in the name of a newspaper, or a share thereof, may be the subject of mortgage (*m*). Mortgage.

A mortgagee must register himself as the proprietor, for if he permits the name of the mortgagor to remain upon the Register and the latter becomes bankrupt, the right of publication may be held to be in the order and disposition of the bankrupt, even though the printing machines and other tangible effects covered by the mortgage have been seized by the sheriff in process of execution (*n*). Registration of mortgagee.

A receiver and manager may be appointed to print, publish, and edit a newspaper (*o*).

Part IV.—Advertisements (*p*).

SECT. 1.—*Illegal Advertisements.*

420. Certain notices or advertisements relating to the drawing Liability of printer and publisher.

(*g*) For the definition of "property," see p. 219, *ante*.

(*h*) *Kelly* v. *Hutton* (1868), 3 Ch. App. 703; *Longman* v. *Tripp* (1805), 2 Bos. & P. (N. R.) 67; *Re Baldwin, Ex parte Foss* (1858), 2 De G. & J. 230, C. A.; and see, generally, title CHOSES IN ACTION, Vol. IV., pp. 365 *et seq.*

(*i*) *Hutton* v. *Beeton and M'Murray, Beeton* v. *M'Murray and Hutton* (1863), 9 Jur. (N. S.) 1310.

(*j*) *Ward* v. *Beeton* (1874), L. R. 19 Eq. 207.

(*k*) *Bradbury* v. *Dickens* (1859), 27 Beav. 53.

(*l*) *Crookes* v. *Petter* (1860), 3 L. T. 225.

(*m*) See title MORTGAGE, Vol. XXI., p. 120.

(*n*) *Re Baldwin, Ex parte Foss, supra*; and see EXECUTION, Vol. XIV., p. 55. As to registration, see pp. 210 *et seq.*, *ante*.

(*o*) *Chaplin* v. *Young* (1862), 6 L. T. 97; see also *Robertson* v. *Norris* (1859), 5 Jur. (N. S.) 1238; and see title RECEIVERS.

(*p*) As to exhibition of advertisements, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION; as to libellous advertisements, see title LIBEL AND SLANDER, Vol. XVIII., pp. 603 *et seq.*; as to advertisements involving contempt of court, see p. 224, *post*; as to advertisements having the effect of offers the response to which may form a contractual relationship,

SECT. 1. Illegal Advertisements.

of lotteries (*q*), the existence of betting houses (*r*), and the recovery of stolen property (*s*), are illegal, and subject the printer and publisher of them to the payment of fines.

Liability of advertiser and publisher.

Subject to some exceptions (*t*), both the advertiser and the publisher are equally liable for the publication of illegal advertisements. In the case of advertisements relating to lotteries, or to stolen property, or betting advertisements, the statutory provisions prohibiting them state so in terms (*u*); in the case of advertisements involving contempt of court (*v*), the responsibility of the publisher is not so great as that of the advertiser (*w*).

In doubtful cases an indemnity may be given by the advertiser to the publisher, but such indemnity is of no legal effect if the advertisement is on its face, or by necessary inference, illegal (*x*).

SECT. 2.—*Advertisement Contracts.*

Contracts.

421. Contracts for the insertion of advertisements in a newspaper or other periodical (*y*) do not differ in their legal aspect from other contracts, but the following points may be noticed (*z*).

Damages for breach.

422. No damages can be recovered for breach of any agreement to insert an advertisement which is illegal, nor can any money be recovered which has been paid in advance for the insertion of such an advertisement (*a*).

Where damages are recoverable, such damages are not limited to the amount paid for the insertion of the advertisement, but may include any damage which may reasonably be presumed to have been in the contemplation of the parties at the time the contract was made, such as estimated loss of business in the case of trading advertisements (*b*).

see title CONTRACT, Vol. VII., pp. 346, 347. A reader who accepts the advertised offer of the proprietor of a newspaper to give advice through the medium of the paper enters into a contract for good consideration, and such proprietor is bound to take reasonable care in giving the advice, although he does not warrant its accuracy (*De la Bere* v. *Pearson, Ltd.*, [1908] 1 K. B. 280, C. A.).

(*q*) See title GAMING AND WAGERING, Vol. XV., pp. 300, 303.

(*r*) *Ibid.*, p. 298.

(*s*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 504.

(*t*) In the case of libellous advertisements, defences in some circumstances are available for the publisher which are not open to the advertiser. For these distinctions, see title LIBEL AND SLANDER, Vol. XVIII., pp. 661, 669, note (*e*).

(*u*) See note (*p*), p. 221, *ante*.

(*v*) See p. 223, *post*.

(*w*) And see note (*t*), *supra*.

(*x*) *Shackell* v. *Rosier* (1836), 2 Bing. (N. C.) 634; and see *Smith* (*W. H.*) *& Son* v. *Clinton* (1908), 25 T. L. R. 34; title GUARANTEE, Vol. XV., pp. 446, 453.

(*y*) See *Metzler* v. *Gounod* (1875), 32 L. T. 656 (where certain documents were held to constitute a contract). As to the notice required in a contract for the employment of an advertising agent, see title MASTER AND SERVANT, Vol. XX., p. 97, note (*p*).

(*z*) See, generally, title CONTRACT, Vol. VII., pp. 327 *et seq.*

(*a*) *Owen* v. *Greenberg* (1898), *Times*, 10th March.

(*b*) *Marcus* v. *Myers and Davis* (1895), 11 T. L. R. 327; *Hawkins* v.

SECT. 2. Advertisement Contracts.

423. Documents which contain the terms of an advertising contract by which the parties, both advertiser and newspaper proprietor, agree to be bound, must bear a 6*d.* stamp to render them admissible in evidence (*c*). A request or offer to insert an advertisement does not require a stamp unless it comes within the above rule. Stamp duty.

424. If the contract is not to be performed within a year, no action can be brought upon it unless it is in writing (*d*). Writing, when necessary.

Part V.—Offences.

SECT. 1.—*Contempt of Court.*

425. Publication of certain matter may constitute a contempt of court (*e*); but it is not contempt of court for an editor to refuse to hand over the manuscript or disclose the name of the author of an article in his newspaper making an attack upon a judge, because the court has no power to make such an order (*f*). By publication of matter

Ignorance of the contents of a publication which contains matter in contempt of court does not excuse the printer or publisher (*g*).

The distribution by a news agency of items of news which constitute a contempt of court is an offence by the manager of the agency or the person responsible (*h*).

426. Advertisements inserted for the purpose of obtaining witnesses or evidence in pending litigation are not contempts of court, provided that they are *bonâ fide* and not used for the purpose of making personal attacks (*i*), and provided the advertisement is not a direct inducement to subornation of perjury (*k*). By advertisement.

Advertisements warning the public generally, or a certain class of the public, that an action for infringement of a patent or trade mark has been commenced, or that an injunction has been granted, are not contempts provided the advertisement does not go into the merits of the case (*k*). The same applies to advertisements asking

Tuxford (1867), *Times*, 23rd December; and see title DAMAGES, Vol. X., pp. 301 *et seq.*

(*c*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I.; see also title REVENUE.

(*d*) Statute of Frauds (29 Car. 2, c. 3), s. 4; *Boydell* v. *Drummond* (1809), 11 East, 142; title CONTRACT, Vol. VII., pp. 327 *et seq.*

(*e*) For this subject generally, see title CONTEMPT OF COURT, ATTACHMENT, AND COMMITTAL, Vol. VII., pp. 286 *et seq.*

(*f*) *Re Bahama Islands* (*Special Reference from*), [1893] A. C. 138, P. C.

(*g*) *Ex parte Jones* (1806), 13 Ves. 237; *Re American Exchange in Europe, American Exchange in Europe* v. *Gillig* (1889), 58 L. J. (CH.) 706.

(*h*) *Re Robbins of the Press Association, Ex parte Green* (1891), 7 T. L. R. 411.

(*i*) *Coats* (*J. & P.*) v. *Chadwick*, [1894] 1 Ch. 347; *Plating Co* v. *Farquharson* (1881), 17 Ch. D. 49, C. A.; *Brodribb* v. *Brodribb* (1886), 11 P. D. 66; *Butler* v. *Butler* (1888), 13 P. D. 73; *Paraguay Republic* v. *Lynch*, [1872] W. N. 48.

(*k*) *Plating Co.* v. *Farquharson*, *supra*; *Pool* v. *Sacheverel* (1720), 1

SECT. 1. Contempt of Court.

for financial assistance from a certain trade in prosecuting an action in the result of which the whole trade has a common interest (*l*).

Liability of publisher and printer of advertisement.

427. In cases of advertisements involving contempt of court, the responsibility of the publisher and printer is not so heavy as that of the advertiser, for in order to commit a publisher or printer for contempt it must be shown that the advertisement on its face was such that a person of ordinary intelligence conducting a newspaper must have known that its publication was an interference with the course of justice (*m*).

SECT. 2.—*Other Offences.*

Other offences.

428. The publication of or conspiracy to spread false news so as to decry or enhance the value of any goods or stocks is a misdemeanour (*n*); and certain publications for the purpose of influencing elections constitute illegal practices (*o*).

Part VI.—Privileges of the Press (*p*).

Attendance at meetings.

What meetings may be attended.

429. Representatives of the Press (*q*) may attend the meetings of every local authority (*r*).

The expression "local authority" includes the council of a county, county borough, borough (including metropolitan borough), urban district, rural district, or parish, and a joint committee or joint board of any two or more such councils to which any of the powers or duties of the appointing councils may have been transferred or delegated under the provisions of any Act of Parliament or provisional order; a parish meeting, an education committee, and a joint education committee, established under the Education Act, 1902 (*s*), so far as relates to any acts or proceedings which are not required to be submitted to the council or councils

P. Wms. 675. Motions for committal for contempt of court of innocent editors and proprietors of newspapers ought to be discouraged as far as possible (*Plating Co.* v. *Farquharson* (1881), 17 Ch. D. 49, C. A., *per* JESSEL, M.R., at p. 55; *Coats* (*J. & P.*) v. *Chadwick*, [1894] 1 Ch. 347).

(*l*) *Plating Co.* v. *Farquharson*, *supra*.

(*m*) *Ibid.*

(*n*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 562.

(*o*) See title ELECTIONS, Vol. XII., p. 296.

(*p*) The privileges of the Press in relation to the law of libel are fully dealt with in title LIBEL AND SLANDER, Vol. XVIII., pp. 603 *et seq.*

(*q*) The expression "representatives of the Press" means duly accredited representatives of newspapers and duly accredited representatives of news agencies which systematically carry on the business of selling and supplying reports and information to newspapers (Local Authorities (Admission of the Press to Meetings) Act, 1908 (8 Edw. 7, c. 43), s. 2).

(*r*) *Ibid.*, s. 1. This Act was passed in consequence of the decision in *Tenby Corporation* v. *Mason*, [1908] 1 Ch. 457, C. A., where it was held that no person had the right to attend meetings of a borough council without its consent.

(*s*) Education Act, 1902 (2 Edw. 7, c. 42), s. 17.

for approval; a board of guardians, and a joint committee constituted in pursuance of the Poor Law Act, 1879 (*t*); the board of management of any school or asylum district formed under any of the Acts relating to the relief of the poor; a central body and a distress committee formed under the Unemployed Workmen Act, 1905 (*u*); the Metropolitan Water Board, and a joint water board, constituted under the provisions of any Act of Parliament or provisional order; and any other local body which has or may hereafter have the power to make a rate (*v*).

What meetings may not be attended.

This privilege does not extend to a meeting of a committee of any of these bodies unless such committee is itself a local authority as above defined (*w*).

Temporary exclusion.

The representatives of the Press may be temporarily excluded from any meeting as often as desirable, if such exclusion is advisable in the public interest (*a*).

Right to remain in court.

430. *Bonâ fide* representatives of a newspaper or news agency have a right to remain in a court, which has been cleared by virtue of the powers given by the Children Act, 1908 (*b*), while a child or young person is giving evidence in any proceedings in relation to an offence against or contrary to decency or morality.

Part VII.—Stationery Office.

Stationery Office

431. The Stationery Office is a Government department which, besides supplying stationery, books and other publications and

(*t*) 42 & 43 Vict. c. 54, s. 8; see title POOR LAW, Vol. XXII., p. 553.

(*u*) 5 Edw. 7, c. 18.

(*v*) Local Authorities (Admission of the Press to Meetings) Act, 1908 (8 Edw. 7, c. 43), s. 2. The expression "rate" means a rate the proceeds of which are applicable to public local purposes, and leviable on the basis of an assessment in respect of property, and includes any sum which, though obtained in the first instance by a precept, certificate, or other document requiring payment from some authority or officer, is or can be ultimately raised out of a rate (*ibid.*).

(*w*) *Ibid.*, s. 3. There is nothing in the Act to interfere with the power of a committee or council to admit the public to its meetings if it thinks fit.

(*a*) *Ibid.*, s. 1. The local authority, in order to exercise this power, must pass a resolution by a majority declaring that, in view of the special nature of the business before them, it is advisable in the public interest that the representatives of the Press should be excluded.

(*b*) 8 Edw. 7, c. 67, s. 114; see title INFANTS AND CHILDREN, Vol. XVII., p. 178. This privilege does not override the power of a court to hear a case *in camera*. If it is held that by publication of proceedings heard *in camera* contempt is committed, such contempt is of a criminal nature, and the order being made in a criminal matter, no appeal lies to the Court of Appeal; see *Scott* v. *Scott* (1912), 28 T. L. R. 526, C. A.; title CONTEMPT OF COURT, ATTACHMENT, AND COMMITTAL, Vol. VII., p. 322.

PART VII. Stationery Office.

matter to the various Government offices, has control of most of the printing required by Parliament and the public departments (*c*).

Crown rights.

432. The Crown has a common law right of exclusively printing the Bible, Acts of Parliament, and other public documents (*d*), and this right as regards Acts of Parliament and other public documents is granted to a printer, called the King's Printer. By letters patent the Controller of the Stationery Office is appointed King's Printer of all Acts of Parliament (*e*).

King's Printer.

Unlawful printing of public documents.

433. Any person who prints any such document purporting to be printed by the King's Printer, the Stationery Office or the Board of Agriculture and Fisheries (*f*), and anyone who forges or tenders the same in evidence, knowing it to have been forged, is guilty of a felony (*g*).

(*c*) As to parliamentary and other public documents, see title CONSTITUTIONAL LAW, Vol. VI., pp. 496, 497, 498, note (*e*).
(*d*) See *ibid.*, p. 497.
(*e*) See *ibid.*, p. 498.
(*f*) Documentary Evidence Act, 1895 (58 & 59 Vict. c. 9).
(*g*) Evidence Act, 1845 (8 & 9 Vict. c. 113), s. 4; Documentary Evidence Act, 1868 (31 & 32 Vict. c. 37), s. 4; Documentary Evidence Act, 1882 (45 & 46 Vict. c. 9), s. 3; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 737, 738. As to the effect of public documents as evidence, see *ibid.*, p. 392, note (*g*); title EVIDENCE, Vol. XIII., pp. 522 *et seq.*

PRESUMPTION AS TO DOCUMENTS AND FACTS.

See EVIDENCE.

PRESUMPTION AS TO RIGHTS OF PROPERTY.

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PREVENTION OF CRIME.

See CRIMINAL LAW AND PROCEDURE.

PREVENTION OF CRUELTY.

See ANIMALS; CRIMINAL LAW AND PROCEDURE; INFANTS AND CHILDREN.

PRIMATE.

See ECCLESIASTICAL LAW.

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Part I.—Prisons.

SECT. 1.—*Prison Authorities.*

SECT. 1. Prison Authorities.

SUB-SECT. 1.—*The Secretary of State.*

Control and powers.

434. All prisons (*a*), State inebriate reformatories (*b*) and Borstal institutions (*c*) are under the control of the Secretary of State for the Home Department (*d*). The appointment of all prison officers (*e*) and of boards of visitors for convict prisons (*f*) are made by him. He makes statutory rules for the government of local and convict prisons, subject to the consent of Parliament (*g*).

SUB-SECT. 2.—*Prison Commissioners and Directors of Convict Prisons.*

Constitution of Prison Commissioners.

435. The Prison Commissioners must not exceed five. They are appointed by the Crown, and hold office during the King's pleasure. One of them may be appointed chairman by the Secretary of State. They are a body corporate with a common seal and with power to hold land. The legal estate of every prison is vested in them (*h*).

Powers.

436. The Prison Commissioners have the general superintendence of all local prisons subject to the control of the Secretary of State, and they appoint subordinate officers (*i*) to the general prison service. They have all the powers and jurisdiction of visiting justices (*j*) and examine into the conduct of officers and prisoners and inquire into all abuses (*k*).

Duties.

The Prison Commissioners must conform to the directions of the

(*a*) For the classification of prisons, see p. 235, *post*.

(*b*) See title INTOXICATING LIQUORS, Vol. XVIII., pp. 168 *et seq.*

(*c*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 413 *et seq.*

(*d*) See title CONSTITUTIONAL LAW, Vol. VII., pp. 82 *et seq.* In *R.* v. *Morton Brown, Ex parte Ainsworth* (1909), 74 J. P. 53, it was held that the Secretary of State, notwithstanding his responsibility for the administration of prisons, is not liable to summons in respect of an assault alleged to have been committed by the medical officer of a prison.

(*e*) Prison Act, 1877 (40 & 41 Vict. c. 21), s. 5. As to prison officers, see p. 235, *post*.

(*f*) Prison Act, 1898 (61 & 62 Vict. c. 41), s. 3. As to boards of visitors, see p. 234, *post*.

(*g*) Prison Act, 1898 (61 & 62 Vict. c. 41), s. 2. As to such rules, see pp. 253 *et seq.*, *post*.

(*h*) Prison Act, 1877 (40 & 41 Vict. c. 21), ss. 6, 48. Though the criminal lunatic asylums at Broadmoor and Rampton are not under their control, the legal estate of both institutions is vested in them. As to criminal lunatic asylums, see p. 270, *post*.

(*i*) The term "subordinate officers" includes all prison officers except the gaoler, deputy gaoler, chaplain, assistant chaplain and surgeon (Prison Act, 1865 (28 & 29 Vict. c. 126), ss. 10, 12).

(*j*) As to visiting justices, see p. 232, *post*.

(*k*) It is doubtful whether the Prison Commissioners have power to take evidence on oath. They have the powers of visiting justices who may "take cognizance of any matters . . . within the powers of their Commission as justices," but this in itself would not confer power to take evidence on oath at an inquiry into abuses; see Prison Act, 1877 (40 & 41 Vict. c. 21), s. 14.

SECT. 1. Prison Authorities.

Secretary of State, to whom they must report on the condition of the prisons, and they must make an annual report on every prison to be laid before both Houses of Parliament (*l*). This annual report must contain full particulars of the industries in which the prisoners are employed; of the value of their labour; and of the offences and punishments of prisoners (*m*), and of each sentence of corporal punishment (*n*).

The Prison Commissioners as directors of convict prisons.

437. The Prison Commissioners are, by virtue of their office, directors of convict prisons (*o*), a body corporate, with perpetual succession and a common seal, who may sue and be sued in all courts (*p*). They are responsible for the proper management of convict prisons and the treatment of convicts, and they are answerable for escape (*q*).

Powers.

They may punish convicts for offences after taking evidence on oath (*r*); they have the powers of justices of the peace for the county in which a convict prison is situated (*s*).

They may order convicts guilty of assault or escape, or of attempts to assault or escape, to wear a distinctive dress and be restrained in leg-irons for any period not exceeding six months (*t*), and may, in addition to other punishments, order a convict to be kept in separate confinement for six months (*u*).

They may authorise the application of a painful test considered necessary by the medical officer to detect malingering (*v*).

Inspectors of prisons.

438. Inspectors of prisons are appointed by the Secretary of State to assist the Prison Commissioners in their duties (*w*).

SUB-SECT. 3.—*Visiting Committees and Boards of Visitors.*

(i.) *Visiting Committees.*

Visiting committee.

439. A visiting committee of justices is appointed annually for each local prison by such courts and authorities as the Secretary of

(*l*) Prison Act, 1877 (40 & 41 Vict. c. 21), s. 10.
(*m*) *Ibid.*, ss. 11, 12.
(*n*) Prison Act, 1898 (61 & 62 Vict. c. 41), s. 5 (2).
(*o*) *Ibid.*, s. 1.
(*p*) Convict Prisons Act, 1850 (13 & 14 Vict. c. 39). Under *ibid.*, s. 1, they have all the powers and duties of the Visitors of Parkhurst Prison (Parkhurst Prison Act, 1838 (1 & 2 Vict. c. 82)), the Commissioners of Pentonville Prison (Pentonville Prison Act, 1842 (5 & 6 Vict. c. 29)); the Visitors of Millbank Prison (Millbank Prison Act, 1847 (11 & 12 Vict. c. 104)), and the Superintendent of Convicts (Transportation Act, 1824 (5 Geo. 4, c. 84)). Though their power to hold land is not expressly stated, they do in fact hold land and they have held the patronage of a living (St. Peter's, Portland).
(*q*) Transportation Act, 1824 (5 Geo. 4, c. 84), s. 15.
(*r*) In this respect their powers as directors are greater than their powers as Commissioners.
(*s*) *Ibid.*, s. 16; and see title MAGISTRATES, Vol. XIX., pp. 559 *et seq.*
(*t*) Rules for Convict Prisons, r. 86 (Stat. R. & O. Rev., Vol. X., Prison, England, p. 77).
(*u*) *Ibid.*, r. 76.
(*v*) *Ibid.*, r. 167.
(*w*) Prison Act, 1877 (40 & 41 Vict. c. 21), s. 7.

State may prescribe. County justices appoint their members at the quarter sessions, held in the first week after the 28th December; borough justices at special sessions held for the purpose in the first whole week after the 28th December (*x*). At Worcester, the City Council appoints members (*y*). The adjourned Quarter Sessions for the whole County of Hertford makes the appointment at the Michaelmas adjourned session, and the Quarter Sessions for the County of London makes the appointment at any session in January not later than the 25th day of that month (*x*). Casual vacancies arising from death, resignation, or other cause are filled at the sessions following the occurrence of the vacancy (*a*), and if the appointing authority fails to appoint the proper number of members, the Secretary of State may order the appointment to be made at a subsequent session (*b*).

Appointment.

Casual vacancies.

440. Members of the visiting committee must meet once a month at the prison, or, if they pass a resolution that less frequent meetings are sufficient, not less than eight times a year (*c*). One or more of them should visit the prison once a week, unless, for reasons specified, fortnightly visits are considered sufficient (*d*).

Visits to prison.

441. No member of the visiting committee may have an interest in contracts made with his prison (*e*).

Disqualification for contracting.

442. The visiting committee must conform to the prison rules (*f*). They must report any abuse to the Prison Commissioners immediately, and in a case of urgency they may suspend any officer from duty (*g*). They must hear complaints from prisoners in private if desired (*h*) and report them to the Prison Commissioners, and take such steps in regard to them as they may be directed to take (*i*).

Powers and duties of visiting committee.

They must adjudicate on charges of misconduct against prisoners (*j*), and may authorise the use of mechanical restraint for a longer period than twenty-four hours (*k*). When they think that injury to body or mind is likely to result from the treatment of any prisoner they may give such orders as they think fit, reporting their action to the Commissioners (*l*).

As to treatment.

They have free access to every part of the prison and to every prisoner at any time (*m*), and may inspect any of the books (*n*).

Powers as to access to prison and prisoners.

(*x*) See title MAGISTRATES, Vol. XIX., p. 638.
(*y*) Prison Act, 1877 (40 & 41 Vict. c. 21), s. 13, and Rules for Local Prisons, r. 275 (Stat. R. & O. Rev., Vol. X., Prison, England, p. 6).
(*a*) Rules for Local Prisons, r. 281.
(*b*) *Ibid.*, r. 280.
(*c*) *Ibid.*, r. 284.
(*d*) *Ibid.*, r. 285.
(*e*) *Ibid.*, r. 286.
(*f*) Prison Act, 1877 (40 & 41 Vict. c. 21), s. 14.
(*g*) Rules for Local Prisons, r. 288.
(*h*) Prison Act, 1877 (40 & 41 Vict. c. 21), s. 14.
(*i*) Rules for Local Prisons, r. 292.
(*j*) *Ibid.*, r. 289.
(*k*) *Ibid.*, r. 290.
(*l*) *Ibid.*, r. 293.
(*m*) Prison Act, 1877 (40 & 41 Vict. c. 21), s. 13.
(*n*) Rules for Local Prisons, r. 295. This rule will not confer any right to see the Commissioners' correspondence with the governor.

SECT. 1. Prison Authorities.

They may inquire into the state of the buildings (*o*) and the employments of the prisoners (*p*).

Powers as to privileges of prisoners.

They may allow a prisoner to change his religion (*q*), and may dispense with his attendance at divine service (*r*). They are to assist in the selection of library books (*s*), and may organise lectures and addresses from time to time (*t*). In special cases they may grant a prisoner an additional letter or visit (*a*). They have power to authorise visits to persons under sentence of death (*b*).

Powers as to punishment.

They have power to award punishments to prisoners up to the following limits: fourteen days' close confinement (*c*); fifteen days' No. 1 punishment diet (*d*) in periods of three days alternating with periods of three days on ordinary diet; forfeiture of stage privileges (*e*) or of remission (*e*) for twenty-eight days (*f*). Their power to award corporal punishment is restricted as hereafter stated (*g*).

Powers of justice of the peace.

443. Any justice of the peace having jurisdiction in the locality of the prison, or in the place where any prisoner confined in the prison committed his offence, may enter the prison and make an entry as to the condition of the prison or of the prisoners in the visitors' book, which must be laid before the visiting committee at their next visit, but he is not entitled to visit a prisoner under sentence of death or to communicate with any prisoner except in reference to his treatment or to a complaint made by him (*h*).

(ii.) *Boards of Visitors.*

Appointment.

444. A board of visitors is appointed by the Secretary of State to each convict prison for three years. Two members at least must be justices (*i*).

Duties.

445. One or more members must visit the prison monthly, and they should meet as a board as often as possible (*k*). Their duties and powers in a convict prison are similar to those of a visiting committee in a local prison (*l*).

(*o*) Rules for Local Prisons, r. 305.
(*p*) *Ibid.*, r. 306.
(*q*) *Ibid.*, r. 300.
(*r*) *Ibid.*, r. 296.
(*s*) *Ibid.*, r. 299.
(*t*) *Ibid.*, r. 301.
(*a*) *Ibid.*, r. 297.
(*b*) *Ibid.*, r. 95.
(*c*) As to close confinement, see p. 256, *post.*
(*d*) As to No. 1 diet, see p. 256, *post.*
(*e*) As to stage privileges and remission, see pp. 257, 258, *post.*
(*f*) Rules for Local Prisons, r. 83. In 1909, the visiting committee of Manchester Prison authorised the use of the hose pipe to dislodge a refractory prisoner who had barricaded the door of her cell. Damages were awarded by the county court against each of the members of the committee.
(*g*) See pp. 257, 266, *post.*
(*h*) Prison Act, 1877 (40 & 41 Vict. c. 21), s. 15.
(*i*) Prison Act, 1898 (61 & 62 Vict. c. 41), s. 3, and Rules for Convict Prisons, r. 176.
(*k*) Rules for Convict Prisons, r. 180.
(*l*) *Ibid.*, rr. 181—190.

The visiting committee of a Borstal institution is appointed like a board of visitors for three years, and the chairman is appointed by the Secretary of State (*m*).

SECT. 2.—*Classification of Prisons.*

Local prisons.

446. Local prisons are prisons for the confinement of persons awaiting trial, criminals sentenced to death or imprisonment other than penal servitude, debtors and persons committed for contempt, and persons attached or committed under other civil process.

Convict prisons.

Convict prisons are prisons set apart for persons sentenced to penal servitude.

Preventive detention prisons.

Preventive detention prisons are prisons or parts of prisons set apart for persons sentenced to preventive detention (*n*).

Borstal institutions.

Borstal institutions are places set apart for the detention of young persons of either sex between the ages of sixteen and twenty-one on conviction (*o*).

State inebriate reformatories.

State inebriate reformatories are institutions established under the Inebriates Act, 1898 (*p*).

All these institutions are under the superintendence and management of the Prison Commissioners and directors of convict prisons, but there are distinct statutory rules or regulations for the government of each class (*q*).

SECT. 3.—*Prison Officers.*

SUB-SECT. 1.—*The Governor.*

Residence at prison.

447. The governor must reside in the house assigned to him (*r*), and must see every prisoner and visit all parts of the prison at least once a day (*s*). He must not be absent for a night without leave from a Commissioner (*a*).

General responsibility.

448. He is responsible for the observance of the law and the prison rules by himself and his subordinates (*b*), and for taking every precaution against the escape of prisoners (*c*). He must assure himself that all gates are securely locked, and must not allow any key to be taken out of the prison (*d*). Both he and his

(*m*) Regulations made under the Prevention of Crime Act, 1908 (8 Edw. 7, c. 59), s. 4 (2). As to Borstal institutions, see the text, *infra*:

(*n*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 417.

(*o*) *Ibid.*, pp. 418—420, 806. There is power under the Prevention of Crime Act, 1908 (8 Edw. 7, c. 59), s. 1 (2), to raise the age to one not exceeding twenty-three years.

(*p*) 61 & 62 Vict. c. 60; see title INTOXICATING LIQUORS, Vol. XVIII., pp. 168—170. As to licensed retreats, see *ibid.*, pp. 159 *et seq.*

(*q*) As to the control and establishment of prisons, see, further, p. 231, *ante*, and p. 242, *post*.

(*r*) Rules for Local Prisons, r. 123, made 21st April, 1899. He is called "gaoler" in the Prison Act, 1865 (28 & 29 Vict. c. 126).

(*s*) Rules for Local Prisons, r. 126.

(*a*) *Ibid.*, r. 141.

(*b*) *Ibid.*, r. 124.

(*c*) *Ibid.*, r. 127.

(*d*) *Ibid.*, r. 129.

SECT. 3. Prison Officers.

deputy must visit the prison once a week at an uncertain hour of the night (*e*).

Reports on condition of prisoners.

449. He must report to the medical officer the case of any prisoner whose state of mind or of body requires attention, and must carry out the directions of the medical officer in such case (*f*). He must report to the Prison Commissioners all cases of insanity or apparent insanity, and all cases where the medical officer thinks that further imprisonment will endanger life or that a sick prisoner will not survive his sentence, or that a prisoner's mind is being impaired by continued imprisonment (*g*).

If a prisoner is dangerously ill the governor must inform the nearest relatives (*h*).

Powers and duties as to visitors.

450. The governor must not allow any person except a member of the visiting committee (*i*), a magistrate having jurisdiction in the locality of the prison (*k*), a judge of the High Court, or a bishop of the diocese (*l*) to view the prison without an order from the Secretary of State or the Commissioners. He may examine all persons and vehicles going into or out of the prison, and may exclude anyone who refuses to be examined (*m*); and he may remove any visitor whose conduct is improper (*n*).

Powers and duties as to misconduct and complaints.

451. He may impose a fine up to 5*s*. on subordinate officers for misconduct (*o*), and may punish prisoners for minor offences, provided that the award does not exceed three days' close confinement on reduced diet (*p*) and forfeiture of stage privileges and of remission for fourteen days (*q*). He must hear any reports of misconduct daily, and must give facilities to prisoners who wish to make complaints either to him or to the visiting committee (*r*).

Powers as to restraint of prisoners.

452. If the governor finds it necessary to put a prisoner under mechanical restraint he must report the fact to the visiting committee, or, in a convict prison, to a director, who have or has power to order the continuance of the restraint after the first twenty-four hours (*a*).

Powers as to letters.

453. The governor must read every letter addressed to or written by a prisoner, and may withhold any such letter (*b*).

(*e*) Rules for Local Prisons, r. 130.
(*f*) *Ibid.*, r. 133. As to the medical officer, see p. 238, *post*.
(*g*) *Ibid.*, r. 138.
(*h*) *Ibid.*, r. 148. As to inquests on persons dying within a prison, see title CORONERS, Vol. VIII., p. 241.
(*i*) Prison Act, 1877 (40 & 41 Vict. c. 21), s. 13.
(*k*) *Ibid.*, s. 15.
(*l*) Rules for Local Prisons, r. 145.
(*m*) *Ibid.*, r. 145 (3).
(*n*) *Ibid.*, r. 145 (4).
(*o*) *Ibid.*, r. 140.
(*p*) *Ibid.*, r. 81.
(*q*) *Ibid.*, r. 81 (a).
(*r*) *Ibid.*, r. 151.
(*a*) *Ibid.*, r. 153; Rules for Convict Prisons, r. 144.
(*b*) Rules for Local Prisons, r. 155.

454. In the governor's absence the charge of the prison devolves upon the deputy governor, or in his absence upon the chief warder or senior discipline officer (*c*).

Person in charge in absence of governor.

455. Though a governor is protected against actions for false imprisonment arising out of his interpretation of the terms of the warrant (*d*), he is liable for detaining the wrong person, even though he has no means of ascertaining the identity of the person named in the warrant (*e*). He is also liable in damages if he detains a prisoner upon a warrant of a magistrate, which has been varied on appeal to quarter sessions, without obtaining a fresh warrant from the court of quarter sessions (*f*).

Liability in damages.

SUB-SECT. 2.—*The Chaplain.*

Appointment.

456. The chaplain is appointed by the Secretary of State, but he cannot officiate in a prison without a licence from the bishop of the diocese (*g*).

Duties.

He must read a service daily, and preach twice on Sundays, on Good Friday, and on Christmas Day (*h*). He must also read prayers daily in the infirmary and visit prisoners under punishment (*i*).

He must see and admonish prisoners on admission and discharge, and visit each prisoner from time to time during sentence (*k*). No books of religious instruction may be circulated among the prisoners except with the concurrence of the chaplain (*l*).

Appointment of minister.

457. Where the number of prisoners belonging to a denomination other than the Established Church is so great as to justify the appointment of a minister, the Prison Commissioners (*m*) may appoint a minister (*n*). Where no prison minister is appointed, the visiting committee may allow prisoners not belonging to the Established Church, on request to the governor, to be visited by ministers of their religious persuasion at a reasonable time (*o*). The minister must conform to prison rules, and support the governor in the maintenance of discipline and order (*a*).

(*c*) Rules for Local Prisons, r. 141.

(*d*) *Henderson* v. *Preston* (1888), 21 Q. B. D. 362, C. A.; see also *Moone* v. *Rose* (1869), L. R. 4 Q. B. 486; *Thomas* v. *Hudson* (1845), 14 M. & W. 353; *Greaves* v. *Keene* (1879), 4 Ex. D. 73; *M'Combe* v. *Gray* (1879), 4 L. R. Ir. 432. As to false imprisonment, see titles CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 606, 607; MALICIOUS PROSECUTION AND PROCEDURE, Vol. XIX., p. 671; TRESPASS.

(*e*) *Aaron* v. *Alexander* (1811), 3 Camp. 35; see also *White* v. *Taylor and Simcoe* (1801), 4 Esp. 80.

(*f*) *Demer* v. *Cook* (1903), 88 L. T. 629.

(*g*) Rules for Local Prisons, r. 46; and see title ECCLESIASTICAL LAW, Vol. XI., p. 650.

(*h*) Rules for Local Prisons, r. 47.

(*i*) *Ibid.*, r. 52.

(*k*) *Ibid.*

(*l*) *Ibid.*, r. 67.

(*m*) Formerly the justices.

(*n*) Prison Ministers Act, 1863 (26 & 27 Vict. c. 79), s. 3. The minister holds his appointment at the pleasure of the Commissioners; see *ibid.*, s. 3.

(*o*) *Ibid.*, s. 4.

(*a*) Rules for Local Prisons, r. 66.

SECT. 3. Prison Officers.

458. The religious persuasion of each prisoner must be registered at the prison (*b*).

Registration of prisoner's religious persuasion.

SUB-SECT. 3.—*The Medical Officer.*

General duties as to visits and inspection.

459. The medical officer must visit the prison at least once every day, see every prisoner at least once a week, visit all prisoners complaining of illness (*c*), and, generally, apply such treatment as may be necessary for restoring a sick prisoner to health or for maintaining him in health (*d*). He must examine every prisoner on reception and before removal (*e*), and must record his state of health (*f*). He must also visit every prisoner undergoing punishment or special penal discipline (*e*), and must make a sanitary inspection of every part of the prison once a month, recording the result in his journal (*g*), and must frequently inspect the food (*h*).

Duties as to special observation and reports.

460. The medical officer must place under special observation any prisoner whose mental state appears to be impaired, and must report any signs of incipient insanity. He must also report in writing the case of any prisoner whose health, in his opinion, is likely to be injured by discipline or treatment, and any case of dangerous illness, and he must make any necessary recommendation for altering the treatment of a prisoner and for supplying him with additional articles (*i*).

Report as to unfitness for prison discipline.

461. Whenever the medical officer is of opinion that the life of a prisoner will be endangered by continuance in prison, or that a prisoner will not survive his sentence, or that he is totally and permanently unfit for prison discipline, he must state the grounds for his opinion in writing to the governor for transmission to the Prison Commissioners (*k*).

Serious operations.

462. The medical officer must not perform any serious operation without consulting another practitioner, except in cases not admitting delay (*l*).

Examination in special cases.

463. The medical officer must examine every prisoner sentenced to hard labour, and report to the governor any case in which health is endangered by a particular kind of labour (*m*). He must also examine every prisoner and certify that he is medically fit before he is subjected to close confinement, dietary or corporal

(*b*) Prison Ministers Act, 1863 (26 & 27 Vict. c. 79), s. 4.
(*c*) Rules for Local Prisons, r. 168.
(*d*) *Leigh* v. *Gladstone* (1909), 26 T. L. R. 139 (where plaintiff sued the defendant for feeding her by force when she was endeavouring to obtain her release by self-starvation).
(*e*) Rules for Local Prisons, r. 177.
(*f*) *Ibid.*, r. 168.
(*g*) *Ibid.*, r. 169.
(*h*) *Ibid.*, r. 170.
(*i*) *Ibid.*, r. 172.
(*k*) *Ibid.*, r. 172 (5). Reports made by the medical officer to the governor are not privileged (*Leigh* v. *Gladstone*, *supra*). As to privilege, see title LIBEL AND SLANDER, Vol. XVIII., pp. 686 *et seq.*
(*l*) *Ibid.*, r. 173.
(*m*) Rules for Local Prisons, r. 180.

punishment, and he must be present at the infliction of every corporal punishment (*n*).

He must inform the governor of any peculiarity in the person of a prisoner which may help in identifying him (*o*).

Attendance on officers and servants.

464. The medical officer must attend all officers and servants of the prison and their families who reside within a distance prescribed by the Prison Commissioners (*p*).

SUB-SECT. 4.—*The Matron.*

Residence.

465. The matron must reside in the prison (*q*).

Duties.

She has the care and superintendence of all the female prisoners, and must keep the keys of all the locks in the female prison (*q*). She must see every female prisoner once in every twenty-four hours, and at least once a week must visit every part of the prison at an uncertain hour of the night (*r*). She is responsible that no male officer or visitor enters the female prison unaccompanied by a female officer (*s*).

SUB-SECT. 5.—*Other Officers.*

Tenure of office.

466. All prison officers hold office during the pleasure of the Secretary of State (*t*).

Prohibition against dealings with prisoners and others.

467. No officer may allow a prisoner to be employed either directly or indirectly for the private benefit or advantage of any person (*u*), nor may he have any pecuniary or other dealings with or on behalf of a prisoner, nor employ him on his private account (*v*).

Officers are forbidden to receive fees from visitors (*w*), or from contractors, or to have any interest in a prison contract (*x*).

Residence.

468. Officers must occupy the quarters assigned to them and vacate them when required to do so. On discharge or resignation an officer must immediately vacate his quarters, and on the death of an officer his family must vacate his quarters when required. No officer may keep a shop or a school or receive lodgers in his quarters, or allow a person not a member of his family to pass a night in them without permission (*a*). Subordinate officers may not receive visitors within the prison without leave (*b*).

Custody and preservation of prisoners and property.

469. Officers must be vigilant in insuring the safe custody of prisoners, must not take a prison key out of the prison (*c*), must

(*n*) Rules for Local Prisons, r. 182.
(*o*) *Ibid.*, r. 179.
(*p*) *Ibid.*, r. 166.
(*q*) *Ibid.*, r. 161.
(*r*) *Ibid.*, r. 162.
(*s*) *Ibid.*, r. 165.
(*t*) *Ibid.*, r. 96.
(*u*) Rules for Local Prisons, r. 98; Rules for Convict Prisons, r. 89.
(*v*) Rules for Local Prisons, r. 97; Rules for Convict Prisons, r. 88.
(*w*) Rules for Local Prisons, r. 101; Rules for Convict Prisons, r. 92.
(*x*) Rules for Local Prisons, r. 100; Rules for Convict Prisons, r. 91.
(*a*) Rules for Local Prisons, r. 106; Rules for Convict Prisons, r. 97.
(*b*) Rules for Local Prisons, r. 105; Rules for Convict Prisons, r. 96.
(*c*) Rules for Local Prisons, r. 104; Rules for Convict Prisons, r. 95.

SECT. 3. Prison Officers.

frequently examine the cell furniture, locks, bolts etc., and deliver to the governor all prohibited articles they may seize (*d*). They must not fail to report any misconduct of the prisoners in their charge (*e*).

Performance of duties.

470. Officers must perform their duties conscientiously, but without harshness (*f*). They must not strike a prisoner except in self-defence, nor use more force at any time than is actually necessary, nor inflict any punishment or privation that is not ordered by the governor (*g*), nor speak unnecessarily to a prisoner, nor do anything tending to irritate a prisoner. They must not allow prisoners to be familiar with them, nor may they speak of their duties in a prisoner's hearing (*h*).

Unlawful communications.

471. They must not correspond with a prisoner's friends without permission, and they are liable to dismissal if they communicate matters derived from official sources to any person without authority.

They are forbidden to publish a book relating to the prison department or to make unauthorised communications to the Press (*i*).

Offence and penalty.

An officer who communicates any information acquired in his official duties to any person, to whom it ought not in the public interest to be communicated at that time, is guilty of a misdemeanour, and is liable to imprisonment with or without hard labour for a term not exceeding two years, or to a fine, or to both (*k*).

Prohibition against importation or exportation of articles.

472. Officers who bring into or carry out of the prison, to or for any prisoner, any money, clothing, provisions, tobacco, letters, papers, or other articles, must forthwith be suspended (*l*). The gatekeeper must examine everything carried through the gate, and may stop any person suspected of bringing in prohibited articles or carrying out prison property (*m*).

Effect of suspension.

473. Officers under suspension for misconduct must surrender their keys and quit the prison, but must attend daily at such hour as the governor may appoint (*n*).

Appeal.

They may appeal against any decision affecting them by stating their complaint to the governor for transmission to the Prison Commissioners (*o*).

Actions against officers.

474. Prior to the 1st January, 1894, in any action brought against any person for anything done in pursuance of the Prison Act, 1865 (*p*), the general issue could be pleaded and the statute

(*d*) Rules for Local Prisons, r. 105; Rules for Convict Prisons, r. 96.
(*e*) Rules for Local Prisons, r. 113; Rules for Convict Prisons, r. 104.
(*f*) Rules for Local Prisons, r. 108; Rules for Convict Prisons, r. 99.
(*g*) Rules for Local Prisons, r. 112; Rules for Convict Prisons, r. 103.
(*h*) Rules for Local Prisons, r. 114; Rules for Convict Prisons, r. 105.
(*i*) Rules for Local Prisons, r. 115; Rules for Convict Prisons, r. 106.
(*k*) Official Secrets Act, 1911 (1 & 2 Geo. 5, c. 28), s. 2; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 480.
(*l*) Rules for Local Prisons, r. 121; Rules for Convict Prisons, r. 112.
(*m*) Rules for Local Prisons, r. 107; Rules for Convict Prisons, r. 98.
(*n*) Rules for Local Prisons, r. 119; Rules for Convict Prisons, r. 110.
(*o*) Rules for Local Prisons, r. 118; Rules for Convict Prisons, r. 109.
(*p*) 28 & 29 Vict. c. 126.

put in evidence, and, if the action failed, the defendant might recover double costs; but if the verdict was given for the plaintiff, no costs could be recovered against the defendant unless the judge certified his approval of the action and the verdict (*q*).

SUB-SECT. 6.—*Superannuation.*

Officers before 1st April, 1878.

475. Prison officers who were civil servants on the 1st April, 1878, and who had served for not less than twenty years, and were not less than sixty years of age, or were invalided, might receive a retiring allowance not exceeding two-thirds of their salary or a gratuity of not more than one year's salary and emoluments (*r*).

Officers before 21st September, 1909.

476. Prison officers who became civil servants after the 1st April, 1878, and before the 21st September, 1909, may retire at the age of sixty, and are compulsorily retired at the age of sixty-five. Provided that they have served for not less than ten years, they may receive a pension of one-sixtieth of their annual salary for every year of service up to a maximum of two-thirds (*s*). If killed or injured while on duty, a gratuity or an allowance may be granted not exceeding one year's salary or £300, whichever is less (*t*).

Officers after 20th September, 1909.

477. Prison officers, like other civil servants, who enter the service after the 20th September, 1909, receive a retiring allowance of one-eightieth of their annual salary on retirement multiplied by the number of years they have served. The Treasury may also grant a lump sum not exceeding one and a half times their annual salaries provided that they have served for two years. If, however, they do not retire until after sixty-five years of age, a reduction is made in respect of each completed year served after attaining that age (*u*).

(*q*) See the Prison Act, 1865 (28 & 29 Vict. c. 126), s. 49, which although repealed by the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 2, and Sched., may be still in force as to proceedings not within the latter statute; see further title PUBLIC AUTHORITIES AND PUBLIC OFFICERS, pp. 338 *et seq.*, *post.*

(*r*) Prison Act, 1877 (40 & 41 Vict. c. 21), s. 36; Prison (Officers' Superannuation) Act, 1886 (49 & 50 Vict. c. 9). In *Middlesex Justices* v. *R.* (1884), 9 App. Cas. 757, it was decided that, even where a governor retired before he was sixty years of age, without being invalided, to enable reforms to be carried out, the county was liable for its share of the pension.

(*s*) Superannuation Act, 1859 (22 Vict. c. 26), s. 2. As to the power of the local prison authority to recommend the payment of an annuity in excess of the scale provided by the Superannuation Act, 1859 (22 Vict. c. 26), see Prison Officers (Pensions) Act, 1902 (2 Edw. 7, c. 9), s. 1. The term "local prison authority" has by *ibid.* the same meaning as "prison authority" in the Prison Act, 1865 (28 & 29 Vict. c. 126), s. 5, and in the Prison Act, 1877 (40 & 41 Vict. c. 21), ss. 36, 61; and see note (*e*), p. 242, *post.*

(*t*) Superannuation Act, 1887 (50 & 51 Vict. c. 67), s. 1 (3). On the death of a civil servant, any sum due to him not exceeding £100 may be paid to his reputed heirs without probate; see also the Superannuation Act, 1892 (55 & 56 Vict. c. 40), as regards the computation of successive service in different offices. The term "existing officer of a prison" in the Prison Act, 1877 (40 & 41 Vict. c. 21), was extended by the Superannuation Act, 1893 (56 & 57 Vict. c. 40), to Prison Commissioners and any members of their clerical or executive staff who were attached to a prison before the Prison Act, 1877 (40 & 41 Vict. c. 21), came into force (1st April, 1878).

(*u*) Superannuation Act, 1909 (9 Edw. 7, c. 10), s. 1. By *ibid.*, s. 3, existing civil servants were allowed to adopt the provisions of the Act provided that they were then under sixty years of age.

SECT. 4. Establishment and Discontinuance of Prisons.

SECT. 4.—*Establishment and Discontinuance of Prisons.*

SUB-SECT. 1.—*Establishment and Maintenance.*

Alteration and acquisition of prisons.

478. The Secretary of State, with the approval of the Treasury, may alter, enlarge, or rebuild any prison, or build a new prison, or declare any building, or part of a building, to be a prison (*v*).

Where land contiguous to a prison is required for enlargements, the land may be acquired by compulsory purchase (*a*).

Purchase of buildings within prisons.

479. Town halls, court-houses, and rooms situated within the boundary of a prison, but not used in the management of the prison, may be purchased from the local authority to whom they belong (*b*).

Maintenance of buildings.

480. Buildings in the nature of national monuments which are used as prisons must be maintained in such a manner as to prevent their being defaced or injured as monuments (*c*).

SUB-SECT. 2.—*Discontinuance.*

Discontinuance of prisons.

481. Provided that there is at least one prison in every county, except for special reasons to be stated in the order, the Secretary of State may discontinue any prison by an order which must be laid before Parliament forthwith (*d*). He must serve a notice on the prison authority (*e*) to which the prison originally belonged that he will, within six months, convey the prison, but not the furniture, to the authority on payment to the Exchequer of £120 for each of the average maximum number of prisoners confined in the prison during the five years preceding the 1st January, 1877. The authority, if it accepts such offer and takes the conveyance, may then sell or dispose of the prison as it pleases. If it declines to accept the offer, the Secretary of State must sell the prison, and, after deducting expenses and the money due to the Exchequer, must pay the overplus, if any, to the prison authority (*f*).

A prison authority may borrow money from the Public Works Loans Commissioners for the purpose of buying back a discontinued prison on terms providing for repayment within thirty-five years (*g*).

(*v*) Prison Act, 1884 (47 & 48 Vict. c. 51), s. 2.

(*a*) Prison Act, 1865 (28 & 29 Vict. c. 126), s. 44; and see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 7, 162.

(*b*) Prison Act, 1877 (40 & 41 Vict. c. 21), s. 49.

(*c*) *Ibid.*, s. 50; and see title OPEN SPACES AND RECREATION GROUNDS, Vol. XXI., pp. 602 *et seq.*

(*d*) Prison Act, 1877 (40 & 41 Vict. c. 21), s. 33.

(*e*) As to the term "prison authority," see Prison Act, 1865 (28 & 29 Vict. c. 126), s. 5; title MAGISTRATES, Vol. XIX., p. 638; and see note (*s*), p. 241, *ante*.

(*f*) Prison Act, 1877 (40 & 41 Vict. c. 21), s. 34. If, however, it can be shown that there is sufficient cell accommodation for the prisoners in other prisons originally provided by the same authority, a proportionate reduction in the payment is to be made (*ibid.*).

(*g*) *Ibid.*, ss. 34, 46, 47; and see title MONEY AND MONEY-LENDING, Vol. XXI., p. 59.

Part II.—Prisoners.

SECT. 1.—*Committal and Treatment of Prisoners.*

SECT. 1. Committal and Treatment of Prisoners.

SUB-SECT. 1.—*In General.*

482. For the purpose of the Prison Acts (*h*) a prisoner is defined as a person committed to prison on remand, or for trial, safe custody, punishment or otherwise (*i*).

Definition of "prisoner."

A criminal prisoner is any prisoner charged with or convicted of a crime (*k*).

"Criminal prisoner."

"Maintenance of a prisoner" includes all necessary expenses incurred for food, clothing, custody, safe conduct, and removal from one place of confinement to another from the period of committal until the death or discharge of the prisoner (*l*).

"Maintenance."

483. A prisoner is liable to pay the cost of his conveyance to prison (*m*). When he does not pay, the cost of conveyance is refunded to the local authority by the Prison Commissioners (*n*).

Cost of conveyance to prison.

484. Prisoners may be committed either to the prison in the county in which the committing court has its jurisdiction or to the prison of an adjacent county (*o*). The Secretary of State may remove any convicted criminal prisoner from one prison to any other within his jurisdiction, provided that, if the prison is situated outside the county in which he was convicted, he is taken back to the place of conviction at the public expense (*p*).

Prisons to which prisoners are committed.

485. Prisoners cannot be removed from one prison to another except by warrant, unless it is to a prison in the same county for

Removal from one prison to another.

(*h*) The Prison Acts are the Prison Act, 1865 (28 & 29 Vict. c. 126); the Prison Act, 1877 (40 & 41 Vict. c. 21); the Prison (Officers' Superannuation) Act, 1878 (41 & 42 Vict. c. 63); the Prison Act, 1884 (47 & 48 Vict. c. 51); the Prison (Officers' Superannuation) Act, 1886 (49 & 50 Vict. c. 9); the Prison (Officers' Superannuation) Act, 1893 (56 & 57 Vict. c. 26); the Prison Act, 1898 (61 & 62 Vict. c. 41); the Prison Officers (Pensions) Act, 1902 (2 Edw. 7, c. 9).

(*i*) Prison Act, 1877 (40 & 41 Vict. c. 21) s. 57: and see title MAGISTRATES, Vol. XIX., p. 581.

(*k*) Prison Act, 1865 (28 & 29 Vict. c. 126), s. 4; see also Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 20. A person convicted under the Solicitors Acts, 1843 (6 & 7 Vict. c. 73), s. 32, and 1860 (23 & 24 Vict. c. 127), s. 26, of acting as a solicitor, though not duly qualified, is a criminal prisoner (*Osborne* v. *Milman* (1887), 18 Q. B. D. 471, C. A.).

(*l*) Prison Act, 1877 (40 & 41 Vict. c. 21), s. 57; and see note (*n*), *infra*.

(*m*) Stat. (1605) 3 Jac. 1, c. 10.

(*n*) *Mullins* v. *Surrey Treasurer* (1881), 7 App. Cas. 1, affirming S. C. (1880), 6 Q. B. D. 156, where it was held that the cost of conveyance to prison was included in the term "maintenance of a prisoner" under the Prison Act, 1877 (40 & 41 Vict. c. 21), s. 57, for which the justices were formerly liable, and that this liability passed to the Prison Commissioners when they assumed the control of the prisons. It would appear that the police are responsible for conveying the prisoner to prison in the first instance, at the cost of the Prison Commissioners, but that the Commissioners are responsible for bringing him to court on remand or for trial; see title MAGISTRATES, Vol. XIX., p. 354.

(*o*) Prison Act, 1877 (40 & 41 Vict. c. 21), s. 24; see title MAGISTRATES Vol. XIX., p. 659.

(*p*) Prison Act, 1877 (40 & 41 Vict. c. 21), s. 25.

SECT. 1. Committal and Treatment of Prisoners.

trial, or in the case of some sudden necessity, such as a fire. There must be no removal after an assize has been opened (*q*).

Legal custody.

486. Prisoners are in legal custody while being taken to and from any prison in which they are lawfully confined, or when they are working outside the prison or are otherwise beyond the walls in the custody of a prison officer, or of a constable or other officer acting under the order of a magistrate (*r*).

Calendar of prisoners in custody.

487. The governor is responsible for preparing and delivering to the judge of assize or to the justices in quarter sessions a calendar of all prisoners in his custody for trial (*s*).

Rules as to treatment.

488. There are separate rules for the treatment of different classes of prisoners, namely:—prisoners awaiting trial, offenders of the first division, offenders of the second division, offenders of the third division, prisoners sentenced to hard labour, and debtors.

SUB-SECT. 2.—*Prisoners Awaiting Trial.*

Class.

489. This class includes persons committed for trial, on remand, and awaiting sentence.

Special treatment.

They must be kept separate from convicted prisoners and from each other, and may be allowed by the visiting committee, on payment of a small sum, to occupy a special room furnished with private furniture. They may be relieved of domestic work, and may be allowed to exercise apart or with selected untried prisoners. They need not take a bath unless it is necessary.

The visiting committee may modify the routine of the prison so far as to dispense with any practice which the governor thinks is unnecessary in any particular case, and any money belonging to a prisoner in the hands of the governor may be applied to defray the expenses of such special treatment (*t*).

Books and papers.

490. A prisoner awaiting trial may have any books, papers, documents or other articles in his possession when arrested that are not required as evidence against him, and are not connected with his case or incompatible with prison discipline (*u*). He may also have such books, newspapers or other means of occupation as are not considered objectionable (*v*).

Food and clothing.

491. Prisoners awaiting trial may provide themselves with food, clothing, bedding, or other necessaries. Those who do not provide their own food receive the diet approved for prisoners awaiting trial (*a*). They are not required to have their hair cut except on grounds of health and cleanliness (*b*).

(*q*) Habeas Corpus Act, 1679 (31 Car. 2, c. 2).
(*r*) Prison Act, 1877 (40 & 41 Vict. c. 21), s. 28.
(*s*) Prison Act, 1865 (28 & 29 Vict. c. 126), s. 62.
(*t*) Rules for Local Prisons, rr. 185—191.
(*u*) Prison Act, 1877 (40 & 41 Vict. c. 21), s. 39; Rules for Local Prisons, r. 192.
(*v*) Rules for Local Prisons, r. 203.
(*a*) *Ibid.*, r. 193.
(*b*) *Ibid.*, r. 200.

Prison dress.

492. Prisoners awaiting trial may wear the prison dress, and must do so if their own clothes are unfit for use, or are required for purposes of justice. The medical officer may order their own clothing to be disinfected, and while this is being done, they must wear prison dress (*c*).

Employment and earnings.

493. Work is not compulsory, but is optional, and in the event of an acquittal a reasonable allowance on account of earnings may be paid to the prisoner by the Prison Commissioners after deducting the cost of maintenance and the wear and tear of tools (*d*).

Visitors and legal and medical attendance.

494. A prisoner awaiting trial may, with the consent of the visiting committee, be visited by his own medical attendant at his own expense (*e*). Daily visits for fifteen minutes by one person, and, if circumstances permit, by two persons at the same time, are also allowed, and a prisoner may, so far as is consistent with the interests of justice, see his legal advisers in the sight, but not in the hearing, of an officer (*f*).

Prisoners in default of bail.

Prisoners in default of bail may see their friends at any reasonable hour for the purpose of providing bail (*g*).

Correspondence.

Reasonable facilities for writing are allowed, but letters must not be sent out of the prison until they have been examined by the governor (*h*).

General rules.

495. Prisoners awaiting trial are otherwise subject to the general prison rules (*i*).

Recognisances in respect of persons committed in default of sureties.

496. Where a person has been committed to prison in default of sureties, and sureties afterwards come forward, they may enter into recognisances before the governor of the prison in which the prisoner is confined (*k*). Before taking the recognisances the governor may require the person proposed as surety to produce a certificate that he is considered satisfactory, signed by a magistrate or the clerk of a court of summary jurisdiction (*l*). The person proposed as surety must sign his name on the margin of the certificate (*m*).

SUB-SECT. 3.—*Confinement after Conviction.*

(i.) *Identification of Prisoners.*

Regulations for photographing and measuring.

497. By statutory regulations (*n*) for the photographing and

(*c*) Rules for Local Prisons, rr. 194—195.
(*d*) *Ibid.*, rr. 204, 206.
(*e*) *Ibid.*, r. 202.
(*f*) *Ibid.*, rr. 207, 208.
(*g*) *Ibid.*, r. 209.
(*h*) *Ibid.*, r. 210.
(*i*) *Ibid.*, r. 212. Aliens in custody under an expulsion order and not serving a term of imprisonment (Aliens Act, 1905 (5 Edw. 7, c. 13), and prisoners awaiting extradition, are treated under the rules for prisoners awaiting trial; and see titles ALIENS, Vol. I., p. 325; EXTRADITION AND FUGITIVE OFFENDERS, Vol. XIV., p. 408.
(*k*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 42; see also the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 13 (11).
(*l*) Summary Jurisdiction Rules, 1886, r. 13.
(*m*) *Ibid.*, r. 13A (dated 30th December, 1903).
(*n*) Made under the Prevention of Crimes Act, 1871 (34 & 35 Vict.

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measuring of persons convicted of crime (*o*), any prisoner who refuses to obey such regulation is guilty of an offence against prison discipline (*p*).

Description and measurements.

498. The name, age, height, weight, features, particular marks, general appearance, and such other measurements and particulars of a prisoner as may be required are to be recorded at his admission and from time to time afterwards (*q*).

Photographs.

He may, if required for purposes of justice, be photographed, but no copy of the photograph is to be given to any person not officially authorised to receive it (*r*). A criminal prisoner may be photographed, full face and in profile, and measured at any time during his imprisonment, either in prison dress or in the dress he wore at the time of his arrest or trial, or in any other dress suitable to his ostensible position or occupation.

Finger-prints.

In addition to the measurements of various parts of the body and the description of every scar and distinctive marks, the print of the fingers and thumbs of both hands are to be taken by pressing them first upon an inked plate and then upon paper or cardboard (*s*).

Untried prisoners.

499. An untried prisoner is not to be photographed or measured in prison except by order of the Secretary of State or upon a written application of a police superintendent approved by a justice, or, in the Metropolitan Police District, by the Commissioner or Assistant Commissioner of Police, setting forth that from the character of the offence with which he is charged, and for other reasons, it is suspected that he has been previously convicted, or has been engaged in crime, or that his photograph and measurements are required for the purpose of justice (*t*). When an untried prisoner who has not been previously convicted has been photographed and measured and has been discharged by the magistrates or acquitted, all photographs

c. 112), s. 6, and the Penal Servitude Act, 1891 (54 & 55 Vict. c. 69), s. 8.

(*o*) "Crime" is defined as any felony, coining, obtaining goods or money by false pretences, conspiracy to defraud, being found by night armed with intent to commit a burglary or a felony in any building, or carrying house-breaking implements, or being disguised with intent to commit a felony, or being found by night in any building with intent to commit a felony (Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 20; Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 58).

(*p*) Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 6 (10). As to offences against prison discipline, see p. 256, *post*.

(*q*) Rules for Local Prisons, r. 8.

(*r*) *Ibid.*, r. 9.

(*s*) Regulations made by the Secretary of State under the Penal Servitude Act, 1891 (54 & 55 Vict. c. 69), s. 8. The practice of measuring under what is known as the Bertillon system has been abandoned in favour of recording finger-prints and distinctive marks. If a prisoner refuses to allow his photograph and finger-prints to be taken, a reasonable degree of force may be used.

(*t*) *Ibid.*, s. 8. In practice, if the prisoner does not object, the photograph and finger-prints of an untried person are taken by order of the governor of the prison, on the application of a chief constable or superintendent of police without the approval of a Secretary of State or a justice.

(negatives and prints), finger-prints, and records of measurements are to be destroyed or handed over to the prisoner (*a*).

(ii.) *Offenders of the First Division.*

General treatment.

500. In respect of books and newspapers, clothing, compulsory bathing, employment and domestic cleaning, haircutting, searching, separation from other prisoners, special locations and furniture, supply of food, offenders of the first division are treated in the same way as prisoners awaiting trial (*b*). They are allowed to receive letters and visits from not more than three friends at intervals of a fortnight. Additional letters and visits may be allowed at the discretion of the visiting committee (*c*).

Particular offenders.

501. Persons committed under the Vaccination Acts (*d*) for disobeying an order or failing to pay fines or costs (*e*), and persons convicted of sedition or seditious libel, are treated as offenders of the first division (*f*).

(iii.) *Offenders of the Second Division.*

General treatment.

502. Offenders of the second division are kept apart from other prisoners as far as possible. They must take a bath on reception unless excused, and they must eat the prison food. Unless it is necessary for health and cleanliness their hair is not cut. They must keep their cells and furniture clean and neatly arranged. They wear clothing of a special colour and are allowed a mattress throughout their sentences. They are employed at industrial work (*g*), and may thus earn such remission and gratuities as the rules allow; and they are entitled to a letter and a visit once a month. In other respects they are subject to the general prison rules (*h*).

(iv.) *Offenders of the Third Division.*

General treatment.

503. In the third division are included all convicted prisoners not sentenced to penal servitude or to imprisonment with hard labour, and not ordered to be placed in the first or second divisions. Persons imprisoned in default of paying a fine, or sentenced to imprisonment without hard labour, fall within this division. They are treated under the general rules, and, except that they are not required to sleep without a mattress, or to pass the first twenty-eight days in separate confinement on hard bodily or manual

(*a*) Regulations made by the Secretary of State under the Penal Servitude Act, 1891 (54 & 55 Vict. c. 69), r. 5.

(*b*) See p. 244, *ante*.

(*c*) Rules for Local Prisons, rr. 213—231.

(*d*) See title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*e*) Vaccination Act, 1898 (61 & 62 Vict. c. 49), s. 40.

(*f*) Prison Act, 1877 (40 & 41 Vict. c. 21), s. 40. Persons committed for contempt of court, when it does not appear on the warrant that the contempt arose from the non-payment of money, are treated under the rules for the first division. If the committal resulted from the non-payment of money, they are treated as debtors; see *ibid.*, s. 41; p. 249, *post*. As to committal for contempt of court, see title CONTEMPT OF COURT, ATTACHMENT, AND COMMITTAL, Vol. VII., pp. 315 *et seq.*

(*g*) See note (*l*), p. 248, *post*.

(*h*) Rules for Local Prisons, rr. 232—242; and see p. 249, *post*. As to the general prison rules, see p. 253, *post*.

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labour, their treatment differs but little from that of prisoners sentenced to hard labour (*i*).

Classification.

504. All convicted prisoners, except those of the first and second divisions, are to be placed in one of the following classifications: (1) Star class, for those not previously convicted of serious crime, or those not being habitual criminals, or of corrupt habits; (2) ordinary class, for those not eligible for the Star class (*j*).

(v.) *Prisoners Sentenced to Hard Labour.*

General treatment.

505. Offenders sentenced to hard labour are also treated under the general rules (*k*), but, for the first twenty-eight days, they are employed in strict separation for not more than ten nor less than six hours a day on hard bodily or manual labour. After that period, they may be employed on industrial labour in association. If under sixty years of age, they are required to sleep without a mattress for the first fourteen days (*l*). The hair of male prisoners

(*i*) Rules for Local Prisons, rr. 40, 243; and see note (*l*), *infra*, and p. 249, *post*.

(*j*) Rules for Local Prisons, r. 34.

(*k*) As to the general prison rules, see p. 253, *post*.

(*l*) Rules for Local Prisons, r. 39. The difference between the treatment of persons sentenced to imprisonment with hard labour and those sentenced to simple imprisonment consists in their treatment during the first twenty-eight days. In practice the words "hard bodily or manual labour in strict separation" are met by the exaction of a task of manual labour, in a cell, calculated to occupy ten hours daily, exclusive of meals and exercise. Marks representing twenty-eight days must be earned before the prisoner can be employed in association, and, if he fails to complete his task during that period, the marks are not earned, and the period is proportionately prolonged. As soon as this first stage of his imprisonment is completed, he is eligible for employment in association with prisoners of the third division, and his daily task is reduced to one calculated to occupy eight and a half hours, of which about five are spent in association. The treatment of persons sentenced to imprisonment with or without hard labour is therefore identical after the first month; see *infra*. Prisoners sentenced to imprisonment without hard labour (*i.e.*, in the third division) are required to perform a daily task of eight and a half hours from the beginning of their sentences. There is practically no difference in the treatment of females, whether they are sentenced to imprisonment with hard labour or to simple imprisonment, except that the heavier kinds of laundry work are as a rule reserved for those sentenced to hard labour. Females sentenced to hard labour are not required to sleep without a mattress. All prisoners are now employed in work of a remunerative character. The more arduous forms of labour, such as stone-breaking, wood-chopping and sawing, are assigned to those who are physically fit for any form of labour; the others are employed upon carpentry, metal work, shoemaking, tailoring, bookbinding, making string and mail bags for the post office, coal sacks and ships' fenders for the Admiralty, baskets, brushes and mats for the War Office and other departments of the public service. Oakum picking, wool-sorting, and other kinds of unskilled labour are reserved for prisoners with sentences so short as to afford no opportunity for teaching them any kind of skilled labour. Females are never employed at oakum picking. Their work is, for the most part, laundry work and needlework, and they are employed in association from the beginning of their sentences. Prisoners awaiting trial (see. p. 244, *ante*), or on remand, prisoners in the first division (see p. 247, *ante*), when they elect to work, and debtors (see p. 249, *post*), who are required to work, are employed at their own trades, if practicable, or at such manufacturing work as they are able to perform. Prisoners in the second division (see p. 247, *ante*), like those in the third

must not be cut closer than is necessary for health and cleanliness. The hair of female prisoners must not be cut without their consent, unless it is verminous or the medical officer thinks it necessary for health (*a*).

SUB-SECT. 4.—*Confinement of Prisoners other than Criminals.*

(i.) *Offenders Convicted of Offences not Involving Moral Turpitude.*

General treatment.

506. Prisoners of the second or third division (*b*) whose previous character is good, and who are convicted of offences not involving dishonesty, cruelty, indecency or serious violence, may at the discretion of the Prison Commissioners be granted relaxations of the rules, not exceeding those allowed by the rules for the first division, in respect of wearing prison clothing, bathing, hair-cutting, cleaning of cells, employment, exercise, books and otherwise (*c*).

(ii.) *Debtors.*

Classification.

507. Persons (*d*) imprisoned in default of payment of a judgment debt, or in lieu of the levy of a distress ordered by a court of summary jurisdiction, when the imprisonment is to be without hard labour, are treated as debtors under the following rules :—

General treatment.

508. Debtors are not required to take a bath (*e*); they must receive prison diet (*f*); they may wear their own clothes if fit for use, and if they wear prison clothes, the clothing must be of a distinctive colouring (*g*); they are excused from hair-cutting and shaving (*h*); they must keep their cells and furniture and yards swept and clean (*i*); they are required to work either at their own trade or at manufacturing work, the whole of their earnings being credited to them after the cost of their maintenance and the wear and tear of tools has been deducted (*k*); they may associate at exercise (*l*); they are allowed a letter and a visit once a week (*m*), as

division (see p. 247, *ante*), are employed for eight and a half hours daily at manufacturing work, and are associated with one another for about five hours daily. The cooking, baking, cleaning and other services of the prison are performed by selected prisoners, and prisoners who have shown themselves worthy of trust are distinguished by a badge and allowed to work without the supervision of prison officers.

(*a*) Rules for Local Prisons, r. 33.

(*b*) As to these divisions, see p. 247, *ante*.

(*c*) Rules for Local Prisons, r. 243A (10th May, 1910). Persons committed for offences in connection with political agitations are sometimes treated under this rule. The relaxations are all those accorded to the first division (see p. 247, *ante*) with the exception of the admission of newspapers and permission to follow trades and professions. A parcel of food may be received once a week instead of daily. Visits are allowed, usually at intervals of one month.

(*d*) As to such persons, see titles BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 338 *et seq.*; DISTRESS, Vol. XI., p. 223; MAGISTRATES, Vol. XIX., p. 604. As to their discharge, see *ibid.*

(*e*) Rules for Local Prisons, r. 246.

(*f*) *Ibid.*, r. 248.

(*g*) *Ibid.*, r. 249.

(*h*) *Ibid.*, r. 250.

(*i*) *Ibid.*, r. 251.

(*k*) *Ibid.*, r. 252.

(*l*) *Ibid.*, r. 253.

(*m*) *Ibid.*, r. 254.

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well as special visits from their legal advisers and near relations (*n*), and their visits take place in a room other than the visiting room for convicted prisoners (*o*). In other respects debtors are subject to the general prison rules (*p*).

Prisons to which debtors are committed.

509. Debtors can be committed to any convenient prison (*q*). A governor refusing to receive a debtor so committed renders himself liable to a fine of not exceeding £100 (*r*).

SUB-SECT. 5.—*Treatment of Appellants.*

Treatment while in prison.

510. A prisoner who appeals to the Court of Criminal Appeal (*s*) is as far as possible to be kept apart from other classes of prisoners (*t*). While in the prison, he is to wear a prison dress of a different colour from that worn by other convicted prisoners (*u*). He is not deprived of a mattress (*v*), unless he forfeits it by idleness or refusal to work (*w*). He must be employed on industrial or manufacturing work (*x*), and, if he is released in consequence of his appeal, a reasonable allowance on account of his earnings is to be paid to him (*y*).

Visitors.

He may see his counsel, or solicitor, or solicitor's clerk on any week-day at a reasonable hour in the sight, but not in the hearing, of a prison officer (*a*), and he may see, under proper restrictions, other persons with whom he desires to communicate regarding his case (*b*).

Letters.

He is to be supplied with a reasonable quantity of writing materials for communicating with his friends on the subject of the preparation of his appeal. All such communications must be read by the governor before being sent out of the prison, except confidential communications, which he may hand personally to his legal adviser (*c*).

Treatment while out of prison.

While absent from the prison in pursuance of his appeal he is kept in the custody of the prison officers detailed by the governor to escort him (*d*). He wears either his own clothes, or clothing different from prison dress (*e*).

(*n*) Rules for Local Prisons, r. 255.
(*o*) *Ibid.*, r. 256.
(*p*) As to the general prison rules, see p. 253, *post*.
(*q*) As to the prisons to which prisoners may be committed, see Yearly County Court Practice, Vol. II., pp. 835 *et seq.*; [1911] W. N., Part II., pp. 109, 345, 347.
(*r*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 120.
(*s*) As to the court of criminal appeal, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 432 *et seq.*
(*t*) Rules for Local Prisons, r. 212 (a) (1).
(*u*) *Ibid.*, r. 212 (a) (3).
(*v*) *Ibid.*, r. 212 (a) (4); see p. 248, *ante*.
(*w*) Rules for Local Prisons, r. 81.
(*x*) *Ibid.*, r. 212 (a) (5).
(*y*) *Ibid.*, r. 212 (a) (6).
(*a*) *Ibid.*, r. 212 (a) (8).
(*b*) *Ibid.*, r. 212 (a) (7).
(*c*) *Ibid.*, r. 212 (a) (9).
(*d*) *Ibid.*, r. 212 (a) (2).
(*e*) *Ibid.*, r. 212 (a) (3).

He is subject to general prison rules except in so far as they are inconsistent with the special rules for appellants (*f*).

SUB-SECT. 6.—*Production of Prisoners in Courts of Law.*

Purposes for which production required.

511. Any prisoner may be produced in a court of law to receive sentence, to give evidence, or to answer a charge either (1) by *habeas corpus*, or (2) by order of the Secretary of State (*g*).

When the deposition of a person dangerously ill and not likely to recover is to be taken, and a prisoner has been served with a notice that such deposition is to be taken, an order that the prisoner shall be present at the taking of the statement may be made by the committing justice or by the visiting committee (*h*).

When a prisoner is a material witness for the defence of another prisoner, the governor ought to allow the solicitor for the prisoner awaiting trial to see the witness in his presence (*i*).

No writ of *habeas corpus* is necessary for the production of a prisoner under sentence on one indictment to take his trial upon another indictment (*k*).

Custody and liability of governor.

512. A prisoner during his trial, and when at the place of trial, is in the legal custody of the governor of the prison from which he has come or whence he would have come if he had not been admitted to bail, and the governor is responsible for any illegal act of the warders in detaining the prisoner unlawfully after his acquittal, even though he was not himself present and the illegal detention was not ordered by him (*l*).

SUB-SECT. 7.—*Prisoners under Sentence of Death.*

Treatment.

513. Immediately after arrival at the prison after sentence of death every prisoner must be searched, and all articles which the governor considers inexpedient to leave in his possession are taken away. He must be in the constant charge of an officer day and night in a cell apart from other prisoners. He is allowed the diet and exercise which the governor directs.

Visitors.

Except the chaplain or the prison minister, as the case may be, none but prison officers and members of the visiting committee may have access to him, except in pursuance of an order from a Prison Commissioner or a member of the visiting committee (*m*). He may be visited by such of his relations, friends and legal

(*f*) Rules for Local Prisons, r. 212 (a) (10). As to the general prison rules, see p. 253, *post*.

(*g*) See titles COUNTY COURTS, Vol. VIII., p. 530; CROWN PRACTICE, Vol. X., p. 75; EVIDENCE, Vol. XIII., p. 580; and, as to service of process, see note (*t*), p. 252, *post*, and title PRACTICE AND PROCEDURE, p. 114, *ante*.

(*h*) Criminal Law Amendment Act, 1867 (30 & 31 Vict. c. 35), s. 7; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 327.

(*i*) *R.* v. *Simmonds* (1835), 7 C. & P. 176.

(*k*) Criminal Law Amendment Act, 1867 (30 & 31 Vict. c. 35), s. 10.

(*l*) *Mee* v. *Cruikshank* (1902), 86 L. T. 708; and, as to the duty to discharge the prisoner, see, further, title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 374. As to the management of court-houses, see title LOCAL GOVERNMENT, Vol. XIX., p. 364; and, as to the custody of appellants under the Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), see p. 250, *ante*.

(*m*) Rules for Local Prisons, r. 93.

SECT. 1. Committal and Treatment of Prisoners.

advisers as he desires to see, and as are authorised in writing to visit him by a member of the visiting committee, who may also so authorise any person who satisfies such member that he has important business to transact with the prisoner (*n*).

SUB-SECT. 8.—*Capital Punishment.*

General rules.

514. The Secretary of State may make rules for the execution of sentence of death, which must be laid on the tables of both Houses of Parliament (*o*).

Time.

It is recommended that executions should take place in the week following the third Sunday after the day on which sentence is passed, on any week-day but Monday, and at 8 a.m. (*p*).

Persons present.

The execution of a sentence of death is carried out by the sheriff in the prison in which the offender is confined. The governor, chaplain, and medical officer, and such other prison officers as the sheriff may require, must be present. Any justice of the jurisdiction to which the prison belongs, and any relatives of the prisoner and other persons, as the sheriff or the visiting justices of the prison may think proper, may be present at the execution (*q*).

Certificate of death and declaration of execution.

Immediately after the execution the medical officer must examine the body, and, having ascertained that life is extinct, must sign a certificate to that effect and deliver it to the sheriff, who, with the governor and chaplain, must sign a declaration that the execution has taken place (*r*). The declaration must be exhibited outside the prison gate for twenty-four hours (*s*).

SECT. 2.—*Proceedings By and Against Prisoners.*

General procedure.

515. The procedure adopted in the case of actions by and against prisoners is in general governed by the practice applicable to ordinary cases (*t*).

(*n*) Rules for Local Prisons, r. 95.

(*o*) Capital Punishment Amendment Act, 1868 (31 & 32 Vict. c. 24), s. 8

(*p*) Stat. R. & O. Rev., Vol. X., Prison, England, p. 65, made under the Capital Punishment Amendment Act, 1868 (31 & 32 Vict. c. 24), s. 8. If the prisoner signs a notice of appeal within ten days after the conviction, the date of execution is postponed.

(*q*) Capital Punishment Amendment Act, 1868 (31 & 32 Vict. c. 24), s. 3. The control of the prison is handed over to the sheriff for the purposes of the execution. The sheriff engages the services of the executioner, who undertakes to conform to the regulations. He must arrive at the prison not later than 4 p.m. on the day before the execution and may not leave until he receives permission. As to the effect of execution being carried out by a person other than the proper officer, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 575.

(*r*) Capital Punishment Amendment Act, 1868 (31 & 32 Vict. c. 24), s. 4. As to the subsequent inquest and burial, see titles CORONERS, Vol. VIII., pp. 241, 271, 274, 279; BURIAL AND CREMATION, Vol. III., p. 422.

(*s*) Capital Punishment Amendment Act, 1868 (31 & 32 Vict. c. 24), s. 10.

(*t*) See, generally, title PRACTICE AND PROCEDURE, pp. 89 *et seq.*, *ante*. The court will not grant a writ of *habeas corpus* merely to enable a prisoner to appear to argue a case in person (*Weldon* v. *Neal* (1885), 15 Q. B. D. 471); but if in the opinion of the judge a prisoner's presence is urgently necessary to oppose a summons in chambers, a writ may issue; see *Ford* v. *Graham* (1850), 1 L. M. & P. 604; and see title CROWN PRACTICE, Vol. X., p. 47. No action may be brought by any convict during the time he is subject to the operation of the Forfeiture Act, 1870 (33 & 34 Vict. c. 23); see *ibid.*,

SECT. 3.—*Prison Discipline.*

SUB-SECT. 1.—*Prison Rules* (*a*).

Statutory rules.

516. Prison discipline is detailed in codes of rules for the government of local and convict prisons under statutory authority (*b*). These statutory rules must lie on the tables of both Houses of Parliament for thirty days (*c*).

Rules for local prisons.

The rules for local prisons (*d*) detail the practice as to the admission, discharge, and removal of prisoners; their food, clothing,

s. 8; and see *Re Harris, Ex parte Graves*, [1881] W. N. 136, C. A.; and, as to convicts, see pp. 260 *et seq., post.* A statement of claim by a prisoner in custody (except on a criminal charge) may be delivered in accordance with the practice applicable to ordinary cases (*Barnett* v. *Harris* (1833), 2 Dowl. 186; *Millard* v. *Millman* (1834), 2 Dowl. 723); and, as to pleading generally, see title PLEADING, Vol. XXII., pp. 417 *et seq.* Service of pleadings, notices and other documents, including notice of trial, upon a prisoner (where personal service is not required) may be effected by delivery to the gaoler for delivery to the prisoner (*Whitehead* v. *Barber* (1720), 1 Stra. 248; *Moore* v. *Newbold* (1835), 11 Legal Observer, 307). Service of a writ of summons upon a defendant confined in a prison is made in the usual manner upon application to the governor of the prison (*Danson* v. *Le Capelain* (1852), 7 Exch. 667). As to the arrest of a prisoner to satisfy the claims of an execution creditor, it was held that the governor, or keeper, of a prison could not be compelled to accept a writ of *capias ad satisfaciendum* under the Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 2 (now repealed), in order that it might operate as a detainer against a prisoner (*Edwards* v. *Robertson* (1839), 5 M. & W. 520). It was suggested by PARKE, B. (*ibid.*), that the only course for a plaintiff to pursue was to place a writ of *capias* in the hands of the sheriff's officers and to get the governor, or keeper, to notify him of the defendant's discharge out of prison. Presumably, if the discharge took place on a Sunday no arrest could have been made. But where a prisoner was in the custody of the sheriff on a criminal charge, it was held that the latter was bound (presumably as an officer of the court) to give effect to a writ of *capias* and to detain a prisoner in respect of a civil suit (*Grainger* v. *Moore* (1837), 5 Dowl. 456). The cases above cited related to practice now practically obsolete; see title EXECUTION, Vol. XIV., p. 74; and, as to the practice on Latin informations on the Revenue side of the King's Bench Division, see title CROWN PRACTICE, Vol. X., pp. 8 *et seq.* Execution may issue against the goods of a prisoner by the usual means without the necessity of discharging the prisoner (*Jones* v. *Tye* (1832), 1 Dowl. 181). As to execution against the property of a convict, see title EXECUTION, Vol. XIV., p. 15; and, as to convicts, see pp. 260 *et seq., post.* Where action is brought against the administrator of a convict's property, the costs of the same as between solicitor and client are a first charge on such property, unless the court otherwise orders (Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 20. An action in respect of a convict's property, or for any damage relating thereto, may be brought by an *interim* curator in his own name (Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 24); and see pp. 261, 262, *post.* As to securing the attendance of prisoners before the court to give evidence, see title EVIDENCE, Vol. XIII., p. 580; and see p. 251, *ante.*

(*a*) As to the punishment of special classes of offenders, such as habitual criminals, habitual drunkards, and youthful offenders, and as to preventive detention and Borstal institutions, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 415 *et seq.*; and see pp. 260 *et seq., post.*

(*b*) *I.e.*, under the Prison Act, 1898 (61 & 62 Vict. c. 41).

(*c*) Compare title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 419, note (*c*).

(*d*) As to the rules for convict prisons, see p. 254, *post*, and pp. 260 *et seq., post.*

SECT. 3. Prison Discipline.

bedding, and cleanliness; their classification and remission of sentence; their employment, health, religious and secular instruction; their visits and letters; and as to their punishment for misconduct. They prescribe the treatment for various classes of prisoners: those awaiting trial (*e*); offenders of the first (*f*), second (*g*), and third (*h*) divisions; debtors (*i*), juvenile offenders (*k*), and prisoners under sentence of death (*l*). They lay down the duties of the prison officers generally, and of the governor, matron, and medical officer in particular (*m*), and they prescribe the powers and duties of the visiting committee (*n*).

Rules for convict prisons.

517. The rules for convict prisons provide for the treatment of prisoners undergoing sentences of penal servitude (*o*). They also provide for modifications in the direction of less rigorous treatment for convicts serving a sentence of preventive detention (*p*). There are three grades: the disciplinary, the ordinary, and the special grade. Convicts begin in the ordinary grade and may be promoted to the special grade at the end of two years, or degraded to the disciplinary grade at any time for misconduct (*q*). They may earn a gratuity by their work, and may spend a portion of it at the canteen in the purchase of food and other articles (*r*). Indulgences, such as association in the evenings for games and music, and more frequent letters and visits, may be earned on a graduated scale by good conduct and industry (*s*). They may be liberated on licence (*t*) if there is a reasonable probability that they will abstain from crime, or that they are no longer capable of engaging in crime, or if it is desirable for any other reason that they should be released, and for this purpose the directors of convict prisons (*u*) report periodically to the Secretary of State on their conduct and industry, and their prospects and probable behaviour (*v*). A committee must be appointed at each prison to assist the directors in the advice they are to give to the Secretary of State (*v*). The committee should meet once a quarter (*a*). Any

(*e*) See p. 244, *ante*.
(*f*) See p. 247, *ante*.
(*g*) See p. 247, *ante*.
(*h*) See p. 247, *ante*.
(*i*) See p. 249, *ante*.
(*k*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 418 *et seq.*
(*l*) See p. 251, *ante*.
(*m*) As to these officers, see pp. 235 *et seq.*, *ante*.
(*n*) As to the visiting committee, see pp. 232 *et seq.*, *ante*.
(*o*) The rules are made for local and convict prisons respectively, not for local and convict prisoners. Thus, a convict, while undergoing part of his sentence in a local prison, must be treated under the rules for local prisons. As to convicts, see, further, pp. 260 *et seq.*, *post*.
(*p*) Prevention of Crime Act, 1908 (8 Edw. 7, c. 59), s. 13 (2); Prisons for Habitual Criminals Rules, 1st May, 1911 (Stat. R. & O. 1911, p. 243); and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 417.
(*q*) Prisons for Habitual Criminals Rules, rr. 1, 2.
(*r*) *Ibid.*, rr. 4—6.
(*s*) *Ibid.*, rr. 8, 12.
(*t*) As to discharge on licence, see, further, pp. 258, 266, *post*.
(*u*) See p. 232, *ante*.
(*v*) Prevention of Crime Act, 1908 (8 Edw. 7, c. 59), s. 14.
(*a*) Prisons for Habitual Criminals Rules, r. 14.

person whose licence has been revoked or forfeited may be kept in the disciplinary grade (*b*).

Cells.

518. Before being used for the separate confinement of a prisoner, every cell must be certified by an inspector of prisons to satisfy the requirements of health (*c*).

Infirmary.

An infirmary must be provided in every prison (*d*).

Locks

519. The locks in the prison for females must be different from those in the prison for males (*e*).

Search, photographs, and medical examination.

520. Prisoners must be searched on admission and subsequently when necessary (*f*). Their money and effects must be kept for them (*g*). They may be photographed (*h*), and they must be examined by the medical officer, both on reception (*i*) and before discharge (*k*). They must take a bath unless excused (*l*).

Children of prisoners.

521. The child of a female prisoner may be received provided it is at the breast, but except in special circumstances no child may be kept in prison beyond the age of twelve months (*m*).

Supply of liquor or tobacco.

522. Neither fermented liquor (*n*) nor tobacco (*o*) may be given to a prisoner except on the written authority of the medical officer.

Food of prisoners.

523. Every prisoner may have his food weighed or measured in his presence (*p*).

Diets.

524. The diets of all prisoners are prescribed by statutory rules (*q*) according to the length of sentence. Diet A is for prisoners sentenced to not more than seven days, and it is also given for the first seven days where the sentence does not exceed four months (*r*); diet B is for prisoners sentenced to not more than four months, and is given after the first seven days; it is also given for the first four months of a longer sentence of imprisonment (*s*); diet C is for prisoners with a longer sentence than four months after the first four months; it is also given to convicts during the time of separate confinement (*t*); diet D is for male convicts after

(*b*) Prisons for Habitual Criminals Rules, r. 15.
(*c*) Rules for Local Prisons, r. 2.
(*d*) *Ibid.*, r. 3.
(*e*) *Ibid.*, r. 4.
(*f*) *Ibid.*, r. 5.
(*g*) *Ibid.*, r. 6.
(*h*) *Ibid.*, r. 9.
(*i*) *Ibid.*, r. 10.
(*k*) *Ibid.*, r. 11.
(*l*) *Ibid.*, r. 12.
(*m*) *Ibid.*, r. 19.
(*n*) *Ibid.*, r. 26.
(*o*) *Ibid.*, r. 21.
(*p*) *Ibid.*, r. 23.
(*q*) Rules for Convict Prisons dated 2nd September, 1901 (Stat. R. & O. Rev., Vol. X., Prison, England, pp. 109 *et seq.*).
(*r*) Diet A consists of bread, porridge, potatoes and suet pudding, alternating through the week, but includes no meat.
(*s*) Meat, bacon, and soup on alternate days are given in diet B.
(*t*) Diet C resembles diet B, but the quantity of meat is greater.

SECT. 3. Prison Discipline.

the period of separate confinement, when employed at the lighter forms of labour (*a*); diet E is for male convicts after the period of separate confinement, when employed at the hardest labour (*b*); diet F is for female convicts in separate confinement (*c*); diet G is for female convicts after the period of separate confinement (*d*). The rules include a hospital dietary of bread, tea, milk, meat, pudding and vegetables, but the medical officer has an absolute discretion as to extras and medical comforts. The method of preparing each article is also prescribed (*e*).

SUB-SECT. 2.—*The Carrying out of Sentences* (*f*).

Employment of prisoners.

525. All prisoners may be employed in the service of the prison, but not in the service of officers or other prisoners, nor in the discipline of the prison (*g*).

Letters and visits.

Convicted prisoners may write and receive a letter and be visited after two months of their sentence, and thereafter at shorter intervals up to one month, provided that the correspondent or visitor is respectable and the communication unobjectionable. Communications on matters of urgency and visits of solicitors acting *bonâ fide* in any legal business may be allowed (*h*). Letters must be read by the governor (*i*), and the governor may require any visitor to be searched and exclude him if he refuses (*k*).

SUB-SECT. 3.—*Punishment of Prisoners.*

Close confinement and No. 1 diet.

526. Punishments can only be ordered by the governor or the visiting committee, and for one of the offences specified in the rules, which comprehend practically every possible offence against good order and discipline (*l*). For any offence with which the governor is competent to deal, a prisoner may be punished by close confinement (*m*) and No. 1 diet (*n*) (bread and water) for three days, reduction in stage (*o*), and forfeiture of marks for remission (*p*). For more serious offences, such as violence to an officer or a fellow prisoner, wilful damage, attempt to escape, or any other act of gross misconduct, the visiting committee, and in convict prisons, the board of visitors, may award heavier penalties of the same nature (*q*).

(*a*) Diet D resembles diet C, but the quantity of bread and oatmeal is increased.

(*b*) Besides the ingredients of diet D, butter and cheese are included in diet E.

(*c*) Diet F resembles diet C, but the quantities of bread, meat and potatoes are rather less.

(*d*) Diet G resembles diet D with slightly reduced quantities.

(*e*) Rules for Convict Prisons, 2nd September, 1901.

(*f*) See also pp. 245 *et seq.*, *ante*.

(*g*) Rules for Local Prisons, r. 38.

(*h*) *Ibid.*, r. 72.

(*i*) *Ibid.*, r. 75.

(*k*) *Ibid.*, r. 73.

(*l*) *Ibid.*, rr. 78, 79.

(*m*) *Ibid.*, r. 81.

(*n*) Stat. R. & O. Rev., Vol. X., Prison, England, p. 56, 2nd September, 1901.

(*o*) As to progressive stages, see p. 257, *post*.

(*p*) As to remission, see p. 258, *post*.

(*q*) Rules for Local Prisons, rr. 82, 83. There are no punishment cells.

Corporal punishment.

527. For mutiny, incitement to mutiny, or gross personal violence to an officer or servant of the prison, a male prisoner sentenced to penal servitude or hard labour or convicted of felony may be sentenced to a corporal punishment, with the cat-of-nine tails or the birch, of not exceeding thirty-six lashes. If he is under eighteen, the birch only may be used, and the number of strokes must not exceed eighteen (*r*). Corporal punishment must not be carried out until it has been confirmed by the Secretary of State (*s*).

Irons and mechanical restraint.

528. Irons and other mechanical restraints may not be used at all unless of the patterns approved by the Secretary of State, and even then may not be used as a punishment, but only as a restraint in case of urgent necessity, and not for longer than twenty-four hours without a written order from a member of the visiting committee (*a*).

SUB-SECT. 4.—*Progressive Stages.*

Progressive stages.

529. Every convicted prisoner is subject to a system of progressive stages, and is entitled to all the privileges attached to his stage. Promotion from one stage to another is earned by industry, recorded in marks, but it may be postponed, or the prisoner may be reduced to a lower stage for idleness or misconduct. The marks thus forfeited are added to the number to be earned before promotion can be attained (*b*).

SUB-SECT. 5.—*Offences by Persons other than Prisoners* (*c*).

Introduction of spirituous liquor or tobacco into the prison.

530. Any person who introduces or attempts to introduce into a prison any spirituous liquor or tobacco is liable to imprisonment for a term not exceeding six months, or to a penalty not exceeding £20, or to both, and every prison officer convicted of this offence, in addition to other punishment, forfeits his office and all arrears of salary due to him (*d*).

Conveyance of prohibited articles in or out of prison.

Any person who conveys or attempts to convey any document or any prohibited articles into or out of a prison is liable to a penalty not exceeding £10, and, if a prison officer, to loss of office and forfeiture of arrears of salary (*e*).

Notice of penalties.

A notice setting forth these penalties is to be posted in a conspicuous place outside the prison (*f*).

The punishment of close confinement is served in an ordinary cell, or, in the case of a destructive or noisy prisoner, in a cell constructed of materials that cannot be damaged and that do not conduct sound.

(*r*) Rules for Local Prisons, rr. 84, 89, 90.

(*s*) *Ibid.*, r. 84.

(*a*) *Ibid.*, r. 92.

(*b*) *Ibid.*, rr. 35, 36.

(*c*) As to other offences, *e.g.*, aiding escape of prisoner, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 510.

(*d*) Prison Act, 1865 (28 & 29 Vict. c. 126), s. 38.

(*e*) *Ibid.*, s. 39. But this provision does not apply where the offender is liable to heavier penalties under *ibid.*, ss. 37, 38. Offences under *ibid.*, ss. 38, 39, are to be tried summarily by two justices having jurisdiction in the locality of the prison. As to offences under *ibid.*, s. 38, see the text, *supra*; and, as to offences under *ibid.*, s. 37, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 510.

(*f*) Prison Act, 1865 (28 & 29 Vict. c. 126), s. 40.

SECT. 4. Release and Discharge of Prisoners.

SECT. 4.—*Release and Discharge of Prisoners (g).*

SUB-SECT. 1.—*By Act of Grace.*

Royal pardon.

531. The Royal Prerogative of mercy may be exercised, in respect of convicted prisoners, at any time during the term of imprisonment, irrespective of any appeal (*h*). The pardon may be under the Great Seal or, as it commonly is, under the Sign Manual, or there may be a pardon by an Act of Parliament (*i*).

SUB-SECT. 2.—*On Earning Remission.*

Discharge on earning remission.

532. A convicted prisoner sentenced to imprisonment, whether under one sentence or cumulative sentences, for a period exceeding one calendar month, is eligible, for special industry and good conduct, to earn a remission of not more than one-sixth of the whole sentence (*k*). On his discharge, his sentence is deemed to have expired (*l*).

Liberation on licence.

Male prisoners sentenced to penal servitude may, by industry with good conduct, earn liberation on licence when they have served three-fourths of their sentences; and female convicts when they have served two-thirds. The cases of convicts sentenced to penal servitude for life are specially considered at the end of twenty years (*m*).

SUB-SECT. 3.—*On Completion of Sentence.*

Discharge on completion of sentence.

533. A prisoner whose term of imprisonment or penal servitude expires on a Sunday, Christmas Day, or Good Friday must be discharged on the day next preceding. The word "month," unless the contrary is expressed, means calendar month (*n*).

SUB-SECT. 4.—*On Payment of Fine.*

Discharge on payment of fine.

534. A person committed to prison for non-payment of a fine ordered to be paid on conviction by a court of summary jurisdiction

(*g*) As to the discharge of persons detained in Borstal institutions, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 420; and as to placing young persons under the supervision of a probation officer, see *ibid.*, p. 425. As to discharge from reformatories and industrial schools, see title EDUCATION, Vol. XII., pp. 76 *et seq.* As to the release of children and young persons on bail, see title INFANTS AND CHILDREN, Vol. XVII., p. 176.

(*h*) Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 19.

(*i*) See *R.* v. *Crosby* (1695), 12 State Tr. 1291; *R.* v. *Rookwood* (1696), 13 State Tr. 139, 186; see also title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 444; and, generally, as to the Royal Prerogative and pardons and reprieves, see title CONSTITUTIONAL LAW, Vol. VI., pp. 404 *et seq.*

(*k*) Rules for Local Prisons, 1st September, 1907 (Stat. R. & O., 1907, p. 917), r. 37A. The remission is earned by a daily award of marks.

(*l*) Prison Act, 1898 (61 & 62 Vict. c. 41), s. 8.

(*m*) Rules for Convict Prisons, r. 33. A male convict has to earn a fixed number of marks calculated at six a day for the whole period of the sentence; he can earn these at the rate of eight a day. Sentences of females are reckoned at four marks a day, and they can earn six. Any marks forfeited for misconduct are added to the total number to be earned.

(*n*) Prison Act, 1898 (61 & 62 Vict. c. 41), s. 12; and see title TIME. Though, in practice, prisoners are discharged early on the last day of the sentence, the term does not expire until midnight on that day.

may, by paying to the governor the whole of the fine, and of the charges for which he is liable, obtain his discharge, or, in case of payment of a portion of such fine and charges, he may obtain a reduction of the term by a number of days bearing as nearly as possible the same proportion to the total number of days as the sum he tenders bears to the sum for which he is liable (*o*). Payment cannot be made on a Sunday, or on a week-day before 9 a.m. or after 4 p.m. (*p*).

SUB-SECT. 5.—*Provisions on Discharge.*

Medical examination.

535. Every prisoner must be medically examined before he is discharged, and no prisoner suffering from an acute or dangerous illness may be discharged unless he demands his release (*a*).

Supply of means of returning home.

536. The Prison Commissioners may provide any discharged prisoner with the means of returning to his home or place of settlement by paying his railway fare or in some other convenient manner (*b*).

Gratuities to prisoners.

537. The Prison Commissioners may, on the recommendation of the visiting committee or otherwise, order a sum not exceeding £2, to be paid to a prisoner on his discharge, or to a certified prisoners' aid society or refuge, which must give a written undertaking to expend the money for the benefit of the prisoner (*c*). The Prison Commissioners have power to certify a prisoners' aid society on the application of one or more members, after satisfying themselves as to the condition of the society (*d*).

Poor law relief.

538. Prisoners who on their release are likely, by reason of infirmity of mind or body, to require immediate poor law relief, may, on the order of a justice or a member of the visiting committee, be sent to the workhouse of the union in which they appear to be settled, or, if this cannot be ascertained, then to the workhouse of the union of the district where the offence was committed, or, if the offence was committed outside the United Kingdom, where the committing court sat (*e*).

(*o*) Prison Act, 1898 (61 & 62 Vict. c. 41), s. 9; and see titles DISTRESS, Vol. XI., p. 223; MAGISTRATES, Vol. XIX., pp. 604, 610. In practice part payment is accepted on the day the prisoner is received, as he is held to have served one day.

(*p*) Rules for Local Prisons, r. 16.

(*a*) *Ibid.*, r. 11.

(*b*) Under the Prison Act, 1865 (28 & 29 Vict. c. 126), s. 43, the visiting justices were authorised to make these payments "out of any monies under their control." The Prison Commissioners succeeded to all their powers under the Prison Act, 1877 (40 & 41 Vict. c. 21), s. 9; see p. 231, *ante*. The term "prisoner" includes a prisoner tried and acquitted (Prison Act, 1877 (40 & 41 Vict. c. 21), s. 57; and see p. 243, *ante*).

(*c*) Prison Act, 1877 (40 & 41 Vict. c. 21), s. 29; see also Rules for Local Prisons, r. 18, which directs that a gratuity may be paid through a prisoners' aid society under such conditions as will prevent it from being misapplied.

(*d*) Discharged Prisoners Aid Act, 1862 (25 & 26 Vict. c. 44), s. 1.

(*e*) Released Persons (Poor Law Relief) Act, 1907 (7 Edw. 7, c. 14).

SECT. 5. Convicts.

SECT. 5.—*Convicts* (*f*).

SUB-SECT. 1.—*Definition and Classification.*

Definition of "convict."

539. The word "convict" as used in the Forfeiture Act, 1870 (*g*), is defined as a person against whom judgment of death or penal servitude has been pronounced upon any charge of treason or felony. It includes, however, misdemeanants, and, in fact, all persons sentenced to penal servitude (*h*).

Ordinary division. Classification.

540. Convicts in the ordinary division are placed by the directors of convict prisons (*i*) immediately after sentence in one or other of the following classifications:—(1) the Star class for first offenders of previous good character, or those not habitually criminal or of corrupt habits; (2) the Intermediate class for first offenders, whose general character and antecedents render them unfit for the Star class, or who have been previously convicted, but not of grave or persistent crime; (3) the Recidivist class for those previously sentenced to penal servitude, those guilty of grave or persistent crime, or those whose licences under a previous sentence of penal servitude have been revoked or forfeited. Convicts in the Star class may be degraded if found to exercise a bad influence, and those in the Intermediate class may be either promoted or degraded (*j*).

Separate confinement.

541. Every male convict must pass the first part of his sentence in separate confinement for the following periods:—Star class, not exceeding three months; Intermediate class, not exceeding six months; and Recidivist class, not exceeding nine months (*k*).

Long-sentence division.

542. Convicts sentenced to more than ten years, who have served more than seven and a half years, may, provided that their general character, antecedents, and conduct in prison are satisfactory, be placed in the long-sentence division. Convicts in the long-sentence division are kept in a part of the prison set apart for them. They wear a special dress, are allowed to converse at

(*f*) As to measurements and photographs, see p. 245, *ante*; as to treatment of appellants, see p. 250, *ante*; as to general prison discipline, see p. 253, *ante*; as to release and discharge, see p. 258, *ante*, and p. 266, *post*.

(*g*) Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 6; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 428 *et seq.*, and the text, *infra*.

(*h*) Penal Servitude Act, 1853 (16 & 17 Vict. c. 99), ss. 6, 7; Convict Prisons Act, 1850 (13 & 14 Vict. c. 39). The rules apply, not to convicts, but to convict prisons, and convicts may be lawfully confined in any prison in the United Kingdom; see Penal Servitude Act, 1853 (16 & 17 Vict. c. 99), s. 6.

(*i*) As to the directors of convict prisons, see p. 232, *ante*.

(*j*) Rules for Convict Prisons, 1905 (Stat. R. & O., 1905, p. 394), rr. 1—7.

(*k*) *Ibid.*, r. 8. The actual periods now enforced under this rule are:—Star and Intermediate classes, one month; Recidivist class, three months, both for males and females. In the cases of males, these periods are served in the prison of committal before removal to a convict prison. "Separate confinement" means that the convict works in his cell, but is daily in association in chapel and at exercise.

meals and at exercise, and may be allowed to have their meals in association. They may earn gratuity continuously throughout their sentences, and expend a portion of it in the purchase of comforts and relaxations at the prison store as an addition to their dietary. They are liable to be degraded to the ordinary division for misconduct (*l*).

Young convicts.

543. Young convicts under twenty-one on conviction may by order of the Secretary of State be transferred to a Borstal institution to undergo their sentences (*m*). Those who serve their sentences in a convict prison may be selected for a special class, subdivided into Star and Intermediate classes, in which their education—moral, secular, and technical—is specially provided for, and special efforts are made for assisting them on discharge (*n*).

SUB-SECT. 2.—*Effect of Conviction.*

Appointment of administrator or *interim* curator.

544. Upon any person becoming a convict (*o*) his property is no longer subject to forfeiture (*p*), but an administrator (*q*) or *interim* curator (*r*) of his property may be appointed.

Liability and privileges of administrator.

545. The administrator is answerable only for such property as comes into his hands, and is not liable for loss or damage arising from omission or non-feasance on his part (*s*). The administrator is entitled to solicitor and client costs (*t*) in any action relating to the property of the convict which is vested in him by virtue of his appointment or after it is divested; and all charges and expenses properly incurred with reference to such an action are, unless otherwise ordered by the court trying the action, a first charge on such property (*u*). The administrator may, if his remuneration is

(*l*) Rules for Convict Prisons, 1905, rr. 9—16. Aged convicts (over sixty-five) are specially treated under a milder form of discipline.

(*m*) Prevention of Crime Act, 1908 (8 Edw. 7, c. 59), s. 3; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 419, 420.

(*n*) Rules for Convict Prisons (as to juvenile-adult convicts), 1905 (Stat. R. & O., 1905, p. 393).

(*o*) For the definition of "convict," see Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 6; title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 429; and see p. 260, *ante*.

(*p*) Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 1. For the definition of "forfeiture," see *ibid.*, s. 5.

(*q*) For the appointment of such an administrator, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 429. The Public Trustee may be appointed (Public Trustee Act, 1906 (6 Edw. 7, c. 55), s. 2); and see title TRUSTS AND TRUSTEES.

(*r*) See p. 262, *post*.

(*s*) Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 19. As to his liability for property received and not duly administered, see *ibid.*, s. 29; title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 430. As to trust and mortgage estates, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 235.

(*t*) See title SOLICITORS.

(*u*) Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 20. As to the application of this provision, see *Carr* v. *Anderson*, [1903] 1 Ch. 90, 99, 100; affirmed, [1903] 2 Ch. 279, C. A. As to executions against property of the convict vested in the administrator, see title EXECUTION, Vol. XIV., p. 15, and note (*t*) p. 252, *ante*; and see also title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 12.

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not provided for by his instrument of appointment, retain his remuneration out of the convict's property (*a*).

Account of convict's estate.

The Attorney-General or chief law officer of the Crown (*b*), or any person authorised by him, or any person who, if the convict had died intestate, would be his heir-at-law or entitled to all or any part of his personal estate, may apply in a summary way for a writ of summons for an account of the receipts and payments in respect of the convict's property (*c*).

Appointment of *interim* curator.

546. Where no administrator is appointed any person may apply to a justice or justices in petty sessions (*d*) for the appointment of an *interim* curator of the convict's property (*e*).

Powers of *interim* curator as to convict's property.

547. An *interim* curator may, in his own name as curator, take or defend proceedings (*f*) in respect of the property in respect of which he is appointed; he may receive and give receipts for all rents, dividends, interest and income arising therefrom, and for all debts due to, or forming part of, the property of the convict; he may pay all debts due from the convict out of such property, settle accounts with debtors or creditors, and generally manage and administer the convict's property (*g*). He may not, however, sell or transfer any personal property of the convict without the authority of the justice or court having jurisdiction to make the order (*h*).

(*a*) Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 11. For the powers of an administrator in relation to the convict's property, see titles CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 429, 430; MORTGAGE, Vol. XXI., p. 94; SALE OF LAND; *Re Gaskell and Walters' Contract*, [1906] 1 Ch. 440 (where it was held that the statutory power of sale did not authorise the administrator to convey the fee simple of property of which the convict was tenant in tail). As to the duty to exercise care and skill in such a sale, and as to the accountability and liability of an administrator in case of loss on such sale, see *Carr* v. *Anderson*, [1903] 1 Ch. 90.

(*b*) As to proceedings in the Palatine Courts, see title COURTS, Vol. IX., pp. 120 *et seq.*

(*c*) Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 28. Proceedings may be commenced in any court which, if the convict were dead, would have jurisdiction to administer his real or personal estate (*ibid.*).

(*d*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 430; Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 21.

(*e*) Such curator may be either the applicant or some other willing and competent person (*ibid.*). The applicant must satisfy the justices that such appointment is made *bonâ fide* for the benefit of the convict or his family, or for the proper administration of his property (*ibid.*), and must make oath that, to the best of his knowledge and belief, no administrator or curator has been appointed, and as to who are the nearest relatives, including husband and wife, of the convict, and which, if any, of them have consented to, or had notice of, the application (*ibid.*, s. 22). The justices may require such notice of the application to be given as they think fit (*ibid.*).

(*f*) As to proceedings by and against prisoners generally, see p. 252, *ante*.

(*g*) Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 24. The curator has no power over any property acquired by the convict while lawfully at large on licence (*ibid.*, s. 30); as to release on licence, see p. 266, *post*.

(*h*) Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 25. He is accountable for the proceeds of sale as though the property remained unsold (*ibid.*); and, as to his accountability, see, further, title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 430; and see p. 263, *post*.

He may also out of the income of the property or, if that is insufficient, out of the capital, make allowances for the support of any wife or child of the convict, or, if specially authorised by a justice or a court having jurisdiction to make the order, of any other relative dependent on the convict (*i*). Powers to make allowances.

He may retain out of the property all his expenses incurred as such curator (*j*). Expenses of *interim* curator.

The powers of the curator cease upon an administrator being appointed (*k*). Cessation of powers.

548. A curator, or any unauthorised person having possession of the convict's property, is under the same liability to account as an administrator (*l*). Liability to account.

SUB-SECT. 3.—*Incidents of Penal Servitude.*

(i.) *Progressive Stages.*

549. Every convict passes through a system of progressive stages, each stage carrying certain privileges, though he may be degraded or his promotion may be retarded for misconduct (*m*). Progressive stages.

(ii.) *Diet and Clothing.*

550. No spirituous liquor or tobacco may be introduced into the prison except by permission of the directors of convict prisons (*n*) or under the written authority of the medical officer (*o*); but this does not apply to any stock of spirits kept at the infirmary under the control of the medical officer (*o*). Prohibition of spirituous liquor and tobacco.

Special diets are authorised for convicts who have passed through the period of separate confinement (*p*), according to the form of labour on which they are employed (*q*). A convict may request to have his food weighed or measured in his presence, provided that he Special diets.

(*i*) Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 24. As to execution against the property of a convict in the hands of an *interim* curator or person who has taken on himself the possession or management of the convict's property, see title EXECUTION, Vol. XIV., p. 15; and see also title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 12.

(*j*) Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 24.

(*k*) *Ibid.* A curator may, for cause shown, be removed on the application of any relative of the convict or other interested person, and, upon his removal or death, a new *interim* curator may be appointed (*ibid.*, s. 23). Proceedings commenced by or against an *interim* curator do not abate on the appointment of an administrator or new curator (*ibid.*, s. 26).

(*l*) *Ibid.*, s. 29; see pp. 261, 262, *ante*; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 430.

(*m*) Twelve months are passed in each stage, and the fourth can be attained by industry and exemplary conduct at the end of three years. Under certain restrictions convicts may, during the last few months of their sentences, attain the Special stage. The privileges earned by attaining the higher stages consist in the wearing of distinctive badges, in the right to receive visits and letters at more frequent intervals, and in certain small concessions in the matter of diet. Convicts in the Special stage are allowed extra remission of not more than seven days.

(*n*) As to the directors of convict prisons, see p. 232, *ante*.

(*o*) Rules for Convict Prisons, rr. 16, 17.

(*p*) As to separate confinement, see note (*k*), p. 260, *ante*.

(*q*) Rules for Convict Prisons, r. 18; and Diet Tables under the Statutory Rules of 2nd September, 1901 (Stat. R. & O. Rev., Vol. X., Prison, England, p. 109); see pp. 254, 255, *ante*.

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makes his complaint as soon as possible after the food is handed to him, but he is liable to punishment if he makes repeated and groundless complaints with the evident purpose of giving trouble (*r*).

Clothing.

The private clothing of a convict may be sold, and suitable clothing be supplied to him on discharge (*s*).

(iii.) *Employment.*

Record of industry.

551. A daily record of the industry of every convict is kept in marks, both for promotion in stage and for remission of sentence (*t*). In cases where marks cannot be earned owing to genuine illness which is not the result of misconduct, full marks may be awarded (*u*).

Employment.

552. Convicts may be employed for not more than ten hours a day at any work for which they are medically fit (*v*). They may be employed in the service of the prison, but not in its discipline (*v*). When employed in their cells or in indoor work, they are, when practicable, to have one hour's exercise daily in the open air (*a*).

(iv.) *Visits and Communications.*

Visits by minister of religion.

553. Convicts not belonging to the Established Church may be visited by a minister of their persuasion (*b*).

Books and papers.

No books or printed papers can be introduced without the sanction of the directors (*b*). Convicts are allowed books from the prison library, and may change them for others at intervals according to their industry and conduct (*c*).

Letters and visits.

Convicts by good conduct may earn the privilege of writing a letter and receiving a reply, and of receiving a visit after the first four months, and thereafter at gradually decreasing intervals until they attain the fourth stage, when the privilege is accorded once a month (*d*).

(*r*) Rules for Convict Prisons, r. 19.

(*s*) *Ibid.*, r. 24. The proceeds of the sale are credited to the prisoner.

(*t*) *Ibid.*, r. 33; Penal Servitude Act, 1853 (16 & 17 Vict. c. 99), s. 9.

(*u*) Rules for Convict Prisons, r. 35. As to remission, see p. 258, *ante*.

(*v*) Rules for Convict Prisons, rr. 36, 37. The class of work on which convicts are employed depends solely upon their physical fitness. During the period of separate confinement (see note (*k*), p. 260, *ante*) they are employed in their cells at manufacturing work in the local prison. There are four degrees of medical classification in convict prisons: (1) fit for any kind of hard labour, convicts in this degree being employed at quarrying, navvying, reclaiming bog-land, building, smithing, and carpentering; (2) fit for some kinds of hard labour, those in this degree being employed at manufacturing work of the heavier kind which does not entail great bodily effort; (3) fit for light outdoor labour, those in this degree being employed at stone-breaking and light field-work; (4) fit for light indoor labour, those in this degree being employed at tailoring, shoemaking, and sewing (Rules for Convict Prisons, r. 38).

(*a*) *Ibid.*, r. 40.

(*b*) *Ibid.*, r. 62. As to the duties of the chaplain of the prison, see p. 237, *ante*. As to the directors of convict prisons, see p. 232, *ante*.

(*c*) Rules for Convict Prisons, r. 65.

(*d*) *Ibid.*, r. 67. If the friends cannot come, another letter in lieu of the visit is generally allowed.

Special communications.

In addition to these periodical communications, a special letter and reply may be allowed in any of the following circumstances: (1) the death of a near relation; (2) business or family affairs of an urgent nature; (3) arrangements for obtaining employment or assistance from friends on release. The governor may at any time communicate matters of importance to a convict or to his friends (*e*).

Attendance of legal advisers.

A barrister or solicitor conducting legal proceedings to which a convict is a party, or *bonâ fide* acting as legal adviser to the convict in any legal business, may have an interview with the convict, in sight, but out of hearing, of an officer. All other interviews must take place in the sight and hearing of an officer (*e*).

Governor's powers with regard to visitors.

The governor may require the name and address of a visitor, and, if he has ground for suspicion, may search a visitor out of sight of other visitors or may expel him if he refuses to be searched. He may also suspend the visit of any person guilty of introducing prohibited articles or of improper conduct and may remove him from the prison (*f*).

Intercourse between convicts.

Intercourse between convicts is to be prevented except in so far as the business of the prison or the labour of the convicts may render it necessary, and in the case of long-sentence convicts of good character, who may be allowed to converse at fixed times (*g*).

(v.) *Punishments.*

Minor offences.

554. Breaches of discipline of a minor character may be punished by the governor with any punishment not exceeding close confinement or reduced diet for three days; reduction of stage for three months; forfeiture of remission for fourteen days, and, in the case of idleness or refusal to work, deprivation of mattress for three days (*h*).

Serious or repeated offences.

555. For a serious or repeated offence for which the governor's powers are insufficient, a convict is reported to a director, who, after hearing evidence on oath, may award punishment not exceeding twenty-eight days' close confinement; bread and water diet, with intervals, for fifteen days; reduced diet for forty-two days; separate confinement for not exceeding six months; and forfeiture of marks for stage and remission. The board of visitors has all the powers of punishment vested in a director (*i*).

(vi.) *Corporal Punishment.*

Offences punishable.

556. For mutiny, incitement to mutiny and gross personal violence to an officer or servant of the prison, a convict may be ordered to undergo corporal punishment of not exceeding thirty-six strokes with the cat or the birch if he is over eighteen years

(*e*) Rules for Convict Prisons, r. 67.
(*f*) *Ibid.*, r. 68.
(*g*) *Ibid.*, r. 70.
(*h*) *Ibid.*, r. 74.
(*i*) *Ibid.*, r. 76. As to the board of visitors, see p. 234, *ante*. As to directors of convict prisons, see p. 232, *ante*.

SECT. 5. Convicts.

of age, and of not exceeding eighteen strokes with the birch if he is under eighteen years of age (*k*).

Authority to award punishment.

When a convict is charged with any of these offences, the directors summon specially not less than three members of the board of visitors (*l*), of whom two must be justices, to try the case (*m*). The Secretary of State may, however, substitute a metropolitan police magistrate (*n*) or a stipendiary magistrate (*o*) for the board of visitors if he thinks fit (*p*). The sentence cannot be carried out until confirmed by the Secretary of State, to whom a copy of the notes of evidence must be furnished (*q*).

Attendance at punishment.

All corporal punishments must be attended by the governor and the medical officer. The latter is required to give orders for preventing injury to health, and he may, therefore, at any stage order the remainder of the punishment to be remitted (*q*).

(vii.) *Prevention of Escape* (*r*).

Means of prevention.

557. A felon convict attempting to escape, although he offers no violence, may be fired upon, provided that there is no other means of retaking him, and, if he is wounded or killed, the person firing upon him is not guilty of any crime (*s*).

SUB-SECT. 4.—*Release on Licence.*

Powers of Secretary of State to grant or revoke licence.

558. The Secretary of State may grant a licence to be at large (*t*) to every convict for such a portion of his sentence and upon such conditions as seem fit, and the licence may be revoked or altered

(*k*) Prison Act, 1898 (61 & 62 Vict. c. 41), s. 5; Rules for Convict Prisons, rr. 77, 83, 84.

(*l*) As to the board of visitors, see p. 234, *ante*.

(*m*) Prison Act, 1898 (61 & 62 Vict. c. 41), s. 5; Rules for Convict Prisons, r. 77.

(*n*) As to metropolitan police magistrates, see title MAGISTRATES, Vol. XIX., pp. 548 *et seq.*

(*o*) As to stipendiary magistrates, see *ibid.*, pp. 545 *et seq.*

(*p*) Prison Act, 1898 (61 & 62 Vict. c. 41), s. 5.

(*q*) Rules for Convict Prisons, r. 82.

(*r*) For offences connected with the escape of prisoners, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 507.

(*s*) See 3 Co. Inst. 56; 1 Hale, P. C. 489; 1 Hawk. P. C. 81; 1 East, P. C. 298—302. In 1873 a felon convict was shot dead while attempting to escape at Gibraltar, and the coroner's jury returned a verdict of "wilful murder" against two warders. Ultimately a *nolle prosequi* was entered by the Attorney-General of the Colony, who at first held the coroner's view that breaking out of prison was not a felony. In 1896, when a convict was shot dead while attempting to escape at Dartmoor, the coroner's jury returned a verdict of justifiable homicide. A prisoner convicted of misdemeanour, though sentenced to penal servitude, may not lawfully be fired upon when escaping. It is, therefore, the practice in convict prisons not to allow misdemeanants to work outside the walls.

(*t*) No property acquired by a convict during such time as he is lawfully at large under licence vests in an administrator appointed under the Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 30; and, during such time, the disabilities mentioned in *ibid.*, s. 8 (see title CRIMINAL LAW AND PROCEDURE, Vol. IX. pp., 428—430; pp. 261 *et seq.*, *ante*), are, as to such convict, suspended (Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 30).

at pleasure (*u*). If the licence is revoked, a metropolitan police magistrate, acting on a warrant of the Secretary of State, may issue a warrant for the convict's apprehension, and may recommit him to the prison to complete his sentence (*v*).

Conditions of licence.

559. The ordinary conditions of the licence (*w*) are as follows :—
(1) That the holder shall preserve and produce his licence when required by a magistrate or police officer;
(2) That he shall abstain from violation of the law;
(3) That he shall not habitually associate with notoriously bad characters, such as reputed thieves or prostitutes;
(4) That he shall not lead an idle and dissolute life without visible means of obtaining an honest livelihood.
To these conditions any special conditions may be added (*a*).

Forfeiture of licence.

560. A licence may be forfeited when the holder is convicted of an offence on indictment, or when he is convicted summarily of failing to report himself personally to the police within three days of his arrival in a place, and once a month thereafter, or of changing his residence to another police district without previously notifying the police to whom he last reported himself (*b*); and the holder may be punished summarily for failing to produce his licence when called upon to do so by any judicial or police authority, or for breaking any condition of his licence (*c*). A police officer may take any licence-holder into custody without a warrant if he suspects him of having committed an offence, or of having broken the conditions of his licence (*d*), or if it appears that he is getting his livelihood by dishonest means (*e*).

Effect of forfeiture.

561. When a licence is forfeited by a conviction of an indictable offence, or is revoked in consequence of summary conviction, the holder must, in addition to any punishment awarded for the offence, undergo the whole of the unexpired portion of his sentence of penal servitude (*f*). The combined term of the sentence imposed for the offence, together with the unexpired portion of the penal servitude, are treated as one (*g*).

Second licence.

562. A convict whose licence has been revoked or forfeited may be granted a second licence for a portion of the unexpired term (*h*).

(*u*) Penal Servitude Act, 1853 (16 & 17 Vict. c. 99), s. 9.
(*v*) *Ibid.*, s. 10.
(*w*) As to when such licence is usually granted, see Rules for Convict Prisons, r. 33; and see p. 258, *ante*.
(*a*) Penal Servitude Act, 1864 (27 & 28 Vict. c. 47), s. 10, Sched. A; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 415.
(*b*) Penal Servitude Act, 1864 (27 & 28 Vict. c. 47), s. 4; Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 5.
(*c*) Penal Servitude Act, 1864 (27 & 28 Vict. c. 47), s. 5.
(*d*) *Ibid.*, s. 6; Penal Servitude Act, 1891 (54 & 55 Vict. c. 69), s. 2.
(*e*) Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 2.
(*f*) Penal Servitude Act, 1864 (27 & 28 Vict. c. 47), s. 9.
(*g*) Penal Servitude Act, 1891 (54 & 55 Vict. c. 69), s. 3. The unexpired portion of the penal servitude sentence begins on the day following the termination of the fresh sentence, either by remission or expiration.
(*h*) *Ibid.*

SECT. 6. **Criminal Lunatics.**

SECT. 6.—*Criminal Lunatics.*

SUB-SECT. 1.—*Classification.*

(i.) *Criminal Lunatics.*

Definition of "criminal lunatic."

563. A criminal lunatic is:

(1) Any person for whose safe custody during His Majesty's pleasure the King or the Admiralty is authorised to give order, or

(2) Any prisoner whom a Secretary of State or the Admiralty has, in pursuance of any Act of Parliament, directed to be removed to an asylum or other place for the reception of insane prisoners (*i*).

(ii.) *Persons Found Insane on Arraignment.*

Detention of persons found insane at trial.

564. If any person indicted for an offence appears to be insane a jury may be empanelled to try the question of his insanity; and if he is found to be insane, the court may order him to be kept in custody till His Majesty's pleasure be known (*k*); and if a prisoner appears to the jury during the course of his trial to be insane, they may find him insane and a like order may be made (*l*). An order may also be made if the prisoner is brought before a court to be discharged on the ground of want of prosecution and a jury finds him to be then insane (*m*).

(iii.) *Person Found Guilty but Insane.*

Detention of persons found to be insane at time of offence.

565. When a person is charged with an indictable offence, and the jury find that he was insane at the time when he committed the act or made the omission charged against him, they may return a verdict that the defendant was guilty of the act or omission, but was insane at the time. He is then detained during His Majesty's pleasure (*n*).

(*i*) Criminal Lunatics Act, 1884 (47 & 48 Vict. c. 64), s. 16; and see Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 341. The power to order detention during His Majesty's pleasure is given by the Criminal Lunatics Act, 1800 (39 & 40 Geo. 3, c. 94), and the Trial of Lunatics Act, 1883 (46 & 47 Vict. c. 38); see also title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 429. As to the jurisdiction of the court in lunacy over the property of criminal lunatics, see *ibid.*, pp. 428 *et seq.*

(*k*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 354.

(*l*) Criminal Lunatics Act, 1800 (39 & 40 Geo. 3, c. 94), s. 2. The prisoner must be produced, unless it can be shown that it is dangerous to bring him into court (*R.* v. *Dwerryhouse* (1847), 2 Cox, C. C. 446).

(*m*) Criminal Lunatics Act, 1800 (39 & 40 Geo. 3, c. 94), s. 2. Persons found insane on arraignment have not been tried for any offence, and are, therefore, legally liable to be put on their trial if they recover their sanity. The Criminal Lunatics Act, 1800 (39 & 40 Geo. 3, c. 94), deals only with the case of persons who are insane at the time of trial. Such persons will generally have been insane when they committed the offence, but this is not necessarily the case. Conversely, the Trial of Lunatics Act, 1883 (46 & 47 Vict. c. 38) (see the text, *infra*), deals only with persons who were insane when they committed the offence; they may or may not be still insane at the time of the trial. The grand jury must find a true bill; otherwise the court cannot order detention during His Majesty's pleasure (*R.* v. *Hodges* (1838), 8 C. & P. 195).

(*n*) Trial of Lunatics Act, 1883 (46 & 47 Vict. c. 38), s. 2 (1); and see

(iv.) *Persons Certified Insane by Visiting Committee of Prison.*

SECT. 6. **Criminal Lunatics.**

566. When it appears to two members of the visiting committee (*o*) of a prison or to one or more of the Prison Commissioners, or, in the case of a convict prison, to one or more of the directors of convict prisons (*p*), that a prisoner, not being under sentence of death, is insane, they must call two medical practitioners to their assistance and examine the prisoner, and, on being satisfied as to his insanity, they may certify, in writing, that he is insane. The Secretary of State may thereupon issue a warrant directing the removal of the prisoner to the asylum named in the warrant as a criminal lunatic, where, unless he is removed by warrant to another asylum, he must be detained until he ceases to be a criminal lunatic (*q*).

Prisoners not under sentence of death.

If it appears to the Secretary of State, either from a certificate signed by two members of the visiting committee of the prison or otherwise, that a prisoner lying under sentence of death may be insane, he is to appoint two or more medical practitioners to examine the prisoner and report, in writing, upon his sanity, and they, or the majority of them, may certify, in writing, that he is insane (*r*).

Prisoners under sentence of death.

567. A person ceases to be a criminal lunatic (1) if he is remitted to prison by a warrant of the Secretary of State issued upon a certificate from two medical practitioners that he is sane (*s*); (2) if he is absolutely discharged by a warrant of the Secretary of State (*t*); (3) when the term of penal servitude or imprisonment to which he is subject expires (*u*).

When person ceases to be a criminal lunatic.

568. When a criminal lunatic, detained in an asylum or other place, or in a prison, is about to be absolutely discharged, or his term of penal servitude or imprisonment is about to expire, and in the opinion of the superintendent of the asylum or of the governor of the prison he is insane and unfit to be at large, the superintendent or governor may give notice, in writing, to a justice who has jurisdiction in the locality, or to a member of the visiting committee of the prison; and the justice, if satisfied, after taking medical and other evidence, that the person is insane, must make an order for his detention in the asylum specified in the order, and if he is discharged within one month from the date of the notice addressed

Detention of discharged criminal lunatics as pauper lunatics.

title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 373. It is important to notice that no person can be detained during His Majesty's pleasure unless he has been definitely found insane in the verdict; and see *R.* v. *Tebbitt* (1912), *Times*, April 12th.

(*o*) As to the visiting committee, see p. 232, *ante*.

(*p*) As to the directors of convict prisons, see p. 232, *ante*.

(*q*) Criminal Lunatics Act, 1884 (47 & 48 Vict. c. 64), s. 2. The asylum is not necessarily a criminal lunatic asylum. The practice of the Home Office is to avoid removing a lunatic to an asylum before trial. If he is charged with a serious offence, however obvious it may be that he is insane, it is considered better that he should be found insane by a jury.

(*r*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 2 (4).

(*s*) Criminal Lunatics Act, 1884 (47 & 48 Vict. c. 64), s. 3.

(*t*) *Ibid.*, s. 5.

(*u*) *Ibid.*, s. 6.

SECT. 6. Criminal Lunatics.

to the justice he is deemed to be a pauper lunatic (*v*). The names and addresses of the relations of the lunatic should, if possible, be inserted in the order, and the order may be amended by the justice who signed it, or by another justice if he is unable to act, at any time before the lunatic is removed to an asylum (*w*).

SUB-SECT. 2.—*Criminal Lunatic Asylums.*

Provision and supervision.

569. An asylum for criminal lunatics may be provided or appropriated by warrant under the Royal Sign Manual (*a*). Criminal lunatics may be conveyed to such asylums and confined therein by a warrant under the hand of a Secretary of State (*b*), who may appoint a council of supervision and officers (*c*), and may make rules which are binding on the council and officers. These rules must be laid before Parliament within twenty-one days after they are certified (*d*).

Escape of criminal lunatic.

570. Any criminal lunatic who has escaped from such asylum may be retaken by any officer of the asylum, or by any person authorised in writing in that behalf by the Secretary of State (*e*). Any person who rescues a criminal lunatic while being conveyed to, or confined in, a criminal lunatic asylum, and any officer who, through wilful neglect or connivance, permits a criminal lunatic to escape, is guilty of felony (*f*). Any officer who carelessly allows a criminal lunatic to escape may be convicted summarily before the justices and ordered to pay a fine not exceeding £20 (*g*).

Ill-treatment by person employed in asylum.

571. Any person employed in a criminal lunatic asylum who strikes, wounds, ill-treats, or wilfully neglects any criminal lunatic is subject to indictment, and to fine and imprisonment (*h*).

Inspection by Commissioners in Lunacy.

572. The Commissioners in Lunacy (*i*) must visit each criminal lunatic asylum at least once a year, and report to a Secretary of State annually in the month of March. Their report is laid before Parliament (*k*).

SUB-SECT. 3.—*Treatment in Custody.*

Special treatment.

573. The Secretary of State may make regulations for the special treatment of imbeciles sentenced to penal servitude or imprisonment who are unfit for the same penal discipline as other prisoners (*l*).

(*v*) As to the expenses of pauper lunatics, see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 488 *et seq.*

(*w*) Criminal Lunatics Act, 1884 (47 & 48 Vict. c. 64), s. 7.

(*a*) Criminal Lunatic Asylums Act, 1860 (23 & 24 Vict. c. 75), s. 1.

(*b*) *Ibid.*, s. 2.

(*c*) *Ibid.*, s. 4.

(*d*) *Ibid.*, s. 5.

(*e*) *Ibid.*, s. 11.

(*f*) *Ibid.*, s. 12; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 511.

(*g*) Criminal Lunatics Act, 1884 (47 & 48 Vict. c. 64), s. 12.

(*h*) *Ibid.*, s. 13.

(*i*) As to the Commissioners in Lunacy, see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 466 *et seq.*

(*k*) Criminal Lunatics Act, 1884 (47 & 48 Vict. c. 64), ss. 14, 15.

(*l*) *Ibid.*, s. 12.

Nothing in the Criminal Lunatics Act, 1884 (*a*), affects the authority of the Crown to make orders for the safe custody of persons ordered to be detained during His Majesty's pleasure (*b*). SECT. 6. Criminal Lunatics.

SUB-SECT. 4.—*Maintenance of Criminal and Pauper Lunatics.*

574. The maintenance of a pauper lunatic is *primâ facie* chargeable to the union which appears to the justice to be his ordinary residence when he committed the offence (*c*). When this cannot be ascertained, it is chargeable to the union in which the offence appears to have been committed, or, if the offence was committed abroad, to the union where the lunatic was apprehended, or, if he was apprehended abroad, to the union in which he first landed. But if the lunatic was serving in the army or navy when the offence was committed, or is the wife or infant child of a man so serving, he is *primâ facie* chargeable to the union to which the declaration or attestation made on enlistment shows him to belong (*c*). Maintenance.

All expenses for the maintenance of a criminal lunatic or of removing a person who has become a pauper lunatic are paid from public funds. The maintenance of a criminal lunatic in an asylum must be charged at the rate paid by unions elsewhere than in the county or borough to which the asylum belongs (*d*). Source of payment.

SUB-SECT. 5.—*Discharge.*

575. The superintendent of an asylum in which a criminal lunatic is detained must make a report to the Secretary of State when required and not less than once a year, and the Secretary of State is to consider the case of every criminal lunatic at least once in every three years and determine whether he ought to be discharged or otherwise dealt with (*e*). Report by superintendent of asylum.

576. The Secretary of State may discharge a criminal lunatic upon such conditions as he may think fit, and a report of his condition is to be made to the Secretary of State by such person, at such times and containing such particulars as may be required by the conditions contained in the warrant of discharge (*e*). If the conditions are broken or the conditional discharge is revoked, the Secretary of State may by warrant order the criminal lunatic to be taken into custody and conveyed to some asylum named in the warrant, and the criminal lunatic may then be taken as if he had escaped from such asylum and detained therein (*f*). Power of Secretary of State to order conditional discharge.

577. When a criminal lunatic is absolutely discharged or his term of penal servitude or imprisonment expires, and the superintendent is not satisfied that he is sane, he must take all reasonable means for placing him under the care of some relation or friend or in some asylum for the reception of lunatics (*g*). Absolute discharge.

(*a*) 47 & 48 Vict. c. 64.
(*b*) *Ibid.*, s. 13. As to such persons, see p. 268, *ante*.
(*c*) Criminal Lunatics Act, 1884 (47 & 48 Vict. c. 64), s. 8.
(*d*) *Ibid.*, s. 10.
(*e*) *Ibid.*, s. 4.
(*f*) *Ibid.*, s. 5 (3).
(*g*) *Ibid.*, s. 6.

SECT. 6. Criminal Lunatics.

578. Any order made by a justice under the Criminal Lunatics Act, 1884 (*h*), has the same effect as a justice's order and medical certificate made in respect of a lunatic found wandering at large (*i*).

Effect of order.

579. When a criminal lunatic is absolutely discharged before the expiration of a term of penal servitude or imprisonment to which he is subject, or is conditionally discharged, a grant from public funds may be made by the Secretary of State towards his maintenance until the expiration of his sentence (*k*).

Grant towards maintenance.

(*h*) 47 & 48 Vict. c. 64.
(*i*) See Lunacy Act, 1890 (53 & 54 Vict. c. 5), and title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 508.
(*k*) Criminal Lunatics Act, 1884 (47 & 48 Vict. c. 64), s. 10 (2).

PRIVATE BILLS.

See PARLIAMENT.

PRIVATE INTERNATIONAL LAW.

See CONFLICT OF LAWS.

PRIVATE WAYS.

See EASEMENTS AND PROFITS À PRENDRE.

PRIVILEGED COMMUNICATIONS.

See BARRISTERS; DISCOVERY, INSPECTION, AND INTERROGATORIES; EVIDENCE; LIBEL AND SLANDER; SOLICITORS.

PRIVILEGES OF MEMBERS OF PARLIAMENT.

See PARLIAMENT.

PRIVILEGES OF PEERS.

See PARLIAMENT; PEERAGES AND DIGNITIES.

PRIVILEGES OF THE CROWN.

See CONSTITUTIONAL LAW.

PRIVY COUNCIL.

See CONSTITUTIONAL LAW; COURTS; DEPENDENCIES AND COLONIES.

PRIVY PURSE.

See CONSTITUTIONAL LAW.

PRIVY SEAL.

See CONSTITUTIONAL LAW.

PRIZE LAW AND JURISDICTION.

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Part I.—The Law of Prize.

SECT. 1.—*Meaning of "Prize."*

Definition of "prize."

580. "Prize" is the term applied to a ship or goods captured *jure belli* by the maritime force of a belligerent at sea (*a*), or seized in port.

Prize, when a droit of Admiralty.

If the ship is, or goods are, captured by a maritime force in a port, a creek, or a roadstead—and whether the place of capture is one of these is a question of fact—then the prize is a droit of Admiralty, and will be condemned as such to the King in his Office of Admiralty (*b*). But in order to deprive the captors, as grantees of the Crown, of the right to the prize, if captured in a port or roadstead, the latter must be so connected with the common uses of the port as to constitute a part of the port in which the capture is made, and, further, the ship seized must have come in voluntarily or through stress of weather, and not from a cause connected with warlike operations (*c*). Goods or ships which are captured by the officers and crew of a ship other than a ship of war are also droits of Admiralty (*d*).

(*a*) *The Two Friends* (1799), 1 Ch. Rob. 271; *Genoa and its Dependencies* (1820), 2 Dods. 444.

(*b*) *The Rebeckah* (1799), 1 Ch. Rob. 227. As to the meaning of the term and origin of this special grant, see title ADMIRALTY, Vol. I., p. 76; *The Rebeckah, supra.* The practical result of ships or goods being condemned as a droit of Admiralty is that the captors receive no part of the value of the prize, which would, under modern conditions, be paid to the Treasury (*The Melomane* (1803), 5 Ch. Rob. 41). As to captures by a ship's boats or by tenders, so as to entitle the captors to prize, see *ibid.*; *The Charlotte* (1804), 5 Ch. Rob. 280.

(*c*) *The Maria Francoise* (1806), 6 Ch. Rob. 282.

(*d*) Naval Prize Act, 1864 (27 & 28 Vict. c. 25), s. 39; and see title CONSTITUTIONAL LAW, Vol. VI., p. 445.

SECT. 1. Meaning of "Prize."

When property in prize passes from original owner.

581. Until, however, the capture has been declared valid by a Prize Court—in other words, until a decree of condemnation has been pronounced by a judicial tribunal, established for the special purpose of deciding cases relative to prize—the captured ship or goods cannot legally be disposed of, for seizure is always dubious until adjudication, and the property in the ship or goods seized does not pass from the owners to the Crown or its grantees until a judicial sentence has been pronounced (*e*).

Prize may be the property of an enemy or a neutral.

582. Lawful prize may be the property of an enemy or of a neutral (*f*). Enemy's property is liable to condemnation as prize, except in the circumstances hereinafter stated (*g*). Neutral property is only liable to condemnation when it is being used, or is of a nature to be used, in a manner which violates the rules of neutrality, in the circumstances hereinafter stated (*h*).

Prize as compared with booty.

583. Prize differs from booty, for the former is taken by a maritime force (*i*), and the latter by a land force. Booty is now a term only applicable to the property of an enemy, which is susceptible of appropriation and in its nature partakes of the character of war material (*k*). There is, however, a species of prize which consists of goods, belonging to the enemy state or to a public trading company of the enemy exercising powers of government, which are taken in a fortress or possession. Booty may also be a ship taken in waters defended by or belonging to a fortress or possession. In respect of these things a British Prize Court has jurisdiction as if they were captured at sea (*l*).

SECT. 2.—*Prerogative Rights of the Crown in Prize.*

Enemy ships which are not lawful prize.

584. At the moment when a capture has been effected—and this moment has been held to be the striking of the colours, when this occurred before actual possession was taken of the ship (*m*)—the captured ships or goods become prize of the Crown, except when they are a droit of Admiralty; for prize is altogether a creature of the Crown: no man has, or can have, any interest but what he takes as the mere gift of the Crown (*n*). This right of the Crown to the

(*e*) *The Flad Oyen* (1779), 1 Ch. Rob. 135; *The Henrick and Maria* (1799), 4 Ch. Rob. 43; *Stevens* v. *Bagwell* (1808), 15 Ves. 139; and as to the effect of condemnation, see, further, pp. 284 *et seq.*, *post.*

(*f*) A neutral is at liberty to purchase either goods or merchant ships from a belligerent, even after war has broken out, and any transfer where war is not imminent is good against a captor; but, when a state of war exists or is imminent, a mere transfer by documents is not sufficient to change the property, as against the captors, while it is *in transitu*. (*Sorensen* v. *R.*, *The Ariel* (1857), 11 Moo. P. C. C. 119; *Sorensen* v. *R.*, *The Baltica* (1855), 11 Moo. P. C. C. 141).

(*g*) See p. 278, *post.*

(*h*) See p. 279, *post.*

(*i*) *Genoa and its Dependencies* (1820), 2 Dods. 444.

(*k*) 2 Oppenheim, International Law, p. 144; see *ibid.*, Vol. I., p. 98 (Booty of War).

(*l*) Naval Prize Act, 1864 (27 & 28 Vict. c. 25), s. 34; see titles ADMIRALTY, Vol. I., p. 78; CONSTITUTIONAL LAW, Vol. VI., p. 445.

(*m*) *The Rebeckah* (1799), 1 Ch. Rob. 227.

(*n*) *The Elsebe* (1804), 5 Ch. Rob. 173 (where it was held that the

SECT. 2. Prerogative Rights of the Crown in Prize.

possession of a prize involves the right to make grants of the whole or part of the captured ship and goods to any person, the Lord High Admiral (*o*) or to the actual captors (*p*).

SECT. 3.—*Validity of Capture.*

SUB-SECT. 1.—*When Capture is Lawful.*

Enemy ships which are not lawful prize.

585. Capture of an enemy ship or enemy goods is always lawful, unless it be of a ship employed exclusively in a coast fishery, or of a small boat employed in local trade (*q*), or of a ship employed on a religious, scientific, or philanthropic mission (*r*), or of a cartel ship employed, or about to be employed, in the conveyance of exchanged prisoners of war (*s*).

Ships deemed to be enemy ships or neutral ships.

586. A ship which is sailing under the colours and pass of the belligerent state is deemed to be an enemy ship, and conversely a ship sailing under neutral colours and pass is a neutral ship (*t*). A transfer of property of a ship or goods *in transitu* does not take effect till after delivery, unless made before the outbreak of war (*u*), and a ship may still be an enemy ship after a sale to a neutral, whether immediately before or during a war, unless such transfer is absolutely *bonâ fide* (*v*), and completed by payment of the whole purchase-money (*w*).

Test of nationality.

587. Commercial domicil is the test of nationality for the purposes of prize law; therefore any person is an enemy *quoad* a ship or cargo who resides and carries on trade in enemy territory, and

Crown can release property seized before adjudication and against the will of the captors). In *The Mercurius* (1798), 1 Ch. Rob. 80, it was held that the captors may, against the wish of the Crown, proceed to adjudication.

(*o*) As to the office of the Lord High Admiral, see title CONSTITUTIONAL LAW, Vol. VI., p. 419; Vol. VII., pp. 88 *et seq.*

(*p*) The earliest recorded grants to captors are of the year 1242 (Marsden, Early Prize Jurisdiction and Prize Law in England, English Historical Review, Vol. XXIV., p. 675); and see title CONSTITUTIONAL LAW, Vol. VI., pp. 444, 445.

(*q*) Convention relative to certain restrictions on the Exercise of the Right of Capture in Maritime War, 1907, art. 3 (American Journal of International Law (Official Documents), Vol. II., p. 167); see also *The Young Jacob and Johanna* (1798), 1 Ch. Rob. 20; and *The Liesbet Van den Toll* (1804), 5 Ch. Rob. 283.

(*r*) Convention relative to certain restrictions on the Exercise of the Right of Capture in Maritime War, 1907, art. 4 (American Journal of International Law (Official Documents), Vol. II., p. 167).

(*s*) *The Daifjie* (1800), 3 Ch. Rob. 139; *La Gloire* (1804), 5 Ch. Rob. 193.

(*t*) *The Vrow Elizabeth* (1803), 5 Ch. Rob. 2 (the colours and pass are conclusive as to the character of the ship, but not conclusive as to that of the cargo; see *The Vreede Scholtys* (1804), 5 Ch. Rob. 5, n.); *The Primus* (1854), Spinks, 48; *The Industrie* (1854), Spinks, 54.

(*u*) *The Vrow Margaretha* (1799), 1 Ch. Rob. 336.

(*v*) *The Bernon* (1798), 1 Ch. Rob. 102; *The Welvaart* (1799), 1 Ch. Rob. 122; *The Ernst Merck* (1854), Spinks, 98; *The Rapid* (1854), Spinks, 80; *The Soglasie* (1854), Spinks, 104.

(*w*) *The Baltica* (1855), Spinks, 264; *Batten* v. *R.*, *The Maria* (1857), 11 Moo. P. C. C. 271. A lien gives no right of property in a prize as against a captor (*The Ida* (1854), Spinks, 26).

has not divested himself of this hostile character by *bonâ fide* putting himself in motion to quit the enemy territory (*x*). Conversely, a person of enemy nationality who carries on business in British, allied, or neutral territory is not an enemy in relation to his property (*a*). But if a person carries on business in enemy as well as in British territory, he is, for the purposes of property belonging to him as a merchant of the belligerent state, if the property is captured at sea, regarded as an enemy subject (*b*).

Effect upon property.

588. Capture of a neutral ship is lawful when she commits a breach of neutrality by breaking, or attempting to break, a blockade. This offence is committed when a ship sails on a voyage with an intention to break a blockade; and, when this occurs, she is, from the moment of sailing, liable to capture (*c*), unless in the course of the voyage a clear variation of intention supervenes (*d*). Again, an offence against neutrality may be committed if a ship anchors near a blockaded port (*e*), or approaches without necessity within the protection of the shore (*f*), for in such and similar cases the facts raise a presumption of guilt. If a ship has broken a blockade, she remains liable to capture until she has reached her port of destination (*g*), provided the blockade is still in existence, for the moment a blockade is raised the ship is no longer in a state of guilt (*h*).

Capture of ship breaking blockade.

589. A ship is not liable for a breach of blockade if she enters or attempts to enter a blockaded port after being informed by a belligerent ship of war of the blockading squadron that the port is not blockaded (*i*), nor if she does so in consequence of an absolute or unavoidable necessity (*k*), in other words, of an imperative and overruling compulsion (*l*). Nor is she liable to capture if she leaves a blockaded port in ballast, or with a cargo *bonâ fide* purchased and delivered on board before the commencement of the blockade (*m*),

When a ship is not liable for breach of blockade.

(*x*) *The Indian Chief* (1800), 3 Ch. Rob. 12; *The Ann* (1813), 1 Dods. 221; *Cremidi* v. *Powell*, *The Gerasimo* (1857), 11 Moo. P. C. C. 88; *The Aina* (1854), Spinks, 8, 10.

(*a*) *The Danous* (1802), 4 Ch. Rob. 255, n., H. L.; *The Postilion* (1779), Marr. 245.

(*b*) *The Jonge Klassina* (1804), 5 Ch. Rob. 297; and see title CONFLICT OF LAWS, Vol. VI., pp. 195, 196.

(*c*) *The Columbia* (1799), 1 Ch. Rob. 154.

(*d*) *The Imina* (1800), 3 Ch. Rob. 167.

(*e*) *The Neutralitet* (1805), 6 Ch. Rob. 30.

(*f*) *The Charlotte Christine* (1805), 6 Ch. Rob. 101; *The Gute Erwartung* (1805), 6 Ch. Rob. 182.

(*g*) *The Weelvaart Van Pillaw* (1799), 2 Ch. Rob. 128; *The General Hamilton* (1805), 6 Ch. Rob. 61; *The Juffrow Maria Schroeder* (1800), 3 Ch. Rob. 147.

(*h*) *The Lisette* (1807), 6 Ch. Rob. 387, 395.

(*i*) *The Neptunus* (1799), 2 Ch. Rob. 110; *The Nancy* (1809), 1 Act. 57.

(*k*) *The Hurtige Hane* (1799), 2 Ch. Rob. 124.

(*l*) *The Fortuna* (1803), 5 Ch. Rob. 27; see also *The Charlotta* (1810), Edw. 252 (where the question of necessity was left to the Trinity Masters); *Baltazzi* v. *Ryder*, *The Panaghia Rhomba* (1858), 12 Moo. P. C. C. 168.

(*m*) *The Frederick Molke* (1798), 1 Ch. Rob. 86; *The Vrouw Judith* (1799), 1 Ch. Rob. 150.

SECT. 3. Validity of Capture.

but a ship is liable to capture if, outside a blockaded port, she loads cargo which has been brought out of such port in another craft (*n*).

Notice of blockade.

590. In order to render a ship guilty of a breach of neutrality so as to be liable to capture and condemnation, notice of the blockade must have reached the master of the neutral ship. The simplest form of notice is one of actual notification to those on board, as by the commander of a ship of a blockading squadron, if supported by a blockade in fact (*o*).

When master of ship affected with notice.

591. Where there has been a blockade notoriously in existence for some length of time, the master of a ship coming out of a blockaded port is presumed to have notice of such blockade (*p*); and, where there has been a diplomatic notification of a blockade to neutral powers, the master of a neutral ship will be presumed to have knowledge of it after a reasonable time has elapsed from the time of notification (*q*).

When owners affected with notice to master.

A ship is liable to condemnation for breach of blockade if the knowledge of the blockade is that of the master only, however innocent the owners of the ship herself may be (*r*). The master is in law the agent also of the cargo owners, and, if the ship is condemned for breach of blockade, and the blockade was known or might have been known to the owners of the cargo at the time when the shipment was made, and they might, therefore, by possibility have been privy to an intention of violating a blockade, such privity is assumed as an irresistible inference of law, and it is not competent to the cargo owners to rebut it by evidence (*s*).

When blockade effective.

592. A blockade, the object of which is completely to prevent ingress to and egress from a port, in order to be valid must be effective—that is, it must be maintained by a force sufficient to enforce it (*t*), and must not be relaxed by remissness on the part of any of the blockading ships, or by irregularity in the exclusion of ships (*a*). A temporary and voluntary withdrawal of a blockading force does not, however, invalidate either the effectiveness or the continuance of a blockade (*b*), as does a withdrawal of the blockading

(*n*) *The Maria* (1805), 6 Ch. Rob. 201; *The Lisette* (1807), 6 Ch. Rob. 387. The transfer of a cargo already loaded, from a ship to lighters, and its retransfer to the same ship, is not an infringement of this exception (*The Otto and Olaf* (1855), Spinks, 257).

(*o*) *The Mercurius* (1798), 1 Ch. Rob. 80; *The Neptunus* (1799), 1 Ch. Rob. 170; *The Johanna Maria* (1855), 4 W. R. 106, P. C.

(*p*) *The Vrouw Judith* (1799), 1 Ch. Rob. 150.

(*q*) *The Jonge Petronella* (1799), 2 Ch. Rob. 131; *The Calypso* (1799), 2 Ch. Rob. 298; *The Adelaide* (1801), 3 Ch. Rob. 281.

(*r*) *The Columbia* (1799), 1 Ch. Rob. 154; *The Vrouw Judith, supra.*

(*s*) *Baltazzi* v. *Ryder, The Panaghia Rhomba* (1858), 12 Moo. P. C. C. 168.

(*t*) *The Nancy* (1809), 1 Act. 57.

(*a*) *The Juffrow Maria Schroeder* (1800), 3 Ch. Rob. 147; *The Rolla* (1807), 6 Ch. Rob. 364, 372.

(*b*) *The Columbia, supra; The Frederick Molke* (1798), 1 Ch. Rob. 86; *The Franciska and the Johanna Maria* (1855), Spinks, 287, P. C.; and see title CONSTITUTIONAL LAW, Vol. VI., p. 447, notes (*a*)—(*e*).

ships by compulsion of a belligerent (*c*), until the blockade has been shown to have been resumed (*d*). Further, in order to be valid, a blockade, if commenced under a diplomatic notification, must be in fact of as great extent as is stated in the notification (*e*).

Capture of contraband.

593. Capture of a neutral ship and cargo is also lawful if the latter is absolutely contraband (*f*), or, in certain circumstances, when it is only conditionally contraband, if the real destination is not a neutral port (*g*).

Absolute and conditional contraband.

Goods which are fit only for warlike purposes are absolute contraband; goods suitable for purposes of war or peace are conditional contraband (*h*).

Real destination as test of contraband.

594. The real destination of goods which are conditional contraband is the test of their liability to capture. If the port to which they were being carried is a general commercial port, then it is presumed that the articles were intended for civil use, and they are not liable to capture. If, on the other hand, the port is one of naval or military equipment, then it is presumed that the articles were intended for military use, and they are liable to capture (*i*).

(*c*) *The Hoffnung* (1805), 6 Ch. Rob. 112.

(*d*) *The Triheten* (1805), 6 Ch. Rob. 65.

(*e*) *The Henrick and Maria* (1799), 1 Ch. Rob. 146; *The Franciska and the Johanna Maria* (1855), Spinks, 287, P. C.

(*f*) *The Charlotte* (1804), 5 Ch. Rob. 305. As to articles which are usually treated as absolute contraband, see 2 Oppenheim, International Law, pp. 422—425. As to breach of warranty of neutrality in relation to marine insurance, see title INSURANCE, Vol. XVII., pp. 421, 422.

(*g*) *The Imina* (1800), 3 Ch. Rob. 167; *Hobbs* v. *Henning* (1864), 17 C. B. (N. S.) 791.

(*h*) The Declaration of London ([Cd. 4554] 1909, pp. 77—79) has no legal effect in the Prize Courts of Great Britain, nor does it form any part of British prize law unless and until it is ratified, but the list of articles regarded as absolute contraband may be usefully referred to as indicating the view agreed to by representatives of the principal States in 1909. *Ibid*, art. 22, provides that the following articles may without notice be treated as contraband of war under the name of absolute contraband:—(1) Arms of all kinds, including arms for sporting purposes and their distinctive component parts; (2) projectiles, charges, and cartridges of all kinds and their distinctive component parts; (3) powder and explosives specially prepared for use in war; (4) gun-mountings, limber boxes, limbers, military waggons, field forges and their distinctive component parts; (5) clothing and equipment of a distinctively military character; (6) all kinds of harness of a distinctively military character; (7) saddle, draught and pack animals suitable for use in war; (8) articles of camp equipment and their distinctive component parts; (9) armour plates; (10) warships, including boats and their distinctive component parts of such a nature that they can only be used on a vessel of war; (11) implements and apparatus designed exclusively for the manufacture of munitions of war, for the manufacture or repair of arms, or war material for use on land or sea. *Ibid.*, art. 23, provides that articles exclusively used for war may be added to the list of absolute contraband by a declaration which must be notified to the Governments of neutral powers or their representatives.

(*i*) *The Jonge Margaretha* (1799), 1 Ch. Rob. 189; *The Edward* (1801), 4 Ch. Rob. 68; *The Neptunus* (1800), 3 Ch. Rob. 108.

SECT. 3. **Validity of Capture.**

For the purposes of the above test the port of destination of the ship is assumed to be the destination of the goods (*j*).

Capture of ship employed to carry servants of belligerent state.

595. Capture of a neutral ship and her cargo is also lawful if she is employed by a belligerent state to carry persons in its military or naval service (*k*), or officers of the civil service of the belligerent state sent out on public service, and at the public expense, when such persons will be intimately connected with the hostile operations (*l*). A ship which has become liable to capture for the above reasons is not exempt because her employment has been under duress by the belligerent, and she remains liable after the conclusion of the service if she is still under the control of the belligerent (*m*); nor does the ignorance of the master exempt the ship from the above liability (*n*).

Capture of ship employed to carry despatches of belligerent state.

596. Capture of a neutral ship is also lawful if she carries despatches of a belligerent state—that is, official communications of official persons on affairs of state (*o*) between places in the possession of the belligerent state (*p*). The carriage of despatches from the ambassador of a belligerent state, who is resident in a neutral state, to the belligerent state is not, however, a breach of neutrality (*q*). Nor does the carriage of despatches, if contained in postal correspondence, make a ship liable; postal correspondence, whether official or private, being inviolable, either on a neutral or a belligerent ship (*r*).

SUB-SECT. 2.—*Where Capture is Lawful.*

Capture not lawful in territorial waters.

597. Capture is lawful in any waters, except the territorial waters of a neutral state (*s*). Such territorial waters are estuaries

(*j*) *The Richmond* (1804), 5 Ch. Rob. 325. As to the doctrine of continuous voyage, see the memorandum by Great Britain to the Naval Conference of 1908 ([Cd. 4555] 1909, p. 37), and the cases there cited; *The Maria* (1805), 5 Ch. Rob. 365; *The William* (1806), 5 Ch. Rob. 385; *The Jonge Pieter* (1801), 4 Ch. Rob. 79; *Seymour* v. *London and Provincial Marine Insurance Co.* (1872), 41 L. J. (C. P.) 193; *Hobbs* v. *Heming* (1865), 11 Jur. (N. S.) 223). In very exceptional cases where a prize could not, from the condition of the ship, be brought into a port in the British dominions, the court has condemned it when brought into a neutral port (*The Polka* (1854), Spinks, 57); see also *The Henrick and Maria* (1799), 4 Ch. Rob. 43; and see p. 283, *post*.

(*k*) *The Friendship* (1807), 6 Ch. Rob. 420; *The Orozembo* (1807), 6 Ch. Rob. 430. This rule would not apply in the case of a soldier travelling as an ordinary passenger at his own expense (*The Friendship*, *supra*, at p. 429).

(*l*) *The Orozembo*, *supra*, at p. 436.

(*m*) *The Carolina* (1802), 4 Ch. Rob. 256.

(*n*) *The Orozembo*, *supra*.

(*o*) *The Carolina* (1808), 6 Ch. Rob. 461, 465.

(*p*) *The Atalanta* (1808), 6 Ch. Rob. 440; *The Carolina* (1808), 6 Ch. Rob. 461.

(*q*) *The Carolina* (1808), 6 Ch. Rob. 461.

(*r*) Convention relative to certain restrictions on the Exercise of the Right of Capture in Maritime War, 1907, art. 1 (American Journal of International Law (Official Documents), Vol. II., p. 167).

(*s*) Convention respecting the Rights and Duties of Neutral Powers in Naval War, 1907, art. 2 (American Journal of International Law (Official Documents), Vol. II., p. 167); *The De Fortuyn* (1760), Burrell, 175.

of rivers and the maritime belt within three miles of the shore (*t*), or waters which are bays within such neutral territory. As regards bays, there is a general admission that they are within the territory of the riparian state if the entrance is not wider than six miles (*a*).

Capture in the open sea.

598. Capture in the open sea is not lawful when the act of hostility has its commencement within neutral territory, as when a ship of war anchored in neutral waters sent out boats and captured an enemy ship in the open sea (*b*).

Claim for violation of neutrality.

599. If an enemy ship is captured within neutral territory, any claim made for violation of neutrality must be made by the neutral state whose rights have been infringed, and not by the owners of the captured ship (*c*).

SECT. 4.—*Rights and Duties of Captors.*

Right to visit and search ship.

600. The commander of a belligerent ship of war has a right to visit a ship and examine her papers. If the visiting officer is not then satisfied that the ship is not liable to detention, he has a right to search her, even though she is a neutral ship under national convoy (*d*), and if there is sufficient cause she may be detained. Opposition to this right of visit and search by resistance on the part of the master of the ship subjects her and her cargo to condemnation (*e*); and if there was no fair ground or probable cause for suspicion the Prize Court (*f*) may decree restitution with costs and damages (*g*). If with little or no fault on her part the ship is involved in suspicion, simple restitution will be decreed (*h*), but if a ship, though not liable to condemnation, has by her own misconduct occasioned her capture, she will be restored subject to payment of costs to the captors (*i*).

Duty to despatch prize to convenient port for adjudication.

601. When a ship is detained, it is the duty of the officer in command of the belligerent ship of war which has made the capture to send in the prize for adjudication to a convenient port in the British dominions as soon as possible, otherwise he may be liable to pay damages and costs (*j*). "Convenient" is a general and also a

(*t*) *The Anna* (1805), 5 Ch. Rob. 373; *The Vrow Anna Catharina* (1803), 5 Ch. Rob. 15.

(*a*) 1 Oppenheim, International Law, pp. 246 *et seq.*

(*b*) *The Twee Gebroeders* (1800), 3 Ch. Rob. 162; *The Anna supra.*

(*c*) *The Twee Gebroeders, supra; The Eliza Ann* (1813), 1 Dods. 244.

(*d*) *The Maria* (1799), 1 Ch. Rob. 340.

(*e*) *The Maria, supra; The Catherina Elizabeth* (1804), 5 Ch. Rob. 232.

(*f*) See pp. 285 *et seq., post.*

(*g*) *The Ostsee* (1855), Spinks, 174; *The Peacock* (1802), 4 Ch. Rob. 185; *The Nemesis* (1808), Edw. 50; *The Fortuna* (1855), Spinks, 307.

(*h*) *The Caroline* (1855), Spinks, 252.

(*i*) *The Ostsee, supra.*

(*j*) *The Elsebe* (1804), 5 Ch. Rob. 174; *The Peacock* (1802), 4 Ch. Rob. 185; *Cremidi* v. *Powell, The Gerasimo* (1857), 11 Moo. P. C. C. 88. It has been held that the condemnation of a ship taken into an allied port is valid (*The Christopher* (1799), 2 Ch. Rob. 209), and that condemnation of a ship taken into a neutral port may be valid under peculiar circumstances (*The Polka* (1854), Spinks, 57; see note (*j*), p. 282, *ante*).

SECT. 4. Rights and Duties of Captors.

relative term. It has been held that to fall within this term (1) the port should be one wherein the prize can enter with the cargo on board and lie in safety; (2) the port should be one which is in easy communication with a Prize Court (*k*); (3) the port should also be as near as possible to the place of capture (*l*).

If the captor takes the prize to a port which is not convenient and the ship is ultimately released, the captor may be condemned to pay demurrage in respect of the loss of time caused by his improper conduct (*m*).

If a ship is rescued by her crew out of the hands of the prize crew, and is retaken, the rescue renders both ship and cargo liable to condemnation (*n*).

Duty of captors to take care.

602. The captors are answerable in costs and damages if due care is not taken in bringing in a prize for adjudication and if damage to or loss of the prize ensues through the negligence of the captors' agent, such as the prize master (*o*); but they are not insurers and are not answerable in the absence of negligence (*p*).

Unlawful destruction of prize.

The primary duty of the captors of an enemy ship, as already stated, is to bring the ship into port for adjudication, so that it may be judicially ascertained if she is enemy property, or neutral property liable to capture, and so prevent mistakes by the captors (*q*). If the captured ship is neutral or has a licence from the captors' country, she may not be destroyed by the captors (*r*); therefore, if a neutral ship or a ship protected by a licence is destroyed, however meritorious such act may be as far as the belligerent state is concerned, the neutral or protected shipowner is entitled to full compensation for the loss of his property (*s*).

SECT. 5.—*Condemnation of Prize.*

Sentence of condemnation.

603. The object of bringing in a captured ship or cargo for adjudication is that a sentence of condemnation may be pronounced by a competent court, namely, the Prize Court (*t*), decreeing the capture to have been rightly made (*u*).

(*k*) *The Washington* (1806), 6 Ch. Rob. 275. As to Prize Courts and their jurisdiction, see pp. 285 *et seq.*, *post.*

(*l*) *The Anna* (1805), 5 Ch. Rob. 373.

(*m*) *The Wilhelmsberg* (1804), 5 Ch. Rob. 143; *The Catherina Elizabeth* (1810), 1 Act. 309.

(*n*) *The Dispatch* (1801), 3 Ch. Rob. 278.

(*o*) *The Der Mohr* (1800), 3 Ch. Rob. 129; *The Der Mohr* (1802), 4 Ch. Rob. 314; *The Nemesis* (1808), Edw. 50. The prize master is the person in command of the prize.

(*p*) *The John* (1818), 2 Dods. 336; *The Maria and Vrow Johanna* (1803), 4 Ch. Rob. 348.

(*q*) *The Felicity* (1819), 2 Dods. 381; *The Gerasimo* (1857), 11 Moo. P. C. C. 88.

(*r*) *The Acteon* (1815), 2 Dods. 48; *The Felicity*, *supra.*

(*s*) *Ibid.* As to the right to destroy neutral property at sea, which, if brought in, must have been condemned under the law of blockade or contraband, see Westlake's International Law, 1907, Part II., p. 318; and as to the rule relating to such destruction, which will prevail between countries which may have ratified the Declaration of London, see also Declaration of London, arts. 48—52 ([Cd. 4554] 1909, p. 86).

(*t*) See p. 285, *post.*

(*u*) *The Henrick and Maria* (1799), 4 Ch. Rob. 43.

SECT. 5. Condemnation of Prize.

A sentence of condemnation is necessary in order to vest the property in the captors or in their transferees (*v*), and is conclusive as regards the property in the condemned ship or goods (*x*).

Effect of sentence.

Part II.—Exercise of Jurisdiction.

SECT. 1.—*British Prize Courts.*

SUB-SECT. 1.—*The Prize Court in the United Kingdom.*

Jurisdiction of the High Court of Justice.

604. Jurisdiction in all matters of prize in the United Kingdom is exercised by the High Court of Justice (*a*), and all such matters are, subject to Rules of Court, assigned to the Probate, Divorce, and Admiralty Division of that court. The jurisdiction extends to all prize matters arising on the high seas, or in any part of His Majesty's dominions, or in any place where His Majesty has jurisdiction (*b*). This jurisdiction is permanent, and, unlike that of the Prize Courts in British possessions (*c*), requires no commission from His Majesty, proclamation of war, or other executive act to bring it into operation. The High Court has power to enforce all orders of

(*v*) *The Flad Oyen* (1799), 1 Ch. Rob. 135.

(*x*) *The Purissima Conception* (1805), 6 Ch. Rob. 45; *The Victoria*, otherwise *Alfred the Great* (1809), Edw. 97. In *The Cornelia* (1810), Edw. 244, it was held that a British owner, whose ship had been condemned by a foreign Prize Court, had no right to the possession of the ship when subsequently recaptured; but, as to the right given by statute to the owner to have his recaptured property restored on payment of salvage, see p. 293, *post*.

(*a*) See title COURTS, Vol. IX., pp. 51 *et seq.*

(*b*) See Judicature Act, 1891 (54 & 55 Vict. c. 53), s. 4 (1), (2), amended by Statute Law Revision Act, 1908 (8 Edw. 7, c. 4); Naval Prize Act, 1864 (27 & 28 Vict. c. 25), s. 4; and see title ADMIRALTY, Vol. I., p. 78. Prize jurisdiction was formerly exercised by the High Court of Admiralty under a commission issued by the Crown; later it obtained a statutory jurisdiction (Naval Prize Act, 1864 (27 & 28 Vict. c. 25), ss. 3, 4), and this jurisdiction was transferred to the High Court of Justice by the Judicature Act, 1873 (36 & 37 Vict. c. 66). All questions and matters in Scotland relating to prize and capture in war and the condemnation of ships as such is vested solely in the Probate, Divorce, and Admiralty Division (see Court of Session Act, 1829 (6 Geo. 4, c. 120), s. 57; Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 34 (3)). The jurisdiction of the High Court of Admiralty entirely excluded that of the courts of common law in any matter relating to prize; see *Le Caux* v. *Eden* (1781), 2 Doug. (K. B.) 594; *Faith* v. *Pearson* (1816), 6 Taunt. 439; *The Elize* (1854), Spinks, 88, 97; *Mitchell* v. *Rodney* (1783), 2 Bro. Parl. Cas. 423. For the history of prize jurisdiction of the High Court of Admiralty, see judgment of Lord MANSFIELD in *Lindo* v. *Rodney* (1782), 2 Doug. (K. B.) 612, n.; Marsden, Early Prize Jurisdiction and Prize Law in England, English Historical Review, Vol. XXIV., p. 675. It was asserted by Lord STOWELL that the Prize Court was an international court which administered the law of nations (*The Maria* (1799), 1 Ch. Rob. 340; *The Walsingham Packet* (1799), 2 Ch. Rob. 77; *The Recovery* (1807), 6 Ch. Rob. 341, 349), but this view is now rightly regarded as questionable; see 2 Oppenheim, International Law, p. 474. Appeals in prize cases lie to the Judicial Committee of the Privy Council; see pp. 287, 290, *post*; title COURTS, Vol. IX., p. 28, note (*a*).

(*c*) See pp. 286, 287, *post*.

SECT. 1. British Prize Courts.

Colonial Courts of Admiralty or Vice-Admiralty Prize Courts in prize matters, and of the Judicial Committee of the Privy Council in prize appeals (*d*).

Matters to which the jurisdiction extends.

605. The prize jurisdiction of the High Court extends to all matters relating to booty of war (*e*), to any ship or goods taken by any of His Majesty's naval or naval and military forces while acting in conjunction with the forces of an ally (*f*), and to any ship or goods taken by any of His Majesty's naval or naval and military forces in a land expedition against a fortress or possession of the enemy, if the goods belong to the enemy state or to a public trading company of the enemy exercising powers of government, or if the ship is taken in waters defended by or belonging to the fortress or possession (*g*).

Jurisdiction on petition of right.

606. The High Court has jurisdiction also on a petition of right, in case the subject-matter of the petition or any material part thereof arises out of the exercise of any belligerent right on behalf of the Crown, or would be cognisable in a Prize Court within His Majesty's dominions if the same were a matter in dispute between private persons (*h*).

SUB-SECT. 2.—*Prize Courts in British Possessions.*

Colonial Court of Admiralty; Vice-Admiralty Court.

607. Prize jurisdiction in a British possession is vested in the Colonial Court of Admiralty or in the Vice-Admiralty Court (*i*).

Nature of jurisdiction.

608. The jurisdiction is not inherent, but is derived from a special commission from His Majesty or warrant of the Admiralty authorising the court to act as a Prize Court (*k*). A Vice-Admiralty Court may, by commission or warrant, be established at any place in a British possession simply for the purpose of so acting (*k*).

Commission or warrant.

The commission or warrant may be issued at any time, notwithstanding the existence of peace, but the jurisdiction is defined by and limited to the terms of the commission or warrant which authorises the court so to act, and cannot be exercised until a proclamation has been made by the Vice-Admiral of the possession that war has broken out (*l*).

Jurisdiction is local.

The jurisdiction is local, being confined to the adjudication of property brought within the defined limits (*m*), except that every Prize Court in any British possession has power to and must enforce, within its jurisdiction, all orders and decrees of the Judicial Committee in prize appeals and of the High Court in prize causes (*n*).

(*d*) Naval Prize Act, 1864 (27 & 28 Vict. c. 25), s. 4.

(*e*) *Banda and Kirwee Booty* (1866), L. R. 1 A. & E. 109; and see title ADMIRALTY, Vol. I., p. 78.

(*f*) Naval Prize Act, 1864 (27 & 28 Vict. c. 25), s. 35.

(*g*) *Ibid.*, s. 34.

(*h*) *Ibid.*, s. 52; and see title CROWN PRACTICE, Vol. X., p. 30.

(*i*) For details of the jurisdiction of Colonial Courts of Admiralty and their relation to the Vice-Admiralty Courts, see title ADMIRALTY, Vol. I., p. 140; and see title DEPENDENCIES AND COLONIES, Vol. X., p. 557.

(*k*) Prize Courts Act, 1894 (57 & 58 Vict. c. 39), s. 2 (3).

(*l*) *Ibid.*, s. 2 (1), (2).

(*m*) *The Carel and Magdalena* (1800), 3 Ch. Rob. 58; and see Jenkyns, British Rule and Jurisdiction beyond the Seas.

(*n*) Naval Prize Act, 1864 (27 & 28 Vict. c. 25), s. 9. As to prize appeals, see note (*b*), p. 285, *ante*, pp. 287, 290, *post*.

SECT. 1. British Prize Courts.

Prize Court outside British dominions.

609. His Majesty has power to create outside British territory a court having powers over persons, other than British subjects, in any place where he enjoys jurisdiction over such persons, and it is therefore within the power of the Crown in such cases to establish a Prize Court outside British dominions (*o*).

SUB-SECT. 3.—*The Privy Council.*

Jurisdiction.

610. The Judicial Committee of the Privy Council has jurisdiction to hear and report on an appeal from any order or decree of a British Prize Court, and may therein exercise all such powers as for the time being appertain to it in respect of appeals from any Court of Admiralty Jurisdiction, and all such powers as are vested in the High Court of Justice in prize matters, and all such powers as were wont to be exercised by the Commissioners of Appeal in Prize Causes (*p*).

SECT. 2.—*Procedure* (*q*).

Institution and conduct of proceedings.

611. A cause for the condemnation of a ship as prize must be instituted in the name of the Crown, but the proceedings, with the consent of the Crown, may be conducted by the captors (*r*). Other causes may be instituted in the names of the parties (*s*).

Monition.

612. The cause is commenced by the issue of a monition, a document somewhat analogous to a writ of summons, out of the Registry, that is, in causes in Great Britain, the Admiralty Registry.

Service.

The monition is served by the marshal or his substitutes, who must for this purpose affix it upon the Royal Exchange, or such other building in the City of London as the judge shall direct, and the monition and service thereof must be advertised in one or more newspapers (*t*).

Advertisement.

Filing.

The monition must be filed within twenty days of its service, and, if issued in respect of a neutral ship, notice of it must be sent by the registrar to the consul of the neutral state (*a*).

Appearance.

613. Any person claiming an interest in or against the ship proceeded against may, before final adjudication, enter an appearance (*b*), and after such appearance he must make a claim, in a

Claim.

(*o*) Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37). In 1888 a British Prize Court was established in Zanzibar, the Sultan of Zanzibar being at that time an ally of Her late Majesty and independent.

(*p*) Naval Prize Act, 1864 (27 & 28 Vict. c. 25), s. 6; and see title COURTS, Vol. IX., p. 28.

(*q*) The proceedings of the Prize Court in Great Britain are governed by the Rules of Court of 20th October, 1898 (Stat. R. & O. Rev., Vol. IX., Navy, pp. 128 *et seq.*) (hereinafter referred to as Prize Rules), which leave the procedure practically the same as that in force in the time of the Napoleonic wars. In the Naval Prize Bill, 1911, as it passed the House of Commons, the provisions of the Naval Prize Act, 1864 (27 & 28 Vict. c. 25), as to certain forms of procedure, including monition and citation and the standing interrogatories, were omitted. It is probable, therefore, that these Rules will be brought more into accordance with the present practice before any future war brings them into operation.

(*r*) A prize cause may be commenced after the cessation of a war (*Cargo ex Katharina* (1860), Lush. 142).

(*s*) Prize Rules, r. 2.

(*t*) *Ibid.*, rr. 3, 18, 19.

(*a*) *Ibid.*, rr. 20, 21.

(*b*) *Ibid.*, rr. 22, 23, 24.

SECT. 2. **Procedure.**

specified form, which must be filed in the Registry and verified by affidavit (*c*). A claimant may be compelled to give security for costs (*d*).

Affidavit as to ship papers.

614. Two preliminary steps are obligatory on captors: (1) the making of an affidavit, which must be sworn within three days after the ship is brought in for adjudication, as to ship papers which must be exhibited to the affidavit (*e*); (2) there must be an examination on standing interrogatories, that is, in a form specified in the appendix to the Rules, of persons from the captured ship (*f*).

Examination on standing interrogatories.

First hearing.

615. There is a first hearing upon the answers to the standing interrogatories and on the ship papers. But no ship may be condemned for a year and a day from the return of the monition, unless there is sufficient proof at the first hearing that it is an enemy ship or is otherwise liable to condemnation (*g*). There may then, in the discretion of the court, be a second hearing; further proof is thereupon ordered, and the hearing is on the oral examination of witnesses or on affidavit (*h*).

Second hearing.

Monition by claimant.

616. If a captor does not proceed as above stated, a claimant may, if the ship is still detained, apply for a monition against the captor to proceed (*i*), or, if, owing to the release or loss of the prize, he wishes to claim damages and costs, he may issue a similar monition for that purpose (*k*).

Pleadings.

617. Pleadings are not required unless ordered by the judge (*l*).

(*c*) Prize Rules, r. 25. This affidavit must, *inter alia*, state the residence of the claimant, and must show that the claimant has a *locus standi* (*The Panaja Drapaniotisa* (1856), Spinks, 336). The claim of an alien enemy is inadmissible, unless he can show he is a *persona standi in judicio* (*The Froija* (1854), Spinks, 37).

(*d*) Prize Rules, r. 26.

(*e*) *Ibid.*, rr. 11—17. Spoliation of papers is ground for further proof; in other words, in such a case, without further proof, the prize is not liable to condemnation (*The Johanna Emilie* (1854), Spinks, 12; *The Hunter* (1815), 1 Dods. 480).

(*f*) Prize Rules, rr. 27—39.

(*g*) *Ibid.*, rr. 50—51. The general rule is that in the first instance only the evidence of those on board the prize will be taken (*The Haabet* (1805), 6 Ch. Rob. 54).

(*h*) Prize Rules, rr. 52—57. The captor's evidence will not on a further hearing, as a general rule, be admitted to contradict the ship papers and depositions (*The Leucade* (1855), Spinks, 217, 231; *The Aline and Fanny* (1856), Spinks, 322). Further proof on behalf of a claimant has been refused where the court was satisfied that it could not alter the state of the case (*The Nina* (1855), Spinks, 276). When further proof is asked, the court requires that such a case should at the time of the request be shown as, if proved, would entitle the party asking for further proof to judgment (*The Panaja Drapaniotisa, supra*).

(*i*) Prize Rules, r. 40.

(*k*) *Ibid.*, r. 41. A claimant must take proceedings within a reasonable time, unless prevented by circumstances of inevitable and incurable necessity (*The Susanna* (1805), 6 Ch. Rob. 48).

(*l*) If ordered, they must be in numbered paragraphs, in which the material facts should be shortly stated (Prize Rules, rr. 96—101).

Discovery.

618. Discovery of documents on oath and notice to produce may be ordered by the judge (*m*), and a claimant, after filing his claim, may inspect and take copies of the ship papers and answers to standing interrogatories (*n*).

Inspection.

Order for appraisement and sale, or inspection.

619. During the course of the proceedings the judge may, if necessary, order an appraisement and sale of the prize by the marshal (*o*). The judge may also order any property in the custody of the court to be inspected (*p*).

Bail.

620. A prize may, before further proof or a decree of restitution, by order and by consent of all parties, be delivered to a captor on bail (*q*). After the proceedings it may be delivered by order without consent (*q*). Bail is given by a bond signed by two sureties (*r*).

Arrest of property.

621. A warrant to arrest property may be issued and served by the marshal, but not until after a monition to proceed or an affidavit is filed stating the reasons why the warrant is required (*s*).

Release of property arrested.

Property under arrest can be released by order of the judge (*t*). It can be released by the registrar when the property has been ordered to be delivered on bail, or when the Crown consents, and in certain cases in claims for prize salvage (*a*).

Caveats.

Caveats against arrest in case of prize salvage and against release can be entered in the Registry (*b*).

Interlocutory applications.

622. Interlocutory applications in court must be made by motion; in chambers by summons. The registrar may transact the business in chambers with certain exceptions (*c*).

Subpœnas.

623. Subpœnas to compel the attendance of a witness are prepared by the party and issued out of the Registry (*d*). The practice is the same as in the High Court (*e*).

Evidence at hearing.

Evidence at a hearing may be given orally or by affidavit (*f*), on

(*m*) Prize Rules, rr. 102—106; and see titles ADMIRALTY, Vol. I., p. 97; DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI., pp. 35 *et seq.*

(*n*) Prize Rules, r. 107.

(*o*) *Ibid.*, rr. 108—117; and see title ADMIRALTY, Vol. I., p. 92.

(*p*) Prize Rules, r. 118.

(*q*) *Ibid.*, rr. 121, 122; and see title ADMIRALTY, Vol. I., p. 90.

(*r*) The bond can be prepared in the Registry or before a commissioner appointed to take bail, and the sureties must justify by affidavit (Prize Rules, rr. 129—139; and see title ADMIRALTY, Vol. I., p. 90). Bail in prize causes is a substitute for the thing itself, on all points in adjudication before the court in the current war only (*The Nied Elwin* (1811), 1 Dods. 50).

(*s*) Prize Rules, rr. 123—128; and see title ADMIRALTY, Vol. I., p. 81.

(*t*) Prize Rules, rr. 140, 141.

(*a*) *Ibid.*, rr. 142—146.

(*b*) *Ibid.*, rr. 147—157; and see title ADMIRALTY, Vol. I., p. 83.

(*c*) Notice of motion must be filed twenty-four hours before hearing and a copy served on the adverse party; the same practice prevails as regards summonses (Prize Rules, rr. 158—172).

(*d*) *Ibid.*, rr. 237—240.

(*e*) See title EVIDENCE, Vol. XIII., pp. 577 *et seq.*

(*f*) Prize Rules, r. 173. The practice as to affidavits is practically similar to that in the High Court of Justice (*ibid.*, rr. 191—198), as is that in regard to oaths and printing (*ibid.*, rr. 199—202, 204; see title EVIDENCE, Vol. XIII., pp. 577 *et seq.*).

SECT. 2. Procedure.

motion or summons, by affidavit only (*g*). Witnesses may, if necessary, be examined before the registrar or a special commissioner (*h*). Notice to admit may be given, but not for the first hearing of a cause for condemnation (*i*).

Leave to invoke documents, that is, to make use in one cause of documents already in the control of the court in another cause, may be given in certain cases (*j*).

The hearing of the cause.

624. The court at the hearing of a cause may be assisted by Trinity Masters or other assessors (*k*).

The first hearing of a cause may be appointed after the return of the monition for condemnation (*l*). When there has been an order for further proof, it may take place fourteen days from the date of such order, or within one week after the last pleading (*m*).

Reference.

The judge may refer the assessment of damages and the taking of accounts to the registrar, with or without assessors (*n*). The procedure as to a reference is in all respects the same as in Admiralty actions (*o*).

Costs.

Costs are in the discretion of the judge (*p*). Security for costs may be ordered where a party is ordinarily resident out of the United Kingdom (*q*).

Discontinuance.

Proceedings may only be discontinued by leave of the judge (*r*).

Appeal.

625. A party desiring to appeal must, within one month from the date of the decree or order, file a notice of appeal and give security for the costs of the appeal in a sum not exceeding £300 (*s*), and must cause the registrar to be served with an inhibition citation and a monition for process, whereupon proceedings under the decree or order appealed from are stayed (*t*).

On the service of the monition, the registrar prepares a copy of the evidence and proceedings to be transmitted to the registrar of

(*g*) Prize Rules, r. 174.
(*h*) *Ibid.*, rr. 177—183.
(*i*) *Ibid.*, r. 187.
(*j*) *Ibid.*, rr. 188—190.
(*k*) *Ibid.*, r. 205; and see title ADMIRALTY, Vol. I., p. 100. In *The Mentor* (1810), Edw. 207, the attendance of Trinity Masters was required to decide the point whether from the position of the prize at the moment of capture she was probably bound for a particular port.
(*l*) Prize Rules, r. 206.
(*m*) *Ibid.*, r. 207.
(*n*) *Ibid.*, r. 212.
(*o*) *Ibid.*, rr. 213—220; and see title ADMIRALTY, Vol. I., pp. 117 *et seq.*
(*p*) Prize Rules, r. 221. It is not usual to condemn neutrals in costs except under exceptional circumstances (*The Ida* (1854), Spinks, 26). In *The Atlantic* (1854), Spinks, 104, claimants were condemned in costs for making a fraudulent claim in respect of a captured ship. As to costs and damages against a captor, see p. 283, *ante*. A party desiring to have a bill of costs taxed must file the bill, and notice of the taxation will be sent to the parties by the registrar (Prize Rules, r. 224). Within one week from the taxation, application may be made to the judge to review the taxation (*ibid.*, r. 225; and see title ADMIRALTY, Vol. I., p. 124).
(*q*) Prize Rules, rr. 222, 223.
(*r*) *Ibid.*, r. 227.
(*s*) *Ibid.*, r. 229.
(*t*) *Ibid.*, rr. 231, 232.

the Judicial Committee of the Privy Council, which is the appellate court (*u*).

Payment into or out of court.

626. Payment into court is made in accordance with the Supreme Court Funds Rules, 1905 (*a*), and orders for payment out must be made by the judge (*b*).

Enforcement of orders.

627. Obedience to a decree or order (*c*) of the Prize Court is enforceable by an order for attachment, to be executed by the marshal (*d*). Decrees and orders can also be enforced when property is condemned as prize, if under arrest, by sale; if the property has been sold before condemnation, and the proceeds have not been paid into court, by order to pay into court; in respect of freight due, by arrest of the goods until payment of freight. Orders in respect of costs and expenses can be enforced by monition against the parties, or by monition against the bail (*e*).

Applications for prize bounty.

628. In claims for prize bounty when a ship has been brought in for adjudication, application for a decree must be made in court on the first hearing of the principal cause. When the ship has not been brought in, the application must be by motion. A monition calling on the proper officer of the Crown to appear must, previous to either of the above applications, be issued out of the Registry (*f*).

Applications for prize salvage.

629. The procedure on prize salvage claims is the same as in regard to other ships captured as prize (*g*).

Applications by joint captors.

630. Any person claiming to share as a joint captor may, at any time after the institution of a cause relating to a ship in which he claims a share, intervene by instituting a cause of joint capture (*h*).

If the cause is instituted before condemnation of the ship, the petitioner must give security and file a petition (*i*).

If the cause is instituted after condemnation (*k*), the judge, on sufficient cause being shown, may, if the petition was not presented before condemnation or adjudication, order a monition to issue calling on the party to whom the ship has been condemned to show

(*u*) Prize Rules, rr. 233, 234, and p. 278, *ante*. As to the Privy Council and the procedure before it, see title COURTS, Vol. IX., pp. 27—51.

(*a*) Prize Rules, r. 235; Yearly Practice of the Supreme Court, 1912, pp. 1644 *et seq.*

(*b*) Prize Rules, r. 241.

(*c*) As to the effect of the orders of Prize Courts, see title CONFLICT OF LAWS, Vol. VI., pp. 290, 295—298.

(*d*) Prize Rules, rr. 242, 243. As to attachment in the Admiralty Division, see title ADMIRALTY, Vol. I., pp. 84 *et seq.*; and see, generally, title CONTEMPT OF COURT, ATTACHMENT, AND COMMITTAL, Vol. VII., pp. 307 *et seq.*

(*e*) Prize Rules, rr. 244—246. Proceeds of prize (*i.e.* prize-goods) may be followed wherever they can be traced, except if purchased without knowledge of their history in market overt (*The Pomona* (1811) 1 Dods. 25).

(*f*) Prize Rules, r. 90; as to prize bounty, see pp. 293, 294, *post*.

(*g*) Prize Rules, r. 58; as to prize salvage, see p. 293, *post*.

(*h*) Prize Rules, r. 76; as to joint capture, see pp. 292, 293, *post*.

(*i*) Prize Rules, r. 76 (2).

(*k*) Except by special leave of the judge, no claim can be instituted after six months from the date of condemnation of a prize (*ibid.*, r. 86).

SECT. 2. **Procedure.**

cause why the petitioner should not be pronounced to be a joint captor (*l*).

Petition.

A petition must be filed setting out the material facts (*l*); the respondent must file an appearance in the Registry (*m*).

Admissibility of petition.

On a petition being filed, the judge determines in court the admissibility of the petition (*n*). If the petition is admitted to proof, the respondent, if he desires to contest the claim, must file an answer (*o*), and the case is heard in court on the pleadings (*p*).

Determination of right of petitioner.

If a cause of joint capture is instituted before condemnation, the judge may determine the right of the petitioner on the hearing of the principal cause; if after condemnation, on a day appointed for the hearing of the petition (*q*).

Costs.

Costs are to be paid by the petitioner or the respondent, or out of the proceeds of the prize, as the judge directs (*r*).

SECT. 3.—*Joint Capture.*

Essential elements of claim.

631. To entitle those on a ship of war, to which the prize does not strike her flag, to a share (*s*) of prize money in respect of a capture, she must have been a partner in a common enterprise (*t*), the capture being the joint result of an actual co-operation and the object of the union of forces (*a*).

Claim based on ship being in sight.

If a claim is based on being in sight (*b*), she must have been in sight at the commencement of the engagement in which the capture was made, or when the captors were in the act of chasing or in preparation for chase, or afterwards during its continuance (*c*).

Presumption of co-operation.

When a ship is in sight of an actual capture, there is a presumption that such ship has intimidated the enemy and encouraged her consort, and is therefore entitled to share in the prize. But such presumption is rebuttable (*d*). The not being in sight in consequence of darkness or fog, if a ship out of sight

(*l*) Prize Rules, r. 76 (3), (4).
(*m*) *Ibid.*, r. 76 (5).
(*n*) *Ibid.*, r. 77.
(*o*) *Ibid.*, rr. 77, 78.
(*p*) *Ibid.*, r. 79.
(*q*) *Ibid.*, rr. 80, 81.
(*r*) *Ibid.*, r. 83.
(*s*) As to the calculation of the share, see *Zepherina* (1830), 2 Hag. Adm. 317.
(*t*) *The Dordrecht* (1799), 2 Ch. Rob. 55. In *The Guilliaume Tell* (1808), Edw. 6, it was held that all the ships of a blockading squadron were entitled to a share of a prize, though they did not all join in the pursuit, it being proved that the whole fleet was acting with one common consent, and upon a preconcerted plan for the capture of this particular ship; see also *La Henriette* (1815), 2 Dods. 96.
(*a*) *The Nordstern* (1809), 1 Act. 128; *The Aviso* (1826), 2 Hag. Adm. 31; *The Orestes* (1827), 2 Hag. Adm. 38, n.; *The Rattlesnake* (1815), 2 Dods. 32; *L'Etoile* (1815), 2 Dods. 106; *Genoa and Savona* (1815), 2 Dods. 88.
(*b*) "Being in sight" means being seen by the prize as well as by the captors (*La Melanie* (1816), 2 Dods. 122; *The Brazil* (1856), 4 W. R. 375).
(*c*) *The Vryheid* (1799), 2 Ch. Rob. 16, 30; *The Orion* (1803), 4 Ch. Rob. 362; *The Union* (1813), 1 Dods. 346. It appears to be doubtful if the rule as to "being in sight" applies to the case of ships forming a blockading squadron; see note (*t*), *supra*.
(*d*) *The Sparkler* (1813), 1 Dods. 359; *La Melanie*, *supra*.

is in fact engaged on a particular enterprise which results in a capture, does not bar her claim to share in the prize (*e*). SECT. 3. Joint Capture.

The burden of proof, in case of a claim for joint capture, lies upon the party setting up a claim as joint captor, and such claim is not allowed without very clear proof (*f*). Burden of proof.

SECT. 4.—*Prize Salvage.*

632. If a ship or goods belonging to a British subject, after being taken as prize by the enemy, is, or are, retaken by a British ship of war, the prize must be restored to the owner on his paying as prize salvage one eighth part of the value of the prize as ascertained by the Prize Court, or such a sum, not exceeding one eighth, as may be agreed on between the owner and the recaptors and approved by order of court (*g*); provided that, where the recapture has been made in circumstances of special difficulty or danger, the Prize Court may award a larger part than one eighth, not exceeding, however, one fourth (*h*). Prize salvage.

If the recaptured ship does not within six months return to a port of the United Kingdom, the recaptors may institute proceedings against the ship or goods in the Prize Court, and payment may be enforced by warrant of arrest against the ship or goods, or by monition and attachment against the owner (*i*). Proceedings for recovery.

SECT. 5.—*Prize Bounty.*

633. Prize bounty may be granted by His Majesty, by proclamation or Order in Council, to the officers and crews of his ships of war. Where this is the case, such of the officers and crew of His Majesty's ships of war as are actually present at the taking or destroying of any armed ship of any of His Majesty's enemies are entitled to have distributed among them, as prize bounty, a sum calculated at the rate of £5 for each person on board the enemy's ship at the beginning of the engagement (*k*). How granted. Who are entitled.

The court makes a decree declaring who are entitled to the bounty and the amount thereof. The decree is subject to appeal (*l*). Decree of court.

634. The amount of prize bounty so decreed is payable by the Treasury out of moneys provided by Parliament (*m*). Payment of bounty.

(*e*) *The Forsigheid* (1801), 3 Ch. Rob. 311.

(*f*) *The John* (1813), 1 Dods. 363.

(*g*) Naval Prize Act, 1864 (27 & 28 Vict. c. 25), s. 40. In the Naval Prize Bill of 1911 the sections as to prize salvage were struck out in grand committee, and the Bill passed the House of Commons in this form. It is, therefore, doubtful whether the provisions as to prize salvage referred to in the text, *supra*, will not be repealed before any future war renders them operative. As to salvage generally, see title SHIPPING AND NAVIGATION.

(*h*) Naval Prize Act, 1864 (27 & 28 Vict. c. 25), s. 40; see also title ROYAL FORCES.

(*i*) *Ibid.*, s. 41.

(*k*) *Ibid.*, s. 42. The number of persons on board the enemy's ship must be proved in the Prize Court on the evidence of the survivors from such ship, or of the ship papers, or of three or more of the officers and crew of His Majesty's ship, or otherwise as the court may think fit (Naval Prize Act, 1864 (27 & 28 Vict. c. 25), s. 43).

(*l*) *Ibid.*

(*m*) *Ibid.*, s. 44.

SECT. 5. Prize Bounty.

The costs, charges and expenses of the officers and crew and other expenses properly incurred are deducted from the bounty before distribution (*n*); there is also a further deduction of 5 per cent. to be carried to the Naval Prize Cash Balance (*o*).

The proportion in which the various ranks among the officers and crew share in the prize bounty is determined by Order in Council (*p*).

Part III.—Ransom.

Nature of the contract.

635. Ransom is a contract entered into between the captors and the commander of a captured ship, whereby the captors permit the captured ship to proceed under safe conduct in consideration of a sum of money paid or promised by the commander in his own name and that of the owners of the captured ship. It is usual for the captors to take one of the crew of the captured ship as a hostage for the payment of the ransom money (*q*).

Prohibition.

The ransoming of British ships or goods by British subjects has been prohibited (*r*), and is now regulated by Order in Council. Any agreement for ransom in contravention of such Order is illegal, and any person entering into such an agreement is liable to a fine of £500 (*s*).

Enforcement of contract.

636. Contracts of ransom are within the jurisdiction of the Prize Court. All civilised countries, except the United Kingdom, recognise the contract. An enemy subject cannot sue in a British court for payment of the ransom money, but the payment may be enforced by an action brought by the hostage in the courts of his own country for the recovery of his freedom. Other countries allow the captor to bring the suit directly upon the ransom bill (*t*).

(*n*) Naval Agency and Distribution Act, 1864 (27 & 28 Vict. c. 24), s. 13.

(*o*) *Ibid.*, s. 17.

(*p*) *Ibid.*, s. 14; see title ROYAL FORCES. As to the offences of personation, forgery, and making false affidavits to obtain prize money or bounty money payable by the Admiralty, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 708, 750.

(*q*) See, generally, on this subject, Wheaton, International Law, 4th ed., pp. 553 *et seq.*; 2 Halleck, International Law, pp. 364 *et seq.*

(*r*) Stat. (1782) 22 Geo. 3, c. 25 (now repealed). This prohibition was re-enacted by stat. (1805) 45 Geo. 3, c. 72 (now repealed), subject to cases of extreme necessity being allowed by the Court of Admiralty. The Naval Prize Act, 1864 (27 & 28 Vict. c. 25), s. 45, made the contract subject to Orders in Council.

(*s*) Naval Prize Act, 1864 (27 & 28 Vict. c. 25), s. 45.

(*t*) *Ricord* v. *Bettenham* (1765), 3 Burr. 1734; *Cornu* v. *Blackburne* (1781), 2 Doug. (K. B.) 640; *Anton* v. *Fisher* (1782), 2 Doug. (K. B.) 649, n.; *Yates* v. *Hall* (1785), 1 Term Rep. 73; *The Hoop* (1799), 1 Ch. Rob. 196; *Havelock* v. *Rockwood* (1799), 8 Term Rep. 268; *Furtado* v. *Rogers* (1802), 3 Bos. & P. 191, *per* Lord ALVANLEY, C.J., at p. 200.

Part IV.—Customs, Duties, and Regulations.

Duty of person in charge of incoming ship.

637. On the arrival of a captured ship or goods in a port of the United Kingdom, the person in charge of such ship or goods must bring to at the proper place of discharge and must carry out the instructions of the customs officer; and he must allow any such officer to come on board and make searches or warehouse the goods, as in the case of an ordinary ship, subject, as regards ships of war belonging to His Majesty, to any special regulations issued from the Treasury (*a*).

Liability of captured ship to customs, etc.

Such ships and goods are liable to the same customs, duties, or forfeiture, and subject to the same restrictions under the laws relating to the customs, as if they had come in voluntarily (*b*), except that, when goods taken as prize are sold for home consumption, and the proceeds, after payment of customs duties, are insufficient to satisfy the claims thereon, the Treasury has power to remit the customs duties (*c*).

(*a*) Naval Prize Act, 1864 (27 & 28 Vict. c. 25), s. 48. The penalty for non-compliance is £100. As to officers of His Majesty's customs, see title REVENUE.

(*b*) Naval Prize Act, 1864 (27 & 28 Vict. c. 25), s. 47; and see title REVENUE.

(*c*) Naval Prize Act, 1864 (27 & 28 Vict. c. 25), s. 49.

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Weights and Measures, Inspectors of	,,	WEIGHTS AND MEASURES.
Woods, Forests, and Land Revenues, Commissioners of	,,	CONSTITUTIONAL LAW.
Works and Public Buildings, Commissioners of	,,	CONSTITUTIONAL LAW.
Yorkshire Deeds Registry	,,	LANDLORD AND TENANT; REAL PROPERTY AND CHATTELS REAL.

Part I.—Acts of State.

SECT. 1.—*Introductory.*

Definition.

638. In this part of this title the expression "act of State" is used to denote an exercise of sovereign power by an independent state or potentate, or by its duly authorised agents or officers (*a*). The expression is not a term of art, and is used in different senses by different authorities (*b*).

Acts within the definition.

639. Two kinds of acts are included under the expression:—(1) acts which are capable of being done by a private individual, and which if so done would be tortious or criminal; and (2) acts, such as the making of treaties and the declaration of war, which are in their nature incapable of being performed by anyone but the supreme Government.

A third class, which might be more accurately termed "facts of State" (*c*), is sometimes also included. It consists of matters and questions the determination of which is solely in the hands of

(*a*) See *Salaman* v. *Secretary of State for India*, [1906] 1 K. B. 613, C. A., *per* FLETCHER MOULTON, L.J., at p. 639; *Potter* v. *Broken Hill Proprietary Co., Ltd.* (1906), 3 Commonwealth Law Reports, 479, *per* GRIFFITH, C.J., at p. 491. This definition, taken in its largest sense, might perhaps include legislative and judicial acts, such as an Act of Parliament or a judgment of the superior courts; but it is here used to denote only the executive or administrative acts of the Crown or its agents which, if done by private persons, would be tortious or criminal.

(*b*) See, for instance, the Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 7; 2 Stephen's History of the Criminal Law, pp. 61, 65; *Rustomjee* v. *R.* (1876), 1 Q. B. D. 487, *per* BLACKBURN, J., at p. 493; *Forester* v. *Secretary of State for India in Council* (1872), L. R. Ind. App. Supp. Vol. 10. As to the construction and effect of treaties and other acts of State, see title CONSTITUTIONAL LAW, Vol. VI., p. 442.

(*c*) See Moore, Acts of State in English Law, pp. 33 *et seq.*

the Crown or the Government (*d*), of which the following are examples:—

(1) It is for the Crown to determine whether or not a state of war exists between this Government and any other state (*e*), and if so, when it began (*f*), and the municipal courts have no power of inquiring into the validity of a declaration by the Crown on the matter (*g*).

(2) It is for the Crown to say whether or not a particular territory is or is not hostile (*h*), or whether it is British or foreign (*i*).

(3) It rests with the Crown to determine whether and when a particular government is to be recognised; whether and when insurgents and rebels have achieved such a degree of success as to be entitled to be recognised as belligerents (*k*); and whether a particular community is an independent state (*l*).

"Act of State" in the modern sense.

The extent of all these classes has varied from time to time with that of the Royal Prerogative (*m*), part of which is no longer exercised by the Sovereign personally, but by the executive, acting in most cases within statutory limits (*n*). Since the Revolution the power of the Crown has been diminished by disuse and circumscribed by statute, and "act of State" in the modern sense may be said to be the exercise of the existing residuum of the Prerogative.

Examples of exercise of Royal Prerogative referred to as "acts of State."

Other examples of the exercise of the Royal Prerogative, sometimes referred to as "acts of State," are the power of a Secretary of State to plead privilege in answer to an action for libel (*o*), and the power of the Crown through a Secretary of State

(*d*) As to these, see further, title EVIDENCE, Vol. XIII., p. 493.

(*e*) *Esposito* v. *Bowden* (1857), 7 E. & B. 763, Ex. Ch., *per* WILLES, J., at p. 793.

(*f*) *Blackburne* v. *Thompson* (1812), 15 East, 81, *per* Lord ELLENBOROUGH, C.J., at pp. 90, 91; *Driefontein Consolidated Gold Mines Co.* v. *Janson, West Rand Central Gold Mines* v. *De Rougemont*, [1900] 2 Q. B. 339.

(*g*) *Blackburne* v. *Thompson, supra;* see also *Musgrave* v. *Pulido* (1879), 5 App. Cas. 102, 111, P. C.; *Ex parte Marais*, [1902] A. C. 109; and see title CONSTITUTIONAL LAW, Vol. VI., pp. 402, 403.

(*h*) *Blackburne* v. *Thompson, supra, per* Lord ELLENBOROUGH, C.J., at pp. 90, 91; and see *The Manilla* (1808), Edw. 1; *The Pelican* (1809), Edw. Appendix D; *Direct United States Cable Co.* v. *Anglo-American Telegraph Co.* (1877), 2 App. Cas. 394, P. C.; *Re Cooper* (1892), 143 United States Reports, 472.

(*i*) *The Franconia* (1876), 2 P. D. 8, C. A.; *The Franconia* (1877), 2 P. D. 163, C. A.; overruled on another point by *Seward* v. "*Vera Cruz*" (1884), 10 App. Cas. 59; *Peru Republic* v. *Dreyfus Brothers & Co.* (1888), 38 Ch. D. 348; *Carr* v. *Fracis Times & Co.*, [1902] A. C. 176; *Berne City* v. *Bank of England* (1804), 9 Ves. 347; Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), s. 4.

(*k*) See p. 311, *post.*

(*l*) See *The Charkieh* (1873), L. R. 4 A. & E. 59; *Mighell* v. *Johore (Sultan)*, [1894] 1 Q. B. 149, C. A.

(*m*) As to this, see title CONSTITUTIONAL LAW, Vol. VI., pp. 371 *et seq.;* as to the Crown in regard to foreign relations, see *ibid.*, pp. 427 *et seq.*, and *ibid.*, Vol. VII., pp. 5—8.

(*n*) See *ibid.*, Vol. VI., pp. 377 *et seq.*, and, for an example, see the Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), s. 4; title CONSTITUTIONAL LAW, Vol. VI., p. 449.

(*o*) See title LIBEL AND SLANDER, Vol. XVIII., p. 684.

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to dismiss or compulsorily to retire any naval or military officer without any legal redress (*p*).

SECT. 2.—*Effect of Acts of State* (*q*).

SUB-SECT. 1.—*In General.*

Act of State gives no right of action.

640. The transactions of independent states with each other are governed by other laws than those which municipal courts administer; such courts have neither the means of deciding what is right, nor the power of enforcing any decision which they may make (*r*). Hence, the courts of this country, whether of law or equity (*s*), have no jurisdiction to adjudge upon acts committed by one sovereign state towards another in the exercise of its sovereign power (*t*), such as the making and performance of treaties (*a*), the seizure or annexation of land or goods in right of conquest (*b*), or the declaration of war (*c*) or of blockade (*d*), or upon any rights

(*p*) See title ROYAL FORCES.

(*q*) For the proof of acts of State, see title EVIDENCE, Vol. XIII., pp. 485, 491—493, 497, 527; *Blackburne* v. *Thompson* (1812), 15 East, 81, *per* Lord ELLENBOROUGH, C.J., at p. 90; *Direct United States Cable Co.* v. *Anglo-American Telegraph Co.* (1877), 2 App. Cas. 394, 420, P. C.

(*r*) *Secretary of State for India in Council* v. *Kamachee Boye Sahaba* (1859), 13 Moo. P. C. C. 22, *per* Lord KINGSDOWN, at p. 75; and see *Carnatic* (*Nabob*) v. *East India Co.* (1793), 2 Ves. 56; *Gibson* v. *East India Co.* (1839), 5 Bing. (N. C.) 262; *Doss* v. *Secretary of State for India in Council* (1875), L. R. 19 Eq. 509; *Rustomjee* v. *R.* (1876), 2 Q. B. D. 69, C. A.; *Cook* v. *Sprigg*, [1899] A. C. 572, P. C.; *West Rand Central Gold Mining Co.* v. *R.*, [1905] 2 K. B. 391, 408—410; *Salaman* v. *Secretary of State for India*, [1906] 1 K. B. 613, C. A.

(*s*) *Doss* v. *Secretary of State for India in Council*, *supra*. As to the jurisdiction of the Admiralty Division and Prize Courts to adjudge upon certain acts of State by the rules of international law, and not by the common law, see *Le Caux* v. *Eden* (1781), 2 Doug. (K. B.) 594; *Lindo* v. *Rodney* (1782), 2 Doug. (K. B.) 613, n.; title PRIZE LAW AND JURISDICTION, pp. 275 *et seq.*, *ante*. In former times the Chancery was a "Court of State," and the Chancellor had a somewhat ill-defined jurisdiction to inquire into treaties and other acts of State; see *Weymberg* v. *Touch* (1669), 1 Cas. in Ch. 123; *Troner* v. *Hassold* (1670), 1 Cas. in Ch. 173; *Stock* v. *Denew* (1678), 1 Cas. in Ch. 305; *R.* v. *Carew* (1682), 3 Swan. 669; and see Moore, Acts of State in English Law, pp. 24—31.

(*t*) *Coorg* (*Ex-Rajah*) v. *East India Co.* (1860), 29 Beav. 300.

(*a*) "As in making the treaty, so in performing the treaty" the Crown "is beyond the control of municipal law, and 'his' acts are not to be examined in 'his' own courts" (*Rustomjee* v. *R.* (1876), 2 Q. B. D. 69, C. A., *per* Lord COLERIDGE, C.J., at p. 74); see also *Salaman* v. *Secretary of State for India*, *supra*; title CONSTITUTIONAL LAW, Vol. VI., pp. 439 *et seq.*; and compare *Carnatic* (*Nabob*) v. *East India Co.*, *supra*.

(*b*) *Sirdar Bhagwan Singh* v. *Secretary of State for India* (1874), L. R. 2 Ind. App. 38, P. C.; *East India Co.* v. *Syed Ally* (1827), 7 Moo. Ind. App. 555, P. C.; *Coorg* (*Ex-Rajah*) v. *East India Co.* *supra*; *Salig Ram* (*Rajah*) v. *Secretary of State for India* (1872), L. R. Ind. App. Supp. Vol. 119; see also *Elphinstone* v. *Bedreechund* (1830), 1 Knapp, 316, P. C.; *Cook* v. *Sprigg*, [1899] A. C. 572, P. C.; *Le Caux* v. *Eden*, *supra*; *Lindo* v. *Rodney*, *supra*; *Salaman* v. *Secretary of State for India*, *supra*; and see p. 307, *post*.

(*c*) "The making of peace and the making of war, as they are the undoubted, so they are, perhaps, the highest, acts of the prerogative of the Crown" (*Rustomjee* v. *R.*, *supra*, *per* Lord COLERIDGE, C.J., at p. 73; and see *Esposito* v. *Bowden* (1857), 7 E. & B. 763, Ex. Ch.).

(*d*) *The Rolla* (1807), 6 Ch. Rob. 364; *The "Franciska"* (1855), Spinks, 111.

or liabilities supposed to be acquired in consequence of such acts (*e*).

The same rule applies even where one party, exercising sovereign powers, itself owes allegiance to a higher power, in whose courts the attempt is made to control its acts (*f*).

Exceptions.

But the municipal courts have jurisdiction to decide whether an act relied on as a defence was or was not an act of State (*g*), and may inquire into matters involving the construction of treaties (*h*); and the seizure of land in virtue or under colour of a legal title is not an act of State, and such courts have jurisdiction (*i*). The test is what is the real character of the seizure; no action can be brought in respect of an arbitrary exercise of power by one state upon the dominions of another, but if it is wholly or partly a taking of possession by the Crown under colour of a legal title an action will lie (*k*).

Sovereign power not compellable to account.

641. If, under a treaty with a foreign state, a government has received funds for the benefit of a private person or class of persons, although a moral obligation may thereby be imposed upon the government to pay the funds so received to such persons, no action or petition of right will lie at their suit to recover the fund, and the intended ultimate beneficiaries cannot compel the government to carry out the obligation (*l*).

Ratification of act of subject.

642. An executive or administrative act of a subject, though in the first instance done without the authority of his Sovereign, will have all the effect of an act of State if subsequently ratified (*m*).

SUB-SECT. 2.—*Of the Imperial Government.*

The King can do no wrong.

643. The Sovereign can do no wrong (*n*), and no legal proceedings

(*e*) *West Rand Central Gold Mining Co.* v. *R.*, [1905] 2 K. B. 391, 409. But the courts of this country often have to consider questions of international law; as to this, see *ibid.*, at pp. 406—408, and cases cited there, and *ibid.*, at p. 395. As to the recognition paid by the courts of this country to rights acquired under foreign law, see title CONFLICT OF LAWS, Vol. VI., pp. 180, 181.

(*f*) *Carnatic* (*Nabob*) v. *East India Co.* (1793), 2 Ves. 56, 58; *East India Co.* v. *Syed Ally* (1827), 7 Moo. Ind. App. 555; compare *Secretary of State for India* v. *Kamachee Boye Sahaba* (1859), 13 Moo. P. C. C. 22; and *Coorg* (*Ex-Rajah*) v. *East India Co.* (1860), 29 Beav. 300.

(*g*) *Salaman* v. *Secretary of State for India*, [1906] 1 K. B. 613, C. A.; *Musgrave* v. *Pulido* (1879), 5 App. Cas. 102, P. C.

(*h*) *Rustomjee* v. *R.* (1876), 2 Q. B. D. 69, C. A.; *Salaman* v. *Secretary of State for India*, *supra*, *per* FLETCHER MOULTON, L.J., at pp. 639, 640; *Walker* v. *Baird*, [1892] A. C. 491, P. C.; and see title CONSTITUTIONAL LAW, Vol. VI., p. 442.

(*i*) *Forester* v. *Secretary of State for India* (1872), L. R. Ind. App. Supp. Vol. 10.

(*k*) *Secretary of State for India* v. *Kamachee Boye Sahaba*, *supra*, *per* Lord KINGSDOWN, at p. 77.

(*l*) *Barclay* v. *Russell* (1797), 3 Ves. 424, 434; compare *Taylor* v. *Barclay* (1828), 2 Sim. 213; *Dolder* v. *Bank of England* (1805), 10 Ves. 353; and see, further, pp. 311, *post*.

(*m*) *The Rolla* (1807), 6 Ch. Rob. 364; *Buron* v. *Denman* (1848), 2 Exch. 167; *Feather* v. *R.* (1865), 6 B. & S. 257, 296.

(*n*) See title CONSTITUTIONAL LAW, Vol. VI., pp. 374, 382.

SECT. 2. Effect of Acts of State.

of any kind can be brought against him (*o*). The only remedies for injuries caused by the Crown or the Government are, in cases of contract, a petition of right (*p*), and, in cases of tort, an action against or prosecution of the subordinate by whom the wrongful act was actually done (*q*).

Private rights not affected by treaties.

644. The Crown cannot alter the law by proclamation (*r*), nor can the Crown, in virtue of its prerogative as to treaties, take away private rights (*s*). But, to give effect to certain rights of the Crown, it may be necessary to disregard private rights (*t*), and treaties entered into by the British Government confer no right enforceable by action upon any private individual, British or alien (*a*).

Act of State in time of war.

645. In times of war or of rebellion the Crown and naval and military officers in the Crown's employ have very extensive powers to do whatever may seem necessary to preserve the State or defeat or embarrass the enemy (*b*), and the municipal courts have no jurisdiction to deal with acts so committed (*c*).

(*o*) See title CROWN PRACTICE, Vol. X., p. 28.

(*p*) *Ibid.*, pp. 26 *et seq.*

(*q*) See pp. 316 *et seq.*, *post*; *Feather* v. *R.* (1865), 6 B. & S. 257, 296. But proceedings cannot be taken against a subordinate for the purpose of enforcing a supposed right against the Crown itself (*R.* v. *Treasury* (*Lords Commissioners*) (1872), L. R. 7 Q. B. 387; *R.* v. *Customs Commissioners* (1836), 5 Ad. & El. 380; see also *Doe* d. *Legh* v. *Roe* (1841), 8 M. & W. 579; *Cawthorne* v. *Campbell* (1790), 1 Anst. 205, n.).

(*r*) 12 Co. Rep. 74; Dicey, Law of the Constitution, 4th ed., p. 51; and see title CONSTITUTIONAL LAW, Vol. VI., p. 388.

(*s*) See title CONSTITUTIONAL LAW, Vol. VI., pp. 440—442; *Walker* v. *Baird*, [1892] A. C. 491, P. C.

(*t*) *E.g.*, the Crown may declare certain articles contraband of war (see title PRIZE LAW AND JURISDICTION, p. 281, *ante*), lay an embargo on ships belonging to its own subjects (see title CONSTITUTIONAL LAW, Vol. VI., p. 446), or erect beacons on private lands (Chitty, Prerogatives of the Crown, p. 175; compare *Esposito* v. *Bowden* (1857), 7 E. & B. 763, 780, 781, Ex. Ch.; see, further, title CONSTITUTIONAL LAW, Vol. VI., pp. 447, 448). As to the power of the Crown to cede territory, see title CONSTITUTIONAL LAW, Vol. VI., pp. 440, 441.

(*a*) *Carnatic* (*Nabob*) v. *East India Co.* (1793), 2 Ves. 56; *Rustomjee* v. *R.* (1876), 2 Q. B. D. 69, C. A.; *Cook* v. *Sprigg*, [1899] A. C. 572, P. C.; *De Bode* (*Baron*) v. *R.* (1851), 3 H. L. Cas. 449; see also *Re Californian Fig Syrup Co.'s Trade-mark* (1888), 40 Ch. D. 620; *Re Carter Medicine Co.'s Trade-mark*, [1892] W. N. 106.

(*b*) See titles CONSTITUTIONAL LAW, Vol. VI., pp. 402, 403, 444, 445; PRIZE LAW AND JURISDICTION, pp. 283 *et seq.*, *ante*; ROYAL FORCES; *British Cast Plate Manufacturers* (*Governor & Co.*) v. *Meredith* (1792), 4 Term Rep. 794, 797; *Phillips* v. *Eyre* (1870), L. R. 6 Q. B. 1, Ex. Ch.

(*c*) *Ex parte Marais*, [1902] A. C. 109, P. C., *per* Lord HALSBURY, L.C., at p. 115; *Sutton* v. *Johnstone* (1786), 1 Term Rep. 493, Ex. Ch.; *Elphinstone* v. *Bedreechund* (1830), 1 Knapp, 316, P. C.; *A.-G. for the Cape of Good Hope* v. *Van Reenen*, *A.-G. for the Cape of Good Hope* v. *Smit*, [1904] A. C. 114, P. C. Probably acts done necessarily by the soldiery in repelling an invasion would not be actionable, even if they resulted in the destruction of the lives or property of private individuals; see the American cases of *Luther* v. *Borden* (1849), 7 Howard, 1, and *Mitchell* v. *Harmony* (1851), 13 Howard, 115. But, to quote the opinion of the United States Supreme Court in *Ex parte Milligan* (1866), 4 Wallace, 2, "as necessity creates the rule, so it limits its duration; for if" military government "is continued after the courts are reinstated, it is a gross usurpation of power. Martial law can never exist when the courts are open, and in the proper and

SECT. 2. Effect of Acts of State.

Act of State towards British subjects.

646. If a British subject suffers damage from a British act of State, unauthorised by Parliament and outside the constitutional limits of the Royal Prerogative (*d*), he has a right of action against the officer by whom the act was performed, even if it was expressly authorised by the Crown or the Government (*e*).

Towards aliens.

But if an alien suffers damage from a British act of State committed outside the jurisdiction (*f*), he has no right of redress (*g*), unless such a right has been expressly conferred by statute (*h*).

SUB-SECT. 3.—*Of Other British Governments.*

Colonial Governments

647. The Crown and the Imperial Parliament have from time to time delegated part of their sovereign powers to the legislatures of self-governing colonies and the governors of Crown colonies (*i*). Acts of such legislatures and governors, if within the scope of the authority so conferred, have all the consequences of acts of State (*k*);

unobstructed exercise of their jurisdiction"; and see *Wolfe Tone's Case* (1798), 27 State Tr. 613, 625; title CONSTITUTIONAL LAW, Vol. VI., pp. 402, 403.

(*d*) See title CONSTITUTIONAL LAW, Vol. VI., pp. 371 *et seq.*

(*e*) *Money* v. *Leach* (1765), 3 Burr. 1742; *Sutton* v. *Johnstone* (1786), 1 Term Rep. 493, Ex. Ch.; *Sutherland* v. *Murray* (1783), 1 Term Rep. 538, n.; *Feather* v. *R.* (1865), 6 B. & S. 257, 296; *Walker* v. *Baird*, [1892] A. C. 491, P. C.; *Entick* v. *Carrington* (1765), 2 Wils. 275; *Felkin* v. *Herbert* (*Lord*) (1861), 1 Drew. & Sm. 608; but see note (*q*), p. 308, *ante*, and *Cook* v. *Sprigg*, [1899] A. C. 572, P. C.

(*f*) As regards acts committed within the jurisdiction the position is not clear. It has been held, in Scotland, that there is no redress (*Poll* v. *Lord Advocate* (1899), 1 F. (Ct. of Sess.) 823), and there are English authorities tending in the same direction; see *A.-G. for Canada* v. *Cain, Same* v. *Gilhula;* [1906] A. C. 542, 546, P. C.; *East India Co.* v. *Campbell* (1749), 1 Ves. Sen. 246; *Mure* v. *Kaye* (1811), 4 Taunt. 34, *per* HEATH, J., at p. 43; compare *Re Adam* (1837), 1 Moo. P. C. C. 460; and see, generally, 2 Co. Inst. 57; *Calvin's Case* (1608), 7 Co. Rep. 1. But it is submitted that all aliens within the realm are, in this respect, as much within the protection of the Crown as British subjects. "Though they are not the King's natural born subjects, they are the King's subjects when within his protection" (1 Hale, P. C. p. 542).

(*g*) *Buron* v. *Denman* (1848), 2 Exch. 167; see also *Musgrove* v. *Chung Teeong Toy*, [1891] A. C. 272, P. C.; *A.-G. for Canada* v. *Cain, Same* v. *Gilhula, supra; Le Caux* v. *Eden* (1781), 2 Doug. (K. B.) 594; *Lindo* v. *Rodney* (1782), 2 Doug. (K. B.) 613, n.; *Faith* v. *Pearson* (1816), 6 Taunt. 439; *Madrazo* v. *Willes* (1820), 3 B. & Ald. 353; *Poll* v. *Lord Advocate, supra; Salaman* v. *Secretary of State for India*, [1906] 1 K. B. 613, C. A. It is to be noted that in *Buron* v. *Denman, supra*, the main point in controversy was the effect of a subsequent ratification by the Sovereign of an act of State of a subordinate (as to which see p. 307, *ante*), but it is submitted that it is an authority for the proposition in the text. For the privileges of alien friends in this country, see title ALIENS, Vol. I., pp. 306 *et seq.*; and, as to alien enemies, see *ibid.*, pp. 310 *et seq.*; *R.* v. *Schiever* (1759), 2 Burr. 765.

(*h*) As regards acts committed within the jurisdiction, see, for instance, the rights of alien criminals under the Extradition Acts; title EXTRADITION AND FUGITIVE OFFENDERS, Vol. XIV., pp. 403 *et seq.*; and it is submitted that an action might lie for a breach of the privileges of residence and trading within the realm conferred upon foreign merchants by Magna Carta (25 Edw. 1, c. 30).

(*i*) See title DEPENDENCIES AND COLONIES, Vol. X., pp. 525—541, 569 *et seq.*, 594 *et seq.*

(*k*) *Cameron* v. *Kyte* (1835), 3 Knapp, 332, P. C.; *R.* v. *Burah* (1878), 3 App. Cas. 889, P. C.; *Musgrave* v. *Pulido* (1879), 5 App. Cas. 102, P. C.; *Salaman* v. *Secretary of State for India, supra.* As to the position of the

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but the municipal courts have jurisdiction to inquire whether any particular act is *intra vires* or not (*l*).

Ireland.

648. As regards Ireland, all the official acts of the Lord Lieutenant are acts of State, apparently even if *ultra vires* (*m*).

India.

649. The East India Company was in a peculiar position, being at the same time a trading corporation and a sovereign state with almost unlimited powers (*n*). Although it ceased to exist in 1858 (*o*), the judicial decisions as to its position may still have some bearing upon the powers and liabilities of chartered companies (*p*).

SUB-SECT. 4.—*Of Foreign Governments.*

Official acts of foreign Governments.

650. The official acts of every state or potentate whose independence has been recognised by the Crown (*q*), and of their authorised agents (*r*), are acts of State. No action can be brought in respect of such acts (*s*), even where the agent is a British

several colonies now united in the Commonwealth of Australia, see title DEPENDENCIES AND COLONIES, Vol. X., pp. 506 *et seq.*; *Potter* v. *Broken Hill Proprietary Co., Ltd.* (1906), 3 Commonwealth Law Reports, 479, 491.

(*l*) See cases cited in note (*k*), p. 309, *ante*; *Sprigg* v. *Sigeau*, [1897] A. C. 238, P. C.

(*m*) *Napper Tandy* v. *Westmoreland* (*Earl*) (1800), 27 State Tr. 1191, 1246; *Luby* v. *Wodehouse* (*Lord*) (1865), 17 I. C. R. L. 618; *Sullivan* v. *Spencer* (*Earl*) (1872), 6 I. R. C. L. 173; and see title CONSTITUTIONAL LAW, Vol. VII., p. 99, note (*t*).

(*n*) *Gibson* v. *East India Co.* (1839), 5 Bing. (N. C.) 262, 273; *Coorg* (*Ex-Rajah*) v. *East India Co.* (1860), 29 Beav. 300; and see the cases cited in notes (*r*), (*b*), p. 306, *ante*. As to the position of the present Indian Government, see title DEPENDENCIES AND COLONIES, Vol. X., pp. 584 *et seq.*

(*o*) Government of India Act, 1858 (21 & 22 Vict. c. 106).

(*p*) For these decisions, see cases cited on this and the previous pages.

(*q*) *Peru Republic* v. *Peruvian Guano Co.* (1887), 36 Ch. D. 489; see also *Berne* (*City*) v. *Bank of England* (1804), 9 Ves. 347; and compare *Dolder* v. *Huntingfield* (*Lord*) (1805), 11 Ves. 283.

(*r*) *Dobree* v. *Napier* (1836), 2 Bing. (N. C.) 781; *R.* v. *Lesley* (1860), Bell, C. C. 220; *Carr* v. *Fracis Times & Co.*, [1902] A. C. 176.

(*s*) *Blad's Case* (1673), 3 Swan. 603, P. C.; *Blad* v. *Bamfield* (1674), 3 Swan. 604; *Barclay* v. *Russell* (1797), 3 Ves. 424; *Dobree* v. *Napier*, *supra*; *Brunswick* (*Duke*) v. *Hanover* (*King*) (1848), 2 H. L. Cas. 1; *Wadsworth* v. *Spain* (*Queen*) (1851), 17 Q. B. 171; *De Haber* v. *Portugal* (*Queen*) (1851), 17 Q. B. 171; *Gladstone* v. *Ottoman Bank* (1863), 1 Hem. & M. 505; *R.* v. *Lesley*, *supra*; *Twycross* v. *Dreyfus* (1877), 5 Ch. D. 605, C. A.; *Vavasseur* v. *Krupp* (1878), 9 Ch. D. 351, C. A.; *National Bolivian Navigation Co.* v. *Wilson* (1880), 5 App. Cas. 176. It is doubtful whether this rule applies to acts committed in British territory by order of a foreign sovereign. There appears to be no direct English authority on the point (see, however, 1 Hale, P. C. 99), but in *The People* v. *McLeod* (1841), 1 Hill, 377, the New York Court held that the plea of "act of State" afforded no defence to a British subject who committed a criminal act in American territory. This decision has been the subject of much comment, chiefly extra-judicial; Lord LYNDHURST, L.C., and LITTLEDALE, J., are said to have agreed with it (see Greville's Memoirs, 2nd series, Vol. I., p. 384), but the Governments of this country and the United States strongly objected to it (see State Papers, 1840–1841, Vol. XXIX., pp. 1127, 1131, 1141). *R.* v. *Lesley*, *supra*, to some extent supports it; see also *R.* v. *Keyn* (1876), 2 Ex. D. 63, C. C. R.; and, on the whole subject, see Moore, Acts of State in English Law, pp. 122—131: title CONFLICT OF LAWS, Vol. VI., pp. 249, 250.

subject, and where, in carrying out the act of State, he is committing an offence against English law (*a*), and the courts of this country have no jurisdiction over the public property of such a state or potentate destined to public use, even though situated within the jurisdiction (*b*), whether by actions *in personam* or *in rem* (*c*), nor will they pay regard to the penal ordinances of another country (*d*). These matters, it is submitted, belong in strictness to private or public international law, and depend upon considerations different from acts of State in the point of view of municipal law.

Acts of revolutionary governments.

651. A government is not regarded as a sovereign power unless it has been recognised by the Crown (*e*); but, when it has been so recognised, it is immaterial to consider whether it is a government *de facto* or *de jure* (*f*).

The English courts have jurisdiction to restrain the acts of an unrecognised revolutionary government in this country in order to protect property (*g*).

SUB-SECT. 5.—*Succession to State Rights and Liabilities.*

Succession to state rights.

652. If a sovereign state has succeeded to the territory or property of another sovereign state, whether by conquest or annexation, or by the suppression of a revolutionary government, the state so succeeding cannot be made liable in the municipal courts for the acts of its predecessor (*h*), nor can privileges or rights obtained from the predecessor be directly enforced against the successor (*i*). But by the rules of international law the acquiring state is subject to the contractual obligations of its predecessor (*k*). If property so acquired by a foreign state is in this country, that

(*a*) *Dobree* v. *Napier* (1836), 2 Bing. (N. C.) 781.

(*b*) *Smith* v. *Weguelin* (1869), L. R. 8 Eq. 198; but see the cases cited in notes (*l*), (*m*), p. 312, *post*.

(*c*) *The Parlement Belge* (1879), 4 P. D. 129; reversed (1880), 5 P. D. 197, C. A.; *The Jassy*, [1906] P. 270; see also *The Charkieh* (1873), L. R. 4 A. & E. 59. As to the right of foreign sovereigns and their officials to sue or be sued in this country, see title ACTION. Vol. I., pp. 18, 19; *Hart* v. *Gumpach* (1872), L. R. 4 P. C. 439; *Re Barnett's Trusts*, [1902] 1 Ch. 847; and see title CONFLICT OF LAWS, Vol. VI., pp. 182, 232.

(*d*) *Folliott* v. *Ogden* (1789), 1 Hy. Bl. 124; affirmed *sub nom. Ogden* v. *Folliott* (1790), 3 Term Rep. 726; *Wolff* v. *Oxholm* (1817), 6 M. & S. 92; see also *Wright* v. *Simpson* (1802), 6 Ves. 714, doubting *Wright* v. *Nutt* (1788), 1 Hy. Bl. 137.

(*e*) *Berne* (*City*) v. *Bank of England* (1804), 9 Ves. 347; *Yrissari* v. *Clement* (1826), 3 Bing. 432; but see *Dolder* v. *Huntingfield* (*Lord*) (1805), 11 Ves. 283.

(*f*) *Peru Republic* v. *Peruvian Guano Co.* (1887), 36 Ch. D. 489.

(*g*) *Austria* (*Emperor*) v. *Day and Kossuth* (1861), 3 De G. F. & J. 217, C. A.

(*h*) *Cook* v. *Sprigg*, [1899] A. C. 572, P. C.; *West Rand Central Gold Mining Co.* v. *R.*, [1905] 2 K. B. 391; *Salaman* v. *Secretary of State for India*, [1906] 1 K. B. 613, C. A.; but see *Frith* v. *R.* (1872), L. R. 7 Exch. 365, and the judgment of FLETCHER MOULTON, L.J., in *Salaman* v. *Secretary of State for India*, *supra*. As to the position of British colonies so acquired, see title DEPENDENCIES AND COLONIES, Vol. X., pp. 565 *et seq.*

(*i*) *Cook* v. *Sprigg*, *supra*. It is not quite clear whether the rule here stated applies to foreign powers as well as to the Crown.

(*k*) *West Rand Central Gold Mining Co.* v. *R.*, *supra*.

SECT. 2. **Effect of Acts of State.**

state may recover it by action (*l*), subject to any contract, lien, or equity relating to the property and available against the former owner (*m*). But where a *de jure* government is temporarily deprived of its property by a revolutionary government which is eventually displaced, it succeeds to its original property free from all contracts and equities affecting the revolutionary government (*n*).

SECT. 3.—*Procedure.*

Act of State a defence and a ground of prohibition.

653. An act of State may be pleaded as a defence to a civil action (*o*), and it may also perhaps be a defence to criminal proceedings (*p*). If an action based upon an act of State is commenced in an inferior court, it may be restrained by prohibition (*q*).

Part II.—Exemptions from Liability.

SECT. 1.—*Exercise of Statutory Powers.*

Statutory authority and its effect upon a wrongful act.

654. If the legislature directs or authorises the doing of a particular thing the doing of it cannot be wrongful (*a*). The statute usually provides that if damage results compensation shall be made for it; but, in the absence of such a provision, no action will lie at common law for such damage, whether the act is authorised for a public purpose or for private profit, because it is *damnum sine injuriâ* (*b*). The statutory authority covers

(*l*) *Two Sicilies* (*King*) v. *Willcox* (1851), 1 Sim. (N. S.) 301; see also *Hullett* v. *Spain* (*King*) (1828), 2 Bli. (N. S.) 31, H. L.

(*m*) *United States of America* v. *Prioleau* (1865), 2 Hem. & M. 559; *The Beatrice, otherwise The Rappahannock* (1866), 36 L. J. (ADM.) 9; *United States of America* v. *McRae* (1869), L. R. 8 Eq. 69; *Peru Republic* v. *Dreyfus Brothers & Co.* (1888), 38 Ch. D. 348.

(*n*) *United States of America* v. *McRae, supra.*

(*o*) *Chatterton* v. *Secretary of State for India in Council*, [1895] 2 Q. B. 189, C. A.; *Buron* v. *Denman* (1848), 2 Exch. 167; and see *Brunswick* (*Duke*) v. *Hanover* (*King*) (1848), 2 H. L. Cas. 1. An action based upon an act of State will be forthwith dismissed with costs (*Salaman* v. *Secretary of State for India*, [1906] 1 K. B. 613, C. A.; and see *The Jassy*, [1906] P. 270), if it appears clearly upon the face of the pleadings that the act complained of was an act of State committed by a competent authority (*Musgrave* v. *Pulido* (1879), 5 App. Cas. 102, P. C.).

(*p*) See *Wadsworth* v. *Spain* (*Queen*) (1851), 17 Q. B. 171, 215.

(*q*) *De Haber* v. *Portugal* (*Queen*) (1851), 17 Q. B. 171. A mere stranger may move for the writ (*ibid.*).

(*a*) *Mersey Docks Trustees* v. *Gibbs* (1866), L. R. 1 H. L. 93, *per* BLACKBURN, J. (delivering the joint opinion of the judges, unanimously approved by the House of Lords), at p. 112; and see title TORT. As to the exercise of special statutory powers, as regards the commission of a nuisance, see title NUISANCE, Vol. XXI., pp. 516 *et seq.*

(*b*) *Ibid.*; see also *British Cast Plate Manufacturers* (*Governor & Co.*) v. *Meredith* (1792), 4 Term Rep. 794 (where the rule was acted upon and based upon the maxim *salus populi suprema lex*); *R.* v. *Pease* (1832), 4 B. & Ad. 30; approved in *Vaughan* v. *Taff Vale Rail. Co.* (1860), 5 H. & N. 679, Ex. Ch.; *Mersey Docks Trustees* v. *Gibbs, supra*; and *Hammersmith etc. Rail. Co.* v. *Brand* (1869), L. R. 4 H. L. 171; and see *Lingke* v. *Christchurch Corporation* (1912), 106 L. T. 376, C. A.

every act reasonably (*c*) necessary for the doing of the thing authorised (*d*).

Duty of persons acting under statutory authority.

655. Whether the statute authorises injury to other persons or not is a question of interpretation (*e*); but in every case the persons acting under statutory authority must use reasonable care in executing the work (*f*). Where, therefore, the work could be performed without injury resulting, it is in general the duty of the persons executing the work to avoid such injury (*g*).

(*c*) "Reasonably" as distinguished from "absolutely" (*Harrison* v. *Southwark and Vauxhall Water Co.*, [1891] 2 Ch. 409, *per* VAUGHAN WILLIAMS, J., at p. 414).

(*d*) *Hawley* v. *Steele* (1877), 6 Ch. D. 521; *London and North Western Rail. Co.* v. *Bradley* (1851), 3 Mac. & G. 336, *per* Lord TRURO, L.C., at p. 341. Thus, the use of locomotive engines may reasonably involve the frightening of horses (*R.* v. *Pease* (1832), 4 B. & Ad. 30), or the destruction of property by sparks (*Vaughan* v. *Taff Vale Rail. Co.* (1860), 5 H. & N. 679, Ex. Ch.), or injury to houses by vibration (*Hammersmith etc. Rail. Co.* v. *Brand* (1869), L. R. 4 H. L. 171), or smoke amounting to a nuisance (*A.-G.* v. *Metropolitan Rail. Co.*, [1894] 1 Q. B. 384, C. A.). Thus also, the authorised use of electricity for a tramway involves the escape of electricity to complete the return circuit (*National Telephone Co.* v. *Baker*, [1893] 2 Ch. 186; *Eastern and South African Telegraph Co.* v. *Cape Town Tramways Cos.*, [1902] A. C. 381, P. C.; and see, further, the cases cited in title NUISANCE, Vol. XXI., p. 519, note (*a*)). As to how far the authority extends, see *Jones* v. *Festiniog Rail. Co.* (1868), L. R. 3 Q. B. 733 (where it was held that an express power to run a tramway "by means of men, horses or otherwise" did not render it reasonably necessary to use steam locomotives).

(*e*) In determining such a question "the burden lies on those who seek to establish that the legislature intended to take away the private rights of individuals to show that, by express words or by necessary implication, such an intention appears" (*Metropolitan Asylum District* v. *Hill* (1881), 6 App. Cas. 193); and a statute empowering but not commanding the performance of an act does not authorise its being done at the cost of committing a nuisance (*Canadian Pacific Railway* v. *Parke*, [1899] A. C. 535, P. C.; see also *R.* v. *Bradford Navigation Co.* (1865), 6 B. & S. 631; *Metropolitan Asylum District* v. *Hill*, *supra*; *Gas Light and Coke Co.* v. *St. Mary Abbott's, Kensington, Vestry* (1885), 15 Q. B. D. 1, C. A.; *Rapier* v. *London Tramways Co.*, [1893] 2 Ch. 588, C. A.). As to where the line between "empowering" and "commanding" is to be drawn, compare *Metropolitan Asylum District* v. *Hill*, *supra*, with *London and Brighton Rail. Co.* v. *Truman* (1885), 11 App. Cas. 45, both cases being discussed in *Canadian Pacific Railway* v. *Parke*, *supra*. For instances of statutes not authorising a nuisance, see *A.-G.* v. *Gaslight and Coke Co.* (1877), 7 Ch. D. 217; *Powell* v. *Fall* (1880), 5 Q. B. D. 597, C. A.; *Price's Patent Candle Co., Ltd.* v. *London County Council*, [1908] 2 Ch. 526, C. A.; and see the cases cited in title NUISANCE, Vol. XXI., pp. 521—523. As to the interpretation of statutes generally, see title STATUTES.

(*f*) *Mersey Docks Trustees* v. *Gibbs* (1866), L. R. 1 H. L. 93, *per* BLACKBURN, J., at pp. 112, 113; *Leader* v. *Moxon* (1773), 2 Wm. Bl. 924; approved in *Sutton* v. *Clarke* (1815), 6 Taunt. 29; *Jones* v. *Bird* (1822), 5 B. & Ald. 837; *Lawrence* v. *Great Northern Rail. Co.* (1851), 16 Q. B. 643; *Fremantle* v. *London and North Western Rail. Co.* (1861), 10 C. B. (N. S.) 89; *Clothier* v. *Webster* (1862), 12 C. B. (N. S.) 790, *per* ERLE, C.J., at p. 796; *Brine* v. *Great Western Rail. Co.* (1862), 2 B. & S. 402, *per* CROMPTON, J., at p. 411; *Coe* v. *Wise* (1866), L. R. 1 Q. B. 711, Ex. Ch.; *Biscoe* v. *Great Eastern Rail. Co.* (1873), L. R. 16 Eq. 636. Such care must be all that any skilful person could reasonably be required to exercise in such a case (*Jones* v. *Bird*, *supra*, *per* BAYLEY, J., at p. 846). As to the duty to take care, see, generally, title NEGLIGENCE, Vol. XXI., pp. 362 *et seq.*

(*g*) *Biscoe* v. *Great Eastern Rail. Co.*, *supra*, *per* WICKENS, V.-C., at p. 641.

SECT. 2. **Exercise of Executive Powers.**

SECT. 2.—*Exercise of Executive Powers.*

SUB-SECT. 1.—*Liability in Contract.*

Contract by servant of the Crown or public agent.

656. Where any person enters into a contract as a servant of the Crown, or as agent for the public, and treats in that capacity, he cannot be made personally liable upon such contract (*h*), either directly (*i*), or upon an implied warrant of authority (*k*).

A public servant may, however, contract personally and not as

In *Fenwick* v. *East London Rail. Co.* (1875), L. R. 20 Eq. 544, where, for a railway in course of construction, a mortar mill was erected which proved a nuisance, JESSEL, M.R., at p. 551, said, "I have to be satisfied that the railway cannot be constructed without the mortar being made at this particular place"; but see the explanation of this case in *Harrison* v. *Southwark and Vauxhall Water Co.*, [1891] 2 Ch. 409, *per* VAUGHAN WILLIAMS, J., at p. 415, where he says that "it has nothing to do with the manner of execution, but only with the works authorised to be executed"; and see title NUISANCE, Vol. XXI., p. 519. Precautions which would be physically possible, but not such as any skilled person could reasonably be expected to take, need not be taken; see *Harrison* v. *Southwark and Vauxhall Water Co.*, *supra*, *per* VAUGHAN WILLIAMS, J., at pp. 412, 413. Similarly, where a recurrent injury can be prevented by measures which can be taken, the undertakers are under an obligation to take them (*Geddis* v. *Bann Reservoir* (*Proprietors*) (1878), 3 App. Cas. 430); compare *Southwark and Vauxhall Water Co.* v. *Wandsworth Board of Works*, [1898] 2 Ch. 603, C. A. (where it was decided that a highway authority having statutory powers to lower a street level, and also to lower gas pipes laid under statutory powers, could lower the street without exercising the latter powers, although the lowering of the street would expose the pipes to being broken and frozen); see also *Metropolitan Asylum District* v. *Hill* (1881), 6 App. Cas. 193; *London and Brighton Rail. Co.* v. *Truman* (1885), 11 App. Cas. 45; *A.-G.* v. *Metropolitan Rail. Co.*, [1894] 1 Q. B. 384, C. A.

(*h*) *Macbeath* v. *Haldimand* (1786), 1 Term Rep. 172, 182 (a colonial governor); *Luterloh* v. *Halsey* (undated) (commissary-general), and *Savage* v. *North* (*Lord*) (undated) (First Lord of the Treasury), both cited in *Macbeath* v. *Haldimand*, *supra*, by Lord MANSFIELD, C.J., at p. 180; *Unwin* v. *Wolseley* (1787), 1 Term Rep. 674 (captain of a man of war); *Myrtle* v. *Beaver* (1800), 1 East, 135 (captain of a troop of cavalry); *Rice* v. *Chute* (1801), 1 East, 579, 582 (captain of a troop of cavalry); *Carter* v. *Hall* (1818), 2 Stark. 361 (purser of a man of war); *Allen* v. *Waldegrave* (1818), 2 Moore (C. P.), 621 (justices of the peace); *Gidley* v. *Palmerston* (*Lord*) (1822), 7 Moore (C. P.), 91 (Secretary of State); *O'Grady* v. *Cardwell* (1872), 20 W. R. 342 (Secretary of State); *Jones* v. *Hope* (1880), 3 T. L. R. 247, n., C. A. (volunteer colonel); *Palmer* v. *Hutchinson* (1881), 6 App. Cas. 619, P. C. (deputy commissioner-general), where the previous cases are reviewed; *Graham* v. *Public Works Commissioners*, [1901] 2 K. B. 781, *per* PHILLIMORE, J., at p. 790; and see title CONSTITUTIONAL LAW, Vol. VI., pp. 413, 415.

(*i*) This is only part of the general law of agency; see title AGENCY, Vol. I., pp. 219, 220; and see *R.* v. *Treasury* (*Lords Commissioners*) (1872), L. R. 7 Q. B. 387, where BLACKBURN, J., at p. 398, said, "where an obligation is cast upon the principal and not upon the servant, we cannot enforce it against the servant as long as he is merely acting as servant: and it makes no difference that the master is only suable by petition of right or perhaps not at all."

(*k*) *Dunn* v. *Macdonald*, [1897] 1 Q. B. 401, 555, C. A.; see also *Jones* v. *Hope*, *supra* (where the same rule was applied to a case where the intention of the parties was to make a contract with "a corps" of volunteers, although such contract was a legal impossibility).

agent (*l*), but whether he does so or not is a question of fact (*m*), and, unless he intended to do so (*n*), and the other party gave credit to him personally or dealt with him in a private capacity (*o*), he is under no personal liability.

Moneys in the hands of public servants.

657. If money has been paid, erroneously or otherwise, by a private individual to an officer of the Crown, it cannot be recovered from him as money had and received (*p*), because that is in substance a claim against the Crown, his principal (*q*). The Attorney-General may, however, consent to the action being brought (*r*), and although no action, or mandamus, will lie against an officer of the Crown, who holds public moneys in his hands, for not advising the Crown to pay such sums to an individual (*s*), if money has actually been paid by the Crown to its officer in trust for an individual, it may perhaps be recovered from him as money had and received (*t*).

(*l*) *Samuel Brothers, Ltd.* v. *Whetherly*, [1907] 1 K. B. 709; [1908] 1 K. B. 184, C. A. (goods supplied to commanding officer of a volunteer corps); *Dunn* v. *Macdonald*, [1897] 1 Q. B. 401, *per* CHITTY, L.J., at p. 557; see also *Van Rooyen* v. *Vander Reit* (1838), 2 Moo. P. C. C. 177; and see title CONSTITUTIONAL LAW, Vol. VI., pp. 414, note (*l*), 415, note (*o*); see also *Graham* v. *Public Works Commissioners*, [1901] 2 K. B. 781. *Graham* v. *Stamper* (1690), 2 Vern. 146, is no authority except upon equity practice; and *Cunningham* v. *Collier* (1785), 4 Doug. (K. B.) 233, appears to be overruled by *Unwin* v. *Wolseley* (1787), 1 Term Rep. 674, and the other cases cited in note (*h*), p. 314, *ante*.

(*m*) *Samuel Brothers, Ltd.* v. *Whetherly, supra*; *Cross* v. *Williams* (1862), 7 H. & N. 675; compare *Thompson* v. *Pearce* (1819), 1 Brod. & Bing. 25; *Clutterbuck* v. *Coffin* (1842), 3 Man. & G. 842; *Auty* v. *Hutchinson* (1848), 6 C. B. 266.

(*n*) *Unwin* v. *Wolseley, supra*; *Samuel Brothers, Ltd.* v. *Whetherly, supra*.

(*o*) *Keate* v. *Temple* (1797), 1 Bos. & P. 158; *Prosser* v. *Allen* (1819), Gow, 117.

(*p*) *Whitbread* v. *Brooksbank* (1774), 1 Cowp. 66, *per* Lord MANSFIELD, C.J., at p. 69; and see *Campbell* v. *Hall* (1774), 1 Cowp. 204. As to money had and received, see title CONTRACT, Vol. VII., pp. 473 *et seq.*

(*q*) See *Sadler* v. *Evans* (1766), 4 Burr. 1984.

(*r*) *Campbell* v. *Hall* (1774), 1 Cowp. 204. In *Whitbread* v. *Brooksbank, supra*, a defendant excise officer waived this defence, and such consent was entered upon the record "so that it be not a precedent."

(*s*) *R.* v. *Treasury* (*Lords Commissioners*) (1872), L. R. 7 Q. B. 387, overruling *R.* v. *Treasury* (*Lords Commissioners*), *Queen Dowager's Annuity* (1851), 16 Q. B. 357; and see *R.* v. *Hornby, or The Bankers Case* (1695), 5 Mod. Rep. 29.

(*t*) See, on the one hand, *Priddy* v. *Rose* (1817), 3 Mer. 86, where GRANT, M.R., said, at p. 102, "It is clear that a suit may be maintained against a public officer for the recovery of money issued by the Government for the use of an individual"; not, however, where the Government has subsequently ordered the money to be withheld (*ibid.*); see also *Row* v. *Dawson* (1749), 1 Ves. Sen. 331; *Rice* v. *Everitt* (1801), 1 East, 583, n. (a); and compare, on the other hand, *Rice* v. *Chute* (1801), 1 East, 579, and *Gidley* v. *Palmerston* (*Lord*) (1822), 7 Moore (C. P.), 91 where an action for a retired allowance against a Secretary of State was dismissed, although the money had been received by him for its payment, the judgment being based upon the multiplicity of such actions to which such an officer might be subjected; see also *Grenville-Murray* v. *Clarendon* (*Earl*) (1869), L. R. 9 Eq. 11; *Wright & Co.* v. *Mills* (No. 2) (1890), 63 L. T. 186; title CONSTITUTIONAL LAW, Vol. VI., p. 415.

SECT. 2. **Exercise of Executive Powers.**

SUB-SECT. 2.—*Liability in Tort.*

Authority of Crown no defence.

658. In actions for tort (*u*) against public officers (*a*), as in actions against private individuals, it is no defence that the tort was committed by order of the Crown or of a superior officer (*b*).

Liability for misfeasance and non-feasance.

659. Where a public authority or public officer commits a breach of his official duty, and thereby causes injury to any person, he is liable to an action for damages (*c*), if the breach complained of amounts to misfeasance (*d*); and, if it consists of a mere nonfeasance, the rule is that the authority or officer, if not a mere servant of the Crown (*e*), is liable if the law casts upon him a specific duty to the plaintiff, or to a class of which the plaintiff is one, to perform the act omitted (*f*). Whether this specific duty to perform the act and consequent liability for nonfeasance is cast upon the defendant or not depends upon the terms of the statute or charter relied upon (*g*);

(*u*) As to the general principles of tort, see title TORT.

(*a*) For a definition of "public officer," see note (*i*), p. 317, *post*. As to how far public authorities are liable for the torts of their subordinates, see pp. 321 *et seq.*, *post*. As to the immunity of the Crown from actions based upon torts of Crown servants, see titles CONSTITUTIONAL LAW, Vol. VI., pp. 414 *et seq.*; CROWN PRACTICE, Vol. X., pp. 28 *et seq.*

(*b*) See pp. 308, 309, *ante*; titles AGENCY, Vol. I., p. 224; CONSTITUTIONAL LAW, Vol. VI., pp. 383, 415; *Rogers* v. *Rajendro Dutt* (1860), 13 Moo. P. C. C. 209; *Madrazo* v. *Willes* (1820), 3 B. & Ald. 353; *Cobbett* v. *Grey* (1849), 4 Exch. 729; *Raleigh* v. *Goschen*, [1898] 1 Ch. 73, *per* ROMER, J., at p. 77; *Winter* v. *Bancks* (1901), 65 J. P. 468.

(*c*) Com. Dig., tit. Action on the Case for Misfeasance (A 1), "an action on the case lies against an officer for a misfeasance, as if an officer misdemean himself by any falsity"; *Smith* v. *Winford* (1693), 1 Lut. 96; Com. Dig., tit. Action on the Case for a Deceit (A 6), "such action will lie if an officer, being entrusted by the law, act deceptive in his office"; *Rowning* v. *Goodchild* (1773), 2 Wm. Bl. 906; *Henly* v. *Lyme Corporation* (1828), 5 Bing. 91; *M'Kinnon* v. *Penson* (1852), 8 Exch. 319, 327; *Whitelegg* v. *Richards* (1823), 2 B. & C. 45 (clerk of a debtor's court falsely issuing a discharge order); *Brasyer* v. *Maclean* (1875), L. R. 6 P. C. 398 (sheriff issuing a false return to a writ, though without malice). In the majority of cases such misfeasance in office would be a tort apart from the official position, and would therefore be governed by the rules stated in the text, *supra*.

(*d*) As to the distinction between misfeasance and nonfeasance, see titles HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 132 *et seq.*; NEGLIGENCE, Vol. XXI., pp. 375 *et seq.*; TORT; *Glossop* v. *Heston and Isleworth Local Board* (1879), 12 Ch. D. 102, C. A.; *Southampton and Itchin Bridge Co.* v. *Southampton Local Board* (1858), 8 E. & B. 801; *A.-G. and Dommes* v. *Basingstoke Corporation* (1876), 24 W. R. 817; *Cracknell* v. *Thetford Corporation* (1869), L. R. 4 C. P. 629; *A.-G.* v. *Dorking Union Guardians* (1882), 20 Ch. D. 595, C. A.; *Dawson & Co.* v. *Bingley Urban Council*, [1911] 2 K. B. 149, C. A.; *McClelland* v. *Manchester Corporation*, [1912] 1 K. B. 118.

(*e*) *Gilbert* v. *Trinity House Corporation* (1886), 17 Q. B. D. 795. As to liability for the acts of subordinates, see pp. 321 *et seq.*, *post*.

(*f*) *Gibraltar Sanitary Commissioners* v. *Orfila* (1890), 15 App. Cas. 400, P. C., *per* Lord WATSON, at p. 411; and see Com. Dig., tit. Action upon Statute (F), "so in every case where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy"; *Watkins* v. *Naval Colliery Co.* (1897), *Ltd.* (1912), 56 Sol. Jo. 719, H. L.

(*g*) *Southampton and Itchin Bridge Co.* v. *Southampton Local Board* (1858), 8 E. & B. 801, *per* Lord CAMPBELL, C.J., at p. 812; *Mersey Docks Trustees* v. *Gibbs* (1866), L. R. 1 H. L. 93, *per* BLACKBURN, J., at p. 104; *Saunders*

and the fact that another remedy is provided therein tends to show that no liability to action was intended to be created (*h*). As a general rule the liability exists unless an intention to negative it is indicated (*i*).

v. *Holborn District Board of Works*, [1895] 1 Q. B. 64; *Gibraltar Sanitary Commissioners* v. *Orfila* (1890), 15 App. Cas. 400, 408, P. C.

(*h*) *Atkinson* v. *Newcastle Waterworks Co.* (1877), 2 Ex. D. 441, C. A., which appears to overrule *Pickering* v. *James* (1873), L. R. 8 C. P. 489; and as to *Couch* v. *Steel* (1854), 3 E. & B. 402, see title NEGLIGENCE, Vol. XXI., p. 423, note (*b*), and see, generally, *ibid.*, pp. 422—424.

(*i*) *Mersey Docks Trustees* v. *Gibbs* (1866), L. R. 1 H. L. 93; *Winch* v. *Thames Conservators* (1874), L. R. 9 C. P. 378, Ex. Ch.; *Bathurst Borough* v. *Macpherson* (1879), 4 App. Cas. 256. The rule as to public officers is stated generally in *Henly* v. *Lyme Corporation* (1828), 5 Bing. 91, *per* BEST, C.J., at p. 107: "If a public officer abuses his office, either by an act of omission or commission, and the consequence of that is an injury to an individual, an action may be maintained against such public officer"; and he further defined public officer for that purpose as "everyone who is appointed to discharge a public duty and receives a compensation in whatever shape, whether from the Crown or otherwise"; compare *Young* v. *Davis* (1862), 7 H. & N. 760, 777, where *Henly* v. *Lyme Corporation*, *supra*, is explained as being a case where a right which was a personal benefit corresponded with an obligation. As to officers of the Crown, see Com. Dig., tit. Action on the Case for Negligence (A 2). The sheriff and similar officers are liable for non-obedience to writs directed to them; see *Hooper* v. *Lane* (1847), 10 Q. B. 546, Ex. Ch.; and see title SHERIFFS AND BAILIFFS; see also *Douglas* v. *Yallop* (1759), 2 Burr. 722; *Herbert* v. *Pagett* (1662), 1 Lev. 64; *Irwin* v. *Grey* (1862), 3 F. & F. 635. The case of *Schinotti* v. *Bumsted* (1796), 6 Term Rep. 646, is one rather of misfeasance.

It may ultimately be held that, except in cases of non-repair of highways, there is no real distinction between nonfeasance and misfeasance. In highway cases the distinction undoubtedly exists; see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 133. The origin of the exception seems to be that neither the inhabitants of the parish or county (*Russell* v. *Men of Devon* (1788), 2 Term Rep. 667), nor the surveyors of highways (*M'Kinnon* v. *Penson* (1854), 9 Exch. 609, Ex. Ch.; *Young* v. *Davis* (1862), 7 H. & N. 760), were liable for nonfeasance, and consequently the local boards and councils to whom their duties were subsequently transferred are also not liable (*Cowley* v. *Newmarket Local Board*, [1892] A. C. 345). As to this principle, see the text, *infra*. *Dicta* in favour of the existence of a general distinction are to be found in the following cases, but the decisions themselves are explainable upon the grounds stated:—*Brennan* v. *Limerick Union Guardians* (1878), 2 L. R. Ir. 42 (the statutory duty lay, not upon the defendants, but upon other persons); *Glossop* v. *Heston and Isleworth Local Board* (1879), 12 Ch. D. 102, C. A. (there was no negligence, the defendants not having had time to fulfil their duty); *Forbes* v. *Lee Conservancy Board* (1879), 4 Ex. D. 116 (the statute did not impose a duty, but gave a discretion); *Gibraltar Sanitary Commissioners* v. *Orfila*, *supra* (the defendants were mere servants of the Crown); *Dawson & Co.* v. *Bingley Urban Council*, [1911] 2 K. B. 149, C. A. (a case of misfeasance, and the *dicta* of VAUGHAN WILLIAMS, L.J. (*ibid.*, at p. 155), in favour of the distinction are opposed to those of KENNEDY, L.J. (*ibid.*, at p. 161), against it). The nearest approach to a direct authority for the distinction appears to be *Saunders* v. *Holborn District Board of Works*, [1895] 1 Q. B. 64, where the court required evidence of the intention of the legislature to impose, rather than not to impose, liability for nonfeasance. It has been suggested that the ground for the supposed immunity is the public inconvenience of a great multiplicity of actions; see *Russell* v. *Men of Devon*, *supra*, *per* Lord KENYON, C.J., at p. 671, and *Glossop* v. *Heston and Isleworth Local Board*, *supra*, *per* JAMES, L.J., at p. 109.

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Where duties are transferred from one body to another newly-created body, no new liability is imposed by the transfer, unless the intention to create such liability is clearly expressed (*k*).

Effect of duty being performed gratuitously.

660. There is no distinction to be drawn between those bodies who tender their services to the public gratuitously and those who are remunerated, or who otherwise derive private profit from the performance of the duty (*l*); but, in considering the intention of the legislature to impose, or not to impose, a liability for mere non-feasance, there is, perhaps, some weight to be attached to the fact that no payments are made by the public for the enjoyment of the benefits derived from the execution of the defendant's duties (*m*).

Advice of officer to the Crown.

661. No officer can be made liable for advice given to the Crown in the performance of his duties, nor should any such advice be disclosed to the court (*n*).

(*k*) *Pictou Municipality* v. *Gildert*, [1893] A. C. 524, P. C., *per* Lord HOBHOUSE, at p. 527. Under this rule comes the exceptional treatment of highway authorities, as to which see note (*i*), p. 317, *ante*. *Saunders* v. *Holborn District Board of Works*, [1895] 1 Q. B. 64, appears to have been decided upon this rule, but it is not in line with the previous cases, as the duty (to sweep away snow) was one transferred to the defendants from private individuals who were liable at law. For cases where the liability has been held to exist although the duty was transferred from bodies not liable, see *Hartnall* v. *Ryde Commissioners* (1863), 4 B. & S. 361; *Ohrby* v. *Ryde Commissioners* (1864), 5 B. & S. 743, which cases have, however, been commented upon in *Cowley* v. *Newmarket Local Board*, [1892] A. C. 345.

(*l*) *Mersey Docks Trustees* v. *Gibbs* (1866), L. R. 1 H. L. 93, where the previous cases upon this point are reviewed. The cases considered upon this point were:—*Hall* v. *Smith* (1824), 2 Bing. 156 (explained in *Mersey Docks Trustees* v. *Gibbs*, *supra*, at p. 115); *Duncan* v. *Findlater* (1839), 6 Cl. & Fin. 894, H. L. (explained in *Mersey Docks Trustees* v. *Gibbs*, *supra*, at p. 116); *Parnaby* v. *Lancaster Canal Co.* (1839), 11 Ad. & El. 223, Ex. Ch. (approved in *Mersey Docks Trustees* v. *Gibbs*, *supra*, at p. 103); *Metcalfe* v. *Hetherington* (1855), 11 Exch. 257 (overruled in *Mersey Docks Trustees* v. *Gibbs*, *supra*; see *ibid.*, pp. 120, 125); *Ward* v. *Lee* (1857), 7 E. & B. 426 (approved in *Mersey Docks Trustees* v. *Gibbs*, *supra*, at p. 118); *Southampton and Itchin Bridge Co.* v. *Southampton Local Board* (1858), 8 E. & B. 801 (approved in *Mersey Docks Trustees* v. *Gibbs*, *supra*, at p. 118); *Ruck* v. *Williams* (1858), 3 H. & N. 308 (approved in *Mersey Docks Trustees* v. *Gibbs*, *supra*, at p. 118); *Whitehouse* v. *Fellowes* (1861), 10 C. B. (N. S.) 765 (approved in *Mersey Docks Trustees* v. *Gibbs*, *supra*, at p. 119); *Holliday* v. *St. Leonard's, Shoreditch, Vestry* (1861), 11 C. B. (N. S.) 192 (doubted in *Mersey Docks Trustees* v. *Gibbs*, *supra*, at p. 119); *Clothier* v. *Webster* (1862), 12 C. B. (N. S.) 790 (approved in *Mersey Docks Trustees* v. *Gibbs*, *supra*, at p. 118); *Brownlow* v. *Metropolitan Board of Works* (1863), 13 C. B. (N. S.) 768 (approved in *Mersey Docks Trustees* v. *Gibbs*, *supra*, at p. 119); and see *Scott* v. *Manchester Corporation* (1857), 2 H. & N. 204, Ex. Ch.; *Goldsmid* v. *Tunbridge Wells Improvement Commissioners* (1866), 1 Ch. App. 349; *A.-G. and Dommes* v. *Basingstoke Corporation* (1876), 24 W. R. 817.

(*m*) *Forbes* v. *Lee Conservancy Board* (1879), 4 Ex. D. 116; and see *Parnaby* v. *Lancaster Canal Co.*, *supra*; *Winch* v. *Thames Conservators* (1874), L. R. 9 C. P. 378, Ex. Ch.

(*n*) *Irwin* v. *Grey* (1862), 3 F. & F. 635; *West* v. *West* (1911), 27 T. L. R. 476, C. A. (the Lord Chamberlain cannot be compelled to disclose in evidence communications made to him in his official capacity); see also the cases cited in note (*s*), p. 315, *ante*. As to the right and duty to claim privilege from disclosure for information and documents touching advice to the Crown etc., see title EVIDENCE, Vol. XIII., pp. 572, 573.

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Exercise of discretion.

662. Where the act complained of as a tort is done in the exercise of a discretion conferred by law, no action will lie in the absence of malice or improper motive (*o*); and the exercise of such a discretion is subject to the rules governing the exercise of *quasi*-judicial powers hereafter stated (*p*).

Act of ministerial officer of court of justice.

663. Where a purely ministerial officer is required by law to obey the decrees of a court of justice, as a general rule (*q*) no liability can attach to him for any act done in obedience to such decrees (*r*); but to obtain this protection he must prove strict obedience (*a*) to the terms of a writ or warrant valid upon the face thereof (*b*), and, in the case of an officer of an inferior court, that

(*o*) *Tozer* v. *Child* (1857), 7 E. & B. 377, Ex. Ch. (churchwardens acting as returning officers at a vestry election); see also the cases cited at note (*d*), p. 335, *post*; and see titles NEGLIGENCE, Vol. XXI., p. 422; NUISANCE, Vol. XXI., p. 518. The question whether the discretion exists depends upon the particular statute or upon the nature of the particular officer claiming to exercise it. Thus, where an officer seized a ship under the Pacific Islanders Protection Act, 1872 (35 & 36 Vict. c. 19), which authorises the seizure of ships "reasonably suspected" of traffic in slaves, it was held to be a question of fact whether the defendant had reasonable grounds for suspecting the ship, not whether he acted in good faith in the exercise of any discretion (*Burns* v. *Nowell* (1880), 5 Q. B. D. 444, C. A.).

(*p*) See pp. 334 *et seq.*, *post*. As to the exercise of true judicial powers, see pp. 323 *et seq.*, *post*. As to the exercise of a similar discretion by officers and private persons in performance of the duty of assisting justice by the arrest of criminals, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 298 *et seq*. As to the exercise of discretion by naval and military officers, see title ROYAL FORCES, and as to their powers in time of war etc., see p. 308, *ante*.

(*q*) As to statutory modification of this rule, see note (*i*), p. 320, *post*.

(*r*) See *B.* (*Dean and Chapter*) v. *T.* (1352), Y. B. 26 Edw. 3, fo. 16, pl. 7, "what an officer doeth by the warrant of a court can not be against the peace"; *Henderson* v. *Preston* (1888), 21 Q. B. D. 362, C. A.; and see the cases cited in notes (*a*), (*b*), *infra*.

(*a*) *Entick* v. *Carrington* (1765), 19 State Tr. 1029, 1063; *Money* v. *Leach* (1765), 3 Burr. 1742; *Cooper* v. *Booth* (1785), 3 Esp. 135; *Munday* v. *Stubbs* (1850), 10 C. B. 432. Thus, a sheriff is liable for taking the goods of B. under a warrant to take those of A., however innocently he may act (*Balme* v. *Hutton* (1833), 9 Bing. 471, Ex. Ch., overruling *Bayly* v. *Bunning* (1665), 1 Lev. 173, and *Glasspoole* v. *Young* (1829), 9 B. & C. 696). Although the sheriff may be justified by estoppel if the other person intentionally deceives him, such estoppel only endures so long as he is ignorant of the true facts (*Dunston* v. *Paterson* (1857), 2 C. B. (N. S.) 495); and he is, of course, liable if he exceeds his powers under the warrant (*Wright* v. *Court* (1825), 4 B. & C. 596); and see title SHERIFFS AND BAILIFFS.

(*b*) *Andrews* v. *Marris* (1841), 1 Q. B. 3 (where a court of requests not having ordered execution to issue, its clerk issued execution which the sergeant executed, the clerk was held liable in trespass, but the officer was protected by the warrant); *Dews* v. *Riley* (1851), 11 C. B. 434. The warrant must be valid upon its face at the time of action taken thereon, and the officer is not protected where it has been withdrawn (2 Roll. Abr., tit. Trespass (O), p. 552, pl. 10; *Brown* v. *Copley* (1844), 8 Scott (N. R.), 350); nor where it is void, as distinguished from voidable (*Morse* v. *James* (1738), Willes, 122 (where an inferior court holden the 24th February issued a precept dated the 26th); *Charleton* v. *Alway* (1840), 11 Ad. & El. 993; *Carratt* v. *Morley* (1841), 1 Q. B. 18; *Humphries* v. *Longmore* (1848), 6 C. B. 363; *Clark* v. *Woods* (1848), 2 Exch. 395). An officer having several warrants may justify under one which is valid, although at the time of acting he produced another which was void (*Bristol Poor*

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the court had general jurisdiction over the case in which the writ or warrant was issued (*c*). In the case of an officer of a superior court, it is presumed that the writs issued by such court are duly issued (*d*); and all writs not appearing to be outside the court's jurisdiction (*e*) are a protection to its officers although on their face irregular (*f*) or void in form (*g*), for officers ought not to examine the judicial act of the court whose servants they are, but are bound to execute it and are therefore protected by it (*h*).

Officers acting under the warrants of justices.

664. Constables or other officers acting in obedience to justices' warrants are, notwithstanding any defect in jurisdiction, protected by special statutory provision (*i*), whereby no action (*k*) may be

(*Governors*) v. *Wait* (1834), 1 Ad. & El. 264). As to wrongful and irregular execution, see titles EXECUTION, Vol. XIV., pp. 28 *et seq.*; TRESPASS.

(*c*) See *London Corporation* v. *Cox* (1867), L. R. 2 H. L. 239. But, of course, the general jurisdiction may be apparent upon the face of the proceedings. Unlike the party who avails himself of execution under the judgment of an inferior court, who is bound to show the validity of such judgment in his defence, the officer need only plead the writ under which he acted. As to this distinction between the party and the officer, see *Moravia* v. *Sloper* (1737), Willes, 30; *Turner* v. *Felgate* (1663), 1 Lev. 95; *Higginson* v. *Martin and Hadley* (1677), 2 Mod. Rep. 195; *Cotes* v. *Michill* (1681), 3 Lev. 20; *Hodson* v. *Cooke* (1683), 1 Vent. 369; *Gwinne* v. *Poole* (1692), 2 Lut. 935; *Truscott* v. *Carpenter* (1697), 1 Ld. Raym. 229; *Barrow* v. *Durchett* (1735) (unreported), referred to in *Moravia* v. *Sloper*, *supra*, by WILLES, C.J., at p. 34; and see *Speers* v. *Daggers* (1885), Cab. & El. 503 (where it was held that officers are not protected (being treated as parties) in the case of process executed under an interpleader order made without jurisdiction, although good on the face of it, if such order was obtained on their own application). The effect of this rule is that the officer is not liable for a defect in jurisdiction in the particular case, unless it appear upon the warrant, but that he is liable for lack of what has been termed "any pretence of jurisdiction" (*Shergold* v. *Holloway* (1734), 2 Stra. 1002), for such defect must appear upon the writ. Officers have been held liable in the following cases:—*Shergold* v. *Holloway*, *supra*; *Nichols* v. *Walker and Carter* (1636), Cro. Car. 394; *Milward* v. *Caffin* (1779), 2 Wm. Bl. 1330; and see *Morse* v. *James* (1738), Willes, 122; *Charleton* v. *Alway* (1840), 11 Ad. & El. 993; *Humphries* v. *Longmore* (1848), 6 C. B. 363; and *Clark* v. *Woods* (1848), 2 Exch. 395. Officers have been held to be protected although the judgments upon which process issued were void in the following cases:—*Olliet* v. *Bessey* (1682), T. Jo. 214; *Higginson* v. *Martin and Hadley*, *supra*; *Hill* v. *Bateman* (1726), 1 Stra. 710; *Wilson* v. *Weller* (1819), 1 Brod. & Bing. 57.

(*d*) *Gosset* v. *Howard* (1845), 10 Q. B. 359, 411, Ex. Ch., *per* PARKE, B., at p. 453.

(*e*) *Ibid.* This exception would seem to be intended to cover a writ of a superior court, which was clearly outside its jurisdiction, *e.g.*, a writ of possession of land in Kent issued by the Court of the County Palatine of Durham.

(*f*) *Rutland's* (*Countess*) *Case* (1605), 6 Co. Rep. 52 b, 54 a.

(*g*) *Parsons* v. *Loyd* (1772), 3 Wils. 341, *per* DE GREY, C.J., at p. 345 (where the officer was said to be protected by a writ of *capias ad respondendum*, although void for being tested in Trinity and returnable in Hilary Term); compare *Humphries* v. *Longmore*, *supra*.

(*h*) *Gosset* v. *Howard*, *supra*; and see *Turner* v. *Felgate* (1663), 1 Lev. 95; *Cotes* v. *Michill*, *supra*; *Tarlton* v. *Fisher* (1781), 2 Doug. (K. B.) 671.

(*i*) Constables Protection Act, 1750 (24 Geo. 2, c. 44), s. 6. The protection extends to persons acting by order or in aid of the officer (*ibid.*), although it appears that a person so acting does not need such protection

(*k*) For note (*k*), see next page.

brought against them for anything done in obedience to such warrant (*l*) unless they refuse or neglect to show the warrant within six days of a written demand (*m*). The warrant must, however, have been strictly obeyed by the officer (*n*). The object of this provision being to protect the officer where the justices are liable, the officer is not protected thereby if there is no remedy against the justices (*o*).

SUB-SECT. 3.—*Liability for Acts of Subordinates.*

665. Where a tort complained of is one of mere nonfeasance, it is immaterial whether the omission to perform the duty was on the part of the authority itself or on the part of its subordinate officer; Nonfeasance.

(*Clarke* v. *Davey* (1820), 4 Moore (C. P.), 465). Any person to whom the warrant is issued is an "officer" for the purposes of the Constables Protection Act, 1750 (24 Geo. 2, c. 44) (*Nutting* v. *Jackson* (1773), cited in Buller, Law of Nisi Prius, 5th ed., p. 24; *Feltham* v. *Terry* (1773), cited in Buller, Law of Nisi Prius, 5th ed., p. 24 (overseers of the poor); *Harper* v. *Carr* (1797), 7 Term Rep. 270 (a churchwarden)); but not one to whom it is not issued (unless acting in aid), as a constable to whom the warrant is not directed by name and who is acting outside his own district (*Milton* v. *Green* (1804), 5 East, 233; *Gladwell* v. *Blake* (1834), 1 Cr. M. & R. 636; *Jones* v. *Chapman* (1845), 2 Dow. & L. 907). The Constables Protection Act, 1750 (24 Geo. 2, c. 44), s. 8 (which provided for a six months' limitation in respect of actions), is repealed by the general repeal contained in the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 2 (see p. 338, *post*); the rest of the Constables Protection Act, 1750 (24 Geo. 2, c. 44), with the exception of *ibid.*, s. 6, is repealed by the Justices Protection Act, 1848 (11 & 12 Vict. c. 44), s. 17. As to the Constables Protection Act, 1750 (24 Geo. 2, c. 44), s. 6, see also titles ACTION, Vol. I., p. 26; MALICIOUS PROSECUTION AND PROCEDURE, Vol. XIX., p. 688, note (*d*).

(*k*) It has been decided that the Constables Protection Act, 1750 (24 Geo. 2, c. 44), extends only to actions for tort, and not to an action for money had and received against an officer who had levied money upon a conviction (*Anon.* (undated), cited in Buller, Law of Nisi Prius, 5th ed., p. 24 b; but see *Midland Rail. Co.* v. *Withington Local Board* (1883), 11 Q. B. D. 788, C. A. (where a somewhat similar point was decided otherwise); and see note (*s*), p. 346, *post*). There was much doubt as to an action of replevin (*Milward* v. *Caffin* (1779), 2 Wm. Bl. 1330; compare *Pearson* v. *Roberts* (1755), Willes, 668).

(*l*) It is immaterial that the justices have, after issue of the warrant, attempted to cancel it (*Barons* v. *Luscombe* (1835), 3 Ad. & El. 589). As to the case where the warrant is wholly invalid, and the justices have so informed the officer, see *ibid.*, *per* Lord DENMAN, C.J., at p. 594.

(*m*) No action can be brought after the warrant has been shown, even if the six days have previously elapsed (*Jones* v. *Vaughan* (1804), 5 East, 445). As to the form of the demand, and what constitutes compliance therewith or waiver thereof, see *Collins* v. *Rose* (1839), 5 M. & W. 194, 196; *Atkins* v. *Kilby* (1840), 4 Per. & Dav. 145; *Clark* v. *Woods* (1848), 2 Exch. 395; see also titles ACTION, Vol. I., p. 26; MALICIOUS PROSECUTION AND PROCEDURE, Vol. XIX., note (*d*); POLICE, Vol. XXII., p. 499.

(*n*) *Money* v. *Leach* (1765), 3 Burr. 1742, *per* Lord MANSFIELD, C.J., at p. 1762; *Price* v. *Messenger* (1800), 2 Bos. & P. 158; *Milton* v. *Green* (1804), 5 East, 233; *Bell* v. *Oakley* (1814), 2 M. & S. 259; *Parton* v. *Williams* (1820), 3 B. & Ald. 330; *Crozier* v. *Cundy* (1827), 9 Dow. & Ry. (K. B.) 224; *Hoye* v. *Bush* (1840), 2 Scott (N. R.), 86; *Munday* v. *Stubbs* (1850), 10 C. B. 432.

(*o*) *Sly* v. *Stevenson* (1826), 2 C. & P. 464 (where the constable himself had inserted his own name in an old warrant and taken it without authority from the justice); *Sturch* v. *Clarke* (1832), 1 Nev. & M. (K. B.) 671 (an action for excessive distress); and *Cotton* v. *Kadwell* (1833), 2 Nev. & M. (K. B.) 399 (where the defendant distrained after tender).

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for, where the law casts upon any person a duty to do some particular act, the fact of his having entrusted the duty to a person who also neglected it furnishes no excuse for an omission on his part (*p*).

Misfeasance.

666. Where the tort consists of the doing of an illegal act, there is a distinction between those public authorities or officers who are servants of the Crown or of the public and those who are such merely in the sense that they perform duties beneficial to the public (*q*). The latter are liable for the acts of their subordinates in the same manner as any other persons (*r*); but where the public officer is merely a servant of the Crown or of the public, he is not responsible for any negligence or default of those in the same employment as himself (*s*). He is not, therefore, liable for the acts

(*p*) *Pickard* v. *Smith* (1861), 10 C. B. (N. S.) 470, *per* WILLIAMS, J., at p. 480; approved in *Mersey Docks Trustees* v. *Gibbs* (1866), L. R. 1 H. L. 93, at p. 114; and see *Watkins* v. *Royal Naval Colliery Co.* (1897), *Ltd.* (1912), 56 Sol. Jo. 719, H. L. As to the cases in which the duty of the superior is limited to the provision of duly trained and certified subordinates, see title AGENCY, Vol. I., p. 213; *Stanbury* v. *Exeter Corporation*, [1905] 2 K. B. 838; compare *Mee* v. *Cruikshank* (1902), 86 L. T. 708; and see, further, titles MASTER AND SERVANT, Vol. XX., pp. 262, 264; NEGLIGENCE, Vol. XXI., pp. 474, 475; PUBLIC HEALTH AND LOCAL ADMINISTRATION, p. 432, *post*; and compare title MEDICINE AND PHARMACY, Vol. XX., p. 334.

(*q*) For example, the Corporation of Trinity House and the Mersey Docks trustees are not "servants of the Crown," although performing duties of a public character (*Gilbert* v. *Trinity House Corporation* (1886), 17 Q. B. D. 795; *Mersey Docks Trustees* v. *Gibbs*, *supra*, at p. 111; *Mersey Docks Trustees* v. *Cameron*, *Jones* v. *Mersey Docks Trustees* (1865), 11 H. L. Cas. 443); compare, as to hospitals, titles MEDICINE AND PHARMACY, Vol. XX., p. 334; PUBLIC HEALTH AND LOCAL ADMINISTRATION, p. 432, *post*.

(*r*) *Mersey Docks Trustees* v. *Gibbs*, *supra*; *Gilbert* v. *Trinity House Corporation*, *supra*; see also *Hall* v. *Smith* (1824), 2 Bing. 156, and *Duncan* v. *Findlater* (1839), 6 Cl. & Fin. 894, H. L., explained in *Mersey Docks Trustees* v. *Gibbs*, *supra*, *per* BLACKBURN, J., at pp. 115, 116; *Brownlow* v. *Metropolitan Board of Works* (1864), 16 C. B. (N. S.) 546, Ex. Ch. As to responsibility for torts of agents generally, see titles AGENCY, Vol. I., pp. 211 *et seq.*; MASTER AND SERVANT, Vol. XX., pp. 248 *et seq.*

(*s*) Thus, the admiral is not liable for the tort of a captain under his command (*The Mentor* (1799), 1 Ch. Rob. 179); nor is the captain of a man-of-war liable for the negligent navigation of his first officer (*Nicholson* v. *Mouncey and Symes* (1812), 15 East, 384); nor is the Postmaster-General liable for the negligence or dishonesty of letter-carriers or telegraphists (*Lane* v. *Cotton* (1701), 1 Ld. Raym. 646 ("each officer is responsible only for himself" (*ibid.*)); *Whitfield* v. *Le Despencer* (*Lord*) (1778), 2 Cowp. 754; *Bainbridge* v. *Postmaster-General*, [1906] 1 K. B. 178, C. A. (which disposed of the doubt raised as to telegraphs in *Jones* v. *Monsell* (1872), 6 I. R. C. L. 155); *Rowning* v. *Goodchild* (1773), 2 Wm. Bl. 906; and see title POST OFFICE Vol. XXII., p. 629); and see, further, title CONSTITUTIONAL LAW, Vol. VI. p. 416. In virtue of the same rule the surveyor of highways is not responsible to a person who sustains injury owing to the parish ways being out of repair, though no action could be brought against his principals the inhabitants of the parish (*Mersey Docks Trustees* v. *Gibbs*, *supra*, *per* BLACKBURN, J., at p. 111; and see cases cited in title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 133, note (*d*)). As to the responsibility of the presiding officer at an election for the acts and omissions of his clerk, see *Pickering* v. *James* (1873), L. R. 8 C. P. 489. A sheriff, however, is liable for the acts and omissions of his subordinates in executing writs etc.; see *Brown* v. *Copley* (1844), 8 Scott (N. R.), 350, and title SHERIFFS AND BAILIFFS. As to the

of his subordinates (*t*), unless directly ordered by him in such a way as to make them his own acts (*u*).

SUB-SECT. 4.—*Exceptions.*

Liability of Government officials and public bodies.

667. In some cases Government officials or public bodies have, by statute, been expressly or impliedly made liable to actions of contract or tort (*v*).

SECT. 3.—*Exercise of Judicial Powers.*

SUB-SECT. 1.—*In General.*

Who are protected.

668. Persons exercising judicial functions in a court (*w*) are exempt from all civil liability whatsoever for anything done or said by them in their judicial capacity (*x*). A further protection arises from the rule that the record of a court of record cannot, if subsisting and valid upon its face, be traversed in any action against the judge of such court (*y*).

liability of boards of guardians for the neglect or default of their officers in carrying out ministerial acts, see title POOR LAW, Vol. XXII., p. 546.

(*t*) He is, however, liable for the torts of persons who are his private servants and are not acting in public employment (*North's (Lord) Case* (1558), 2 Dyer, 161 a).

(*u*) *Raleigh* v. *Goschen*, [1898] 1 Ch. 73, *per* ROMER, J., at p. 77; *Wright & Son* v. *Lethbridge* (1890), 63 L. T. 572, C. A.; see also *Mersey Docks Trustees* v. *Gibbs* (1866), L. R. 1 H. L. 93, *per* BLACKBURN, J., at p. 111.

(*v*) See title CONSTITUTIONAL LAW, Vol. VI., pp. 414, 415; and as to the various departments of State, see *ibid.*, Vol. VII., pp. 79 *et seq.*

(*w*) All persons are protected who are constituent members of the court. Thus the sheriff was a constituent member of the old county courts (*Tinsley* v. *Nassau* (1827), Mood. & M. 52; *Tunno* v. *Morris* (1835), 2 Cr. M. & R. 298); the steward of the hundred courts and courts baron (*Floyd* v. *Barker* (1607), 12 Co. Rep. 23; *Holroyd* v. *Breare* (1819), 2 B. & Ald. 473; *Bradley* v. *Carr* (1841), 3 Man. & G. 221). Members of the jury are members of the court (*Bushell's Case* (1674), Vaugh. 135; and see title JURIES, Vol. XVIII., p. 266). As to the protection afforded to counsel, witnesses and parties for words spoken in the course of judicial proceedings, see title LIBEL AND SLANDER, Vol. XVIII., pp. 678 *et seq.*

(*x*) This rule is of the highest antiquity; the earliest notice there is of it is its extension to jurors in Y. B. 21 Edw. 3 (1346), Hil. pl. 16 (see note (*w*), *supra*); but other early cases of its application are given in Lib. Ass. 27 Edw. 3, pl. 18 (1353); Y. B. 9 Hen. 6, 60, pl. 9 (1431); 1 Roll. Abr. 92, p. 1 (1431); Y. B. 9 Edw. 4, 3, pl. 10 (1469); Y. B. 21 Edw. 4, 67, pl. 49 (1481). Other cases in which the general rule has been stated or acted upon are *Floyd* v. *Barker*, *supra*; *Anon.* (1610), 1 Roll. Abr. 92, pl. 6; *Metcalfe* v. *Hodgson* (1632), Hut. 120; *Bushell's Case* (1674), 1 Mod. Rep. 119; *Hamond* v. *Howell* (1674), 1 Mod. Rep. 184; *Groenvelt* v. *Burwell* (1699), 1 Ld. Raym. 454, 468; *R.* v. *Skinner* (1772), Lofft, 55; *Taaffe* v. *Downes* (1813), 3 Moo. P. C. C. 36, n.; *Miller* v. *Hope* (1824), 2 Sh. Sc. App. 125; *Garnett* v. *Ferrand* (1827), 6 B. & C. 611; *Dicas* v. *Brougham* (*Lord*) (1833), 6 C. & P. 249; *Kendillon* v. *Maltby* (1842), Car. & M. 402 (discussed in *Munster* v. *Lamb* (1883), 11 Q. B. D. 588, C. A.); *Acland* v. *Buller* (1848), 1 Exch. 837; *Hamilton* v. *Anderson* (1858), 3 Macq. 363, H. L.; *Kemp* v. *Neville* (1861), 10 C. B. (N. S.) 523; *Thomas* v. *Churton* (1862), 2 B. & S. 475; *Fray* v. *Blackburn* (1863), 3 B. & S. 576; *Scott* v. *Stansfield* (1868), L. R. 3 Exch. 220; *Johnson* v. *Cooke* (1872), 17 Sol. Jo. 30; *Haggard* v. *Pélicier Frères*, [1892] A. C. 61, P. C.; *Anderson* v. *Gorrie*, [1895] 1 Q. B. 668, C. A.; *Law* v. *Llewellyn*, [1906] 1 K. B. 487, C. A. *Bottomley* v. *Brougham*, [1908] 1 K. B. 584.

(*y*) As to what courts are courts of record, see title COURTS, Vol. IX.,

SECT. 3. Exercise of Judicial Powers.

Reasons for protection.

669. The object of this privilege is not to protect malicious or corrupt judges, but to protect the public from the danger to the administration of justice if the persons concerned therein were subject to inquiry as to malice, or to litigation with every man whom their decisions might offend. It is necessary that such persons should be permitted to administer the law not only independently and freely and without favour, but also without fear (*z*).

Essentials to protection.

670. To entitle any person to this protection, the proceedings out of which the action arises must be the judicial proceedings of a tribunal which is, in the eyes of the law, a court (*a*). The protection applies to all courts of justice and to certain other courts having similar attributes (*b*). Thus, among courts of justice it has been applied not only to the superior courts (*c*), but also to inferior courts of record (*d*) and to inferior courts of justice not of record (*e*). The

pp. 9, 10; compare title LIBEL AND SLANDER, Vol. XVIII., pp. 679, 680. As to the operation of this rule, see *Bonham's Case* (1610), 8 Co. Rep. 114 a (severely commented on in *Groenvelt* v. *Burwell* (1699), 1 Ld. Raym. 454, 468); *Gray* v. *Cookson* (1812), 16 East, 13; *Basten* v. *Carew* (1825), 3 B. & C. 649; *Aldridge* v. *Haines* (1831), 2 B. & Ad. 395; *Ashcroft* v. *Bourne* (1832), 3 B. & Ad. 684; *Kemp* v. *Neville* (1861), 10 C. B. (N. S.) 523; and see *Besébé* v. *Matthews* (1867), L. R. 2 C. P. 684.

(*z*) As to the objects of judicial privilege, see *Taaffe* v. *Downes* (1813), C. P. Ireland, reported in *Calder* v. *Halket* (1839), 3 Moo. P. C. C. 28, 36, n.; *Yates* v. *Lansing* (1809), 5 Johnson's Reports, 282, *per* KENT, C.J., at pp. 286 *et seq.*; *Miller* v. *Hope* (1824), 2 Sh. Sc. App. 125, *per* Lord GIFFORD, at p. 143, "no man but a beggar or a fool would be a judge"; *Scott* v. *Stansfield* (1868), L. R. 3 Exch. 220, *per* KELLY, C.B., at p. 223; *Bottomley* v. *Brougham*, [1908] 1 K. B. 584, *per* CHANNELL, J., at p. 587.

(*a*) *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson*, [1892] 1 Q. B. 431, C. A., *per* FRY, L.J., at p. 447; and see title LIBEL AND SLANDER, Vol. XVIII., pp. 679 *et seq.*

(*b*) *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson*, *supra*, *per* Lord ESHER, M.R., at p. 442.

(*c*) *E.g.*, the Lord Chancellor (*Dicas* v. *Brougham* (*Lord*) (1833), 6 C. & P. 249); the judges of the King's Bench (*Taaffe* v. *Downes*, *supra*; *Fray* v. *Blackburn* (1863), 3 B. & S. 576); the court of the County Palatine of Durham (*Peacock* v. *Bell and Kendal* (1667), 1 Saund. 74); the sheriff-substitute in Scotland (*Hamilton* v. *Anderson* (1858), 3 Macq. 363, H. L.).

(*d*) *E.g.*, the supreme court of a colony (*Anderson* v. *Gorrie*, [1895] 1 Q. B. 668, C. A.); the Lord Mayor and Recorder of London (*Bushell's Case* (1674), 1 Mod. Rep. 119); county court judges (*Johnson* v. *Cooke* (1872), 17 Sol. Jo. 30; *Scott* v. *Stansfield*, *supra*); the sheriff of York holding a court of record (*Metcalfe* v. *Hodgson* (1632), Hut. 120, in which the general proposition was laid down that inferior courts of record are entitled to the same exemption as superior courts); the chancellor of the University of Oxford (*Kemp* v. *Neville* *supra*); the commissioners of a court of requests (*Aldridge* v. *Haines*, *supra*); the Royal College of Physicians exercising a power of fine and imprisonment against practitioners (*Groenvelt* v. *Burwell*, *supra*, dissenting from *Bonham's Case*, *supra*); and justices of the peace (*Law* v. *Llewellyn*, [1906] 1 K. B. 487; see title MALICIOUS PROSECUTION AND PROCEDURE, Vol. XIX., p. 672, note (*p*)). The special position of justices of the peace is dealt with hereafter (see pp. 332, 333, *post*), but they have been entitled to some measure of judicial privilege since the middle of the fifteenth century; see Y. B. 9 Edw. 4 (1469) and Y. B. 21 Edw. 4 (1481).

(*e*) *E.g.*, the sheriff holding the old county courts (*Tinsley* v. *Massa* (1827), Mood. & M. 52; *Tunno* v. *Morris* (1835), 2 Cr. M. & R. 298);

protection is also applied to analogous tribunals other than courts of justice (*f*), if the case is one of an authorised inquiry before a tribunal acting judicially (*g*). It is not, however, sufficient that the tribunal should be acting judicially, it must also be a court or authorised tribunal (*h*).

SUB-SECT. 2.—*Limits of Protection.*

Proceedings to which the protection applies.

671. This protection applies only to the judicial proceedings as contrasted with administrative or ministerial proceedings (*i*); and where a judge acts both judicially and ministerially or administratively, the protection is not afforded to acts done in the latter capacity (*k*). Thus, the act of hearing and determining an action

the stewards of the hundred courts and courts baron (*Floyd* v. *Barker* (1607), 12 Co. Rep. 23; *Holroyd* v. *Breare* (1819), 2 B. & Ald. 473; *Bradley* v. *Carr* (1841), 3 Man. & G. 221); consuls exercising abroad the jurisdiction of the consular courts (*Haggard* v. *Pélicier Frères*, [1892] A. C. 61, P. C.); Indian magistrates (*Calder* v. *Halket* (1839), 3 Moo. P. C. C. 28, 36); members of the ecclesiastical courts (*Ackerley* v. *Parkinson* (1815), 3 M. & S. 411).

(*f*) *E.g.*, coroners (*Garnett* v. *Ferrand* (1827), 6 B. & C. 611; *Thomas* v. *Churton* (1862), 2 B. & S. 475; see title CORONERS, Vol. VIII., p. 256); members of a commission issued by a bishop under statute (*Barratt* v. *Kearns*, [1905] 1 K. B. 504, C. A.; see title ECCLESIASTICAL LAW, Vol. XI., pp. 613, 614); members of courts-martial (*Dawkins* v. *Rokeby* (*Lord*) (1866), 4 F. & F. 806; *Jekyll* v. *Moore* (*Sir John*) (1806), 6 Esp. 63; *Horne* v. *Bentinck* (*Lord F.*) (1820), 4 Moore (C. P.), 563; and see title ROYAL FORCES); commissioners of taxes (*Radnor* (*Earl*) v. *Reeve* (1801), 2 Bos. & P. 391; *Simpkin* v. *Robinson* (1881), 45 L. T. 221); the Law Society (*Lilley* v. *Roney* (1892), 61 L. J. (Q. B.) 727; see title SOLICITORS). As to the position of commissioners of bankruptcy under previous statutes, see *Bracy's Case* (1696), Comb. 390; *Gregory's Case* (1697), 5 Mod. Rep. 368; *Dyer* v. *Missing* (1775), 2 Wm. Bl. 1035; *Miller* v. *Seare* (1777), 2 Wm. Bl. 1141; *Doswell* v. *Impey* (1823), 1 B. & C. 163. Bankruptcy matters being now in the jurisdiction of the High Court, no such question arises (*Bottomley* v. *Brougham*, [1908] 1 K. B. 584). The protection applies also to select committees of either House of Parliament (*Goffin* v. *Donnelly* (1881), 6 Q. B. D. 307), for Parliament, although its duties are as a whole deliberative and legislative, and only partly judicial, is nevertheless a court (*Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson*, [1892] 1 Q. B. 431, C. A., *per* FRY, L.J., at p. 446; and see title PARLIAMENT, Vol. XXI., p. 781).

(*g*) *Barratt* v. *Kearns*, [1905] 1 K. B. 504, C. A. As to the application of the rule to tribunals "recognised by law" acting judicially, see title LIBEL AND SLANDER, Vol. XVIII., p. 680.

(*h*) *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson*, *supra*, *per* FRY, L.J., at p. 447; *Barratt* v. *Kearns*, *supra*. Thus, it would not apply to assessment committees, boards of guardians, the Inns of Court, the General Medical Council, nor to all arbitrators; see pp. 334 *et seq.*, *post*.

(*i*) Thus, while the taxation of a bill of costs by a master of the High Court is a judicial proceeding, and written statements by a solicitor in the objections lodged in the taxation are absolutely privileged (*Pedley and May* v. *Morris* (1891), 61 L. J. (Q. B.) 21), the delivery of a bill of costs to a client by a solicitor under an order of the court is not a judicial proceeding and is not so privileged (*Bruton* v. *Downes* (1859), 1 F. & F. 668); and see the cases cited in notes (*m*), (*n*), p. 326, *post*.

(*k*) A magistrate is entitled to this immunity only so far as he acts judicially, not in the exercise of other administrative discretion (*Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson*, *supra*, *per* LOPES, L.J., at p. 453). Justices of the peace when

SECT. 3. Exercise of Judicial Powers.

is a merely ministerial act, and therefore a refusal, even by a judge of a superior court (*l*), to try a case is actionable, while a wrong decision is not (*m*). Similarly, where justices of the peace make an order in their judicial capacity, and subsequently carry it out in their administrative capacity by their servants, negligence in the latter operation is actionable (*n*). Duties, however, which are partly judicial and partly ministerial, such as the duty of admitting to bail, are not severable so as to admit of liability for any part of the acts done in fulfilment thereof (*o*).

Manner of doing the act complained of.

672. Wherever protection of the exercise of judicial powers applies, it is so absolute that no allegation that the acts or words complained of were done or spoken *malâ fide*, maliciously, corruptly, or without reasonable or probable cause suffices to found an action (*p*). The protection does not, however, extend to acts purely extra-judicial or alien to the judicial duty of the defendant (*q*); and, therefore, if words complained of are not uttered in relation to judicial proceedings (*r*), the defendant is not protected.

Irrelevancy.

It is doubtful whether even the most complete irrelevancy of words spoken in court during or in relation to (*s*) judicial

acting administratively are not a court of summary jurisdiction; see title MAGISTRATES, Vol. XIX., pp. 567—569, 643, 651. It is probable that the duties of returning officers at elections are not judicial in this sense (*Cullen* v. *Morris* (1819), 2 Stark. 577; *Barnardiston* v. *Soame* (1674), 6 State Tr. 1063, 1096; *Ashby* v. *White* (1703), 1 Salk. 19).

(*l*) See *Ferguson* v. *Kinnoull* (*Earl*) (1842), 9 Cl. & Fin. 251, H. L., *per* Lord BROUGHAM, at p. 296, and *per* Lord CAMPBELL, at p. 312.

(*m*) *Ferguson* v. *Kinnoull* (*Earl*), *supra*, at p. 312 (refusal by a Presbytery of the Church of Scotland to "take the trials" of a presentee to a parish); see *Green* v. *Buccle-Churches* (*Hundred*) (1589), 1 Leon. 323; *Anon.* (1669), 1 Vent. 41; *Stirling* v. *Turner* (undated), cited in *Ferguson* v. *Kinnoull* (*Earl*), *supra*, at p. 280; *R.* v. *Canterbury* (*Archbishop*) *and London* (*Bishop*) (1812), 15 East, 117; *White* v. *Hislop* (1838), 4 M. & W. 73; *Ward* v. *Freeman* (1852), 2 I. C. L. R. 460, Ex. Ch.

(*n*) *Hardy* v. *North Riding Justices* (1886), 50 J. P. 663; see *Bradley* v. *Carr* (1841), 3 Man. & G. 221. The issue of a warrant of arrest (*Taaffe* v. *Downes* (1813), 3 Moo. P. C. C. 36, n.), or a warrant in execution (*Tinsley* v. *Nassau* (1827), Mood. & M. 52), is a judicial act.

(*o*) *Metcalfe* v. *Hodgson* (1632), Hut. 120; *Linford* v. *Fitzroy* (1849), 13 Q. B. 240, *per* Lord DENMAN, C.J., at p. 247.

(*p*) *Hamilton* v. *Anderson* (1858), 3 Macq. 363, 378, H. L.; *Fray* v. *Blackburn* (1863), 3 B. & S. 576; *Scott* v. *Stansfield* (1868), L. R. 3 Exch. 220; *Munster* v. *Lamb* (1883), 11 Q. B. D. 588, C. A.; *Anderson* v. *Gorrie*, [1895] 1 Q. B. 668, C. A. (disposing of the doubt raised in *Thomas* v. *Churton* (1862), 2 B. & S. 475, *per* COCKBURN, C.J., at p. 479); *Primrose* v. *Waterston* (1902), 4 F. (Ct. of Sess.) 783 (not following *Allardice and Boswell* v. *Robertson* (1830), 1 Dow & Cl. 495, H. L., where, at p. 515, a contrary rule had been laid down for inferior courts in Scotland by Lord WYNFORD); and see *Law* v. *Llewellyn*, [1906] 1 K. B. 487, C. A.; *Bottomley* v. *Brougham*, [1908] 1 K. B. 584.

(*q*) See *Floyd* v. *Barker* (1607), 12 Co. Rep. 23, 24. For an example of the prosecution of a judge for a political libel written by him in a purely extra-judicial pamphlet, see *Johnson's* (*Mr. Justice*) *Case* (1805), 29 State Tr. 81.

(*r*) See *Paris* v. *Levy* (1860), 9 C. B. (N. S.) 342, *per* BYLES, J., at p. 363 (where a magistrate, after the close of public business, drew the attention of a newspaper reporter to an objectionable advertisement).

(*s*) See *Law* v. *Llewellyn*, [1906] 1 K. B. 487, C. A. (observations by a

proceedings would destroy the protection (*t*); no such irrelevancy as would exempt a witness from prosecution for perjury (*a*) would have that effect (*b*). Probably the correct rule is that words are protected unless so clearly irrelevant that no man of ordinary intelligence and judgment could honestly dispute that they had no connection with the case in hand (*c*).

Act must have been within the jurisdiction.

673. If protection is claimed by a member of the court (*d*), it can only be obtained if the court was acting within its jurisdiction (*e*). This rule applies equally to superior and inferior courts (*f*), but a distinction arises between the two classes of tribunals upon a point of pleading. A superior court is, until the contrary is pleaded

magistrate after withdrawal of a criminal charge). In the case of a witness protection extends to the preparation of his proof (*Watson* v. *M'Ewan*, *Watson* v. *Jones*, [1905] A. C. 480; see title EVIDENCE, Vol. XIII., p. 588).

(*t*) See *Seaman* v. *Netherclift* (1876), 2 C. P. D. 53, C. A., *per* BRAMWELL, J., at p. 60.

(*a*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 491, 492.

(*b*) *Scott* v. *Stansfield* (1868), L. R. 3 Exch. 220; *Seaman* v. *Netherclift*, *supra*. Nor would the protection be destroyed by such irrelevancy as would entitle a party to have the words complained of struck out from an affidavit as prolix, impertinent, and scandalous (*Kennedy* v. *Hilliard* (1859), 10 I. C. L. R. 195, where all the cases as to irrelevancy are reviewed and considered by PIGOT, C.B., in an exhaustive judgment approved in *Seaman* v. *Netherclift* (1876), 1 C. P. D. 540, by Lord COLERIDGE, C.J., at p. 546, and in *Munster* v. *Lamb* (1883), 11 Q. B. D. 588, C. A., by BRETT, M.R., at p. 604). The cases considered in *Kennedy* v. *Hilliard*, *supra*, are *Beauchampe* (*Lord*) v. *Croft* (*Sir Richard*) (1497), Keil. 26; *Stanley* v. *Coursep* (or *Stanley* v. *Curson*) (1560), cited in argument in Cro. Eliz. 230, 248; *Chamberlaine's Case* (1565), cited in argument in Palm. 145; *Cutler* v. *Dixon* (1585), 4 Co. Rep. 14 b; *Buckley* v. *Wood* (1591), 4 Co. Rep. 14 b; *Brode's Case* (1595), cited in Palm. 144; *Damport* v. *Sympson* (1596), Cro. Eliz. 520; *Anfield* v. *Feverhill* (1614), 2 Bulst. 269; *Weston* v. *Dobniet* (1617), Cro. Jac. 432; *Eyres* v. *Sedgewicke* (1620), Cro. Jac. 601; *Hunter* v. *Allen* (1621), Palm. 188; *Ram* v. *Lamley* (1632), Hut. 113; *Boulton* v. *Clapham* (1639), W. Jo. 431; *Lake* v. *King* (1668), 1 Saund. 131; *Astley* v. *Young* (1759), 2 Burr. 807; *R.* v. *Skinner* (1772), Lofft, 55; *Maloney* v. *Bartley* (1812), 3 Camp. 210; *Trotman* v. *Dunn* (1815), 4 Camp. 211; *Hodgson* v. *Scarlett* (1818), 1 B. & Ald. 232; *Gildea* v. *Brien* (1821), cited in 10 I. C. L. R. 217; *Fairman* v. *Ives* (1822), 5 B. & Ald. 642; *Revis* v. *Smith* (1856), 18 C. B. 126; see also *Higginson* v. *O'Flaherty* (1854), 4 I. C. L. R. 125; *Munster* v. *Lamb*, *supra* (where the contrary *dictum* in *Kendillon* v. *Maltby* (1842), Car. & M. 402, of Lord DENMAN, C.J., at p. 409, is disapproved).

(*c*) *Primrose* v. *Waterston* (1902), 4 F. (Ct. of Sess.) 783, *per* Lord MACDONALD, at p. 793.

(*d*) It is submitted that the protection enjoyed by persons other than the judge is not affected by his excess or lack of jurisdiction, and that juries, parties, advocates and witnesses would be protected despite the absence of jurisdiction. As to the position of parties enforcing judgments which are void for lack of jurisdiction, the rule is that, if the judgment was given by a superior court, the person enforcing it is protected, but not if it was given by an inferior court; see *Moravia* v. *Sloper* (1737), Willes, 30, approved in *London Corporation* v. *Cox* (1867), L. R. 2 H. L. 339, by WILLES, J., at p. 263, not following upon this point *Gwinne* v. *Poole* (1692), 2 Lut. 935; and see note (*c*), p. 320, *ante*, and title COURTS, Vol. IX., p. 12.

(*e*) For a general statement of this rule, see the *Marshalsea Case* (1612), 10 Co. Rep. 68 b; and see the cases cited in note (*h*), p. 328, *post*.

(*f*) *Dicas* v. *Brougham* (*Lord*) (1833), 6 C. & P. 249, *per* Lord LYNDHURST, C.B., at p. 264; *Anderson* v. *Gorrie*, [1895] 1 Q. B. 668, C. A., *per* Lord ESHER, M.R., at p. 671.

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and proved, deemed to have been acting within its jurisdiction; in the case of an inferior court (other than a county court), jurisdiction must be affirmatively proved (*g*). Where the court has acted without jurisdiction the matter is said to have been *coram non judice*, the record can be traversed, and the judge has no protection (*h*).

How absence or excess of jurisdiction arises.

674. The absence or excess of jurisdiction which gives rise to liability may arise in a number of different ways:—

Where the court was improperly formed (*i*), or has exercised by delegation powers which could not be delegated (*k*);

Where it has exercised powers not within the jurisdiction of any court, as, for example, where it has convicted upon what is no crime at all (*l*), or has convicted twice for the same offence (*m*), or has inflicted an illegal punishment (*n*), or has proceeded pending a stay (*o*);

(*g*) *Peacock* v. *Bell and Kendal* (1667), 1 Saund. 74; *Trevor* v. *Wall* (1786), 1 Term Rep. 151; *Wilkins* v. *Hemsworth* (1838), 3 Nev. & P. (Q. B.) 55; *Carratt* v. *Morley* (1841), 1 Q. B. 18; title COURTS, Vol. IX., p. 12; see also *London Corporation* v. *Cox* (1867), L. R. 2 H. L. 339, *per* WILLES, J., at p. 262, where a further distinction is indicated, namely, that the judgment of the superior court, unreversed, is conclusive as to all relevant matters thereby decided (including jurisdiction), whereas that of an inferior court, involving a question of jurisdiction, is not final.

(*h*) *Bowser* v. *Colins* (1482), Y. B. 22 Edw. 4, *per* PIGOT, J., at p. 33 b; *Windham* v. *Clere* (1589), Cro. Eliz. 130 (overruled as to form of action in *Morgan* v. *Hughes* (1788), 2 Term Rep. 225); the *Marshalsea Case* (1612), 10 Co. Rep. 68 b; *Terry* v. *Huntington* (1668), Hard. 480; *Dyer* v. *Missing* (1775), 2 Wm. Bl. 1035; *Miller* v. *Seare* (1777), 2 Wm. Bl. 1141; *Crepps* v. *Durden* (1777), 2 Cowp. 640; 1 Smith, L.C. (11th ed.), p. 651 (explained in *Brittain* v. *Kinnaird* (1819), 1 Brod. & Bing. 432); *Milward* v. *Caffin* (1779), 2 Wm. Bl. 1330; *Morgan* v. *Hughes, supra*; *Amherst (Lord)* v. *Sommers (Lord)* (1788), 2 Term Rep. 372; *Jones* v. *Owen* (1823), 2 Dow. & Ry. (K. B.) 600; *Gimbert* v. *Coyney* (1825), M'Cle. & Yo. 469; *Bridget* v. *Coyney* (1827), 6 L. J. (O. S.) (M. C.) 42; *Hutchinson* v. *Lowndes* (1832), 4 B. & Ad. 118 (explained in *Kemp* v. *Neville* (1861), 10 C. B. (N. S.) 523); *Newman* v. *Hardwicke (Earl)* (1838), 8 Ad. & El. 124; *Mitchell* v. *Foster* (1840), 12 Ad. & El. 472; *Caudle* v. *Seymour* (1841), 1 Q. B. 889; *Carratt* v. *Morley* (1841), 1 Q. B. 18; *Jones* v. *Gurdon* (1842), 2 Gal. & Dav. 133; *Stevens* v. *Clark* (1842), Car. & M. 509; *George* v. *Chambers* (1843), 11 M. & W. 149; *Ward* v. *Stevenson* (1844), 1 New Sess. Cas. 162; *Newbould* v. *Coltman* (1851), 6 Exch. 189; *Lawrenson* v. *Hill* (1860), 10 I. C. L. R. 177; *Pease* v. *Chaytor* (1861), 1 B. & S. 658; *Pedley* v. *Davis* (1861), 10 C. B. (N. S.) 492; *Willis* v. *Maclachlan* (1876), 1 Ex. D. 376; *Johnston* v. *Meldon* (1891), 30 L. R. Ir. 15; *M'Creadie* v. *Thomson*, [1907] S. C. 1176. As to the limits of the jurisdiction of various courts, see titles COUNTY COURTS, Vol. VIII., pp. 405 *et seq.*; COURTS, Vol. IX., pp. 11 *et seq.*; MAGISTRATES, Vol. XIX., pp. 559 *et seq.*; MAYOR'S COURT, LONDON, Vol. XX., pp. 286 *et seq.*

(*i*) *George* v. *Chambers* (1843), 11 M. & W. 149; see *Jones* v. *Gurdon* (1842), 2 Gal. & Dav. 133.

(*k*) *Caudle* v. *Seymour, supra* (where a magistrate convicted upon depositions taken by his clerk in his absence); and see note (*t*), p. 329, *post*.

(*l*) *Ward* v. *Stevenson* (1844), 1 New Sess. Cas. 162.

(*m*) *Crepps* v. *Durden, supra*, explained in *Brittain* v. *Kinnaird, supra*.

(*n*) *Scavage* v. *Tateham* (1601), Cro. Eliz. 829; *Robson* v. *Spearman* (1820), 3 B. & Ald. 493; *Prickett* v. *Gratrex* (1846), 8 Q. B. 1020; *Clark* v.

(*o*) For note (*o*), see next page.

Where a court having a jurisdiction limited as to subject-matter (*p*) has proceeded in matters outside such subject-matter (*q*), as, for example, where it has proceeded in a matter above its competency in point of value, or after ouster of its jurisdiction by a *bonâ fide* claim of right (*r*), or has exceeded its jurisdiction in dealing with contempts (*s*);

Where some necessary condition precedent to the jurisdiction has been omitted (*t*), as where magistrates proceed without information duly laid (*a*), or issue warrants without a valid conviction (*b*); or

Where a court, having a jurisdiction limited as to area, has proceeded in matters not arising within that area (*c*).

Woods (1848), 2 Exch. 395; *Davis* v. *Capper* (1829), 10 B. & C. 28; *Edwards* v. *Ferris* (1836), 7 C. & P. 542; see *Willis* v. *Maclachlan* (1876), 1 Ex. D. 376 (where a revising barrister ejected a person from his court, not, as he had a right to do, for disturbance (see *Garnett* v. *Ferrand* (1827), 6 B. & C. 611), but in punishment for misbehaviour upon a previous occasion).

(*o*) See *Kendall* v. *Wilkinson* (1855), 4 E. & B. 680 (in which case, however, it was decided that there was no stay); see also *Ferguson* v. *Kinnoull (Earl)* (1842), 9 Cl. & Fin. 251, H. L., *per* Lord BROUGHAM, at p. 290, where he appears to be of opinion that this liability would only attach to members of inferior courts. It is submitted that there is no such distinction.

(*p*) As to this subject generally, see title COURTS, Vol. IX., pp. 11 *et seq.*

(*q*) See, *e.g.*, *Bowser* v. *Colins* (1482), Y. B. 22 Edw. 4, 30, *per* PIGOT, J., at p. 33 b; *Terry* v. *Huntington* (1668), Hard. 480, explained in *Brittain* v. *Kinnaird* (1819), 1 Brod. & Bing. 432; and see the cases cited in note (*e*), p. 330, *post.*

(*r*) As to ouster by claim of right, see titles MAGISTRATES, Vol. XIX., p. 597; TRESPASS.

(*s*) See *Mayhew* v. *Locke* (1816), 7 Taunt. 63. As to the jurisdiction of various courts in this matter, see title CONTEMPT OF COURT, ATTACHMENT, AND COMMITTAL, Vol. VII., pp. 279 *et seq.*

(*t*) *Hill* v. *Bateman* (1726), 1 Stra. 710; *Beaurain* v. *Scott* (1813), 3 Camp. 388; compare *Ackerley* v. *Parkinson* (1815), 3 M. & S. 411.

(*a*) *Windham* v. *Clere* (1589), Cro. Eliz. 130; overruled on another point in *Morgan* v. *Hughes* (1788), 2 Term Rep. 225; *Massey* v. *Johnson* (1809), 12 East, 67, *per* LE BLANC, J., at p. 82; *Caudle* v. *Seymour* (1841), 1 Q. B. 889; *Jones* v. *Gurdon* (1842), 2 Gal. & Dav. 133; *Stevens* v. *Clark* (1842), Car. & M. 509. For a case in which a magistrate has been held entitled to act without any formal charge, see *R.* v. *Wilkins*, [1907] 2 K. B. 380; and as to this subject generally, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*

(*b*) *Mahew* v. *Locke* (1816), 7 Taunt. 63; *Gimbert* v. *Coyney* (1825), M'Cle. & Yo. 469; *Hutchinson* v. *Lowndes* (1832), 4 B. & Ad. 118 (explained in *Kemp* v. *Neville* (1861), 10 C. B. (N. S.) 523); *Griffith* v. *Harries* (1837), 2 M. & W. 335; *Newman* v. *Hardwicke (Earl)* (1838), 8 Ad. & El. 124; *Newman* v. *Bendyshe* (1839), 10 Ad. & El. 11; *Mitchell* v. *Foster* (1840), 12 Ad. & El. 472; *Mason* v. *Barker* (1843), 1 Car. & Kir. 100. As to how far a magistrate defendant in such an action may protect himself by drawing up a second conviction subsequent to that which is void, or avail himself of such conviction when drawn up, see *Rogers* v. *Jones* (1824), 5 Dow. & Ry. (K. B.) 268; *Chaney* v. *Payne* (1841), 1 Q. B. 712; *Charter* v. *Greame* (1849), 3 New Sess. Cas. 382; *Fuller* v. *Brown* (1849), 3 New Sess. Cas. 603. Similarly, the excess of jurisdiction may lie in the fact that the warrant is itself bad (*Groome* v. *Forrester* (1816), 5 M. & S. 314; *Prickett* v. *Gratrex* (1846), 8 Q. B. 1020, and the cases cited in note (*n*), p. 328, *ante*; *Leary* v. *Patrick* (1850), 15 Q. B. 266; *Bessell* v. *Wilson* (1853), 1 E. & B. 489). As to mere irregularity short of invalidity, see note (*n*), p. 331, *post.*

(*c*) *Ive* v. *Stone* (1639), 1 Roll. Abr. 545, tit. Court (L.) 3; *Gwinne* v. *Poole* (1692), 2 Lut. 935.

SECT. 3. **Exercise of Judicial Powers.**

Facts collateral to main issue.

675. Many of these objections to jurisdiction involve the decision of a question of fact collateral to the main issue (*d*). The general rule is that where the jurisdiction of any tribunal depends upon facts, it has power to determine those facts (*e*); but, in some cases, the jurisdiction of an inferior court does not arise unless the facts are such as to give it jurisdiction (*f*).

Jurisdiction for the purpose of protection compared with jurisdiction for the purpose of the judgment.

In the former case a distinction exists between jurisdiction for the purpose of the validity of the judgment and for the purpose of protecting the judge (*g*). On proceedings by *certiorari*, prohibition or *habeas corpus*, the rule is that no court can give itself jurisdiction by an erroneous decision upon the collateral point (*h*), but, for the purpose of deciding whether the judge is protected, the rule "*ignorantia facti excusat*" applies, and the judge, having general jurisdiction over such matters, is protected unless he had knowledge (*i*), or means of knowledge (*k*), of the special facts which ousted his jurisdiction (*l*).

Collateral point not within inferior jurisdiction.

In those exceptional cases where the collateral point is not for the decision of the inferior court, the judge is not protected unless he has decided it rightly (*m*).

(*d*) Whether, *e.g.*, the cause of action arose within the area; whether the value of land exceeds a certain figure; whether a *bonâ fide* claim of right has been made. The preliminary point may also be one of law or of mixed fact and law, *e.g.*, whether a valid rate has been declared.

(*e*) *Cave* v. *Mountain* (1840), 1 Man. & G. 257, *per* TINDAL, C.J., at p. 261; and see *Brittain* v. *Kinnaird* (1819), 1 Brod. & Bing. 432; *R.* v. *Bolton* (1841), 1 Q. B. 66; *Allen* v. *Sharp* (1848), 2 Exch. 352; *Sommerville* v. *Mirehouse* (1860), 1 B. & S. 652; *Livingstone* v. *Westminster Corporation*, [1904] 2 K. B. 109, *per* BUCKLEY, J., at p. 119.

(*f*) See note (*m*), *infra*. The jurisdiction of courts in this, as in other matters, depends upon the statute or charter under which they act or are created; see title COURTS, Vol. IX., p. 11.

(*g*) *Johnston* v. *Meldon* (1891), 30 L. R. Ir. 15.

(*h*) *Rorke* v. *Errington* (1859), 7 H. L. Cas. 617, *per* Lord WENSLEYDALE, at pp. 630, 632; see also *Welch* v. *Nash* (1807), 8 East, 394; *Bunbury* v. *Fuller* (1853), 9 Exch. 111; *R.* v. *Nunneley* (1858), E. B. & E. 852; *R.* v. *Bolton* (1841), 1 Q. B. 66, *per* Lord DENMAN, C.J., at p. 72; compare *Brown* v. *Cocking* (1868), L. R. 3 Q. B. 672; and see title CROWN PRACTICE, Vol. X., p. 145.

(*i*) *Pease* v. *Chaytor* (1861), 1 B. & S. 658.

(*k*) That is to say, "admitted facts which the judge if he had done his duty would have known, and which facts *per se* and without drawing inferences would have shown the defect of jurisdiction" (*Johnston* v. *Meldon* (1891), 30 L. R. Ir. 15, *per* PALLES, C.B., at p. 34; see *Ive* v. *Stone* (1639), 1 Roll. Abr. 545, tit. Court (L) 3). In *Johnston* v. *Meldon*, *supra*, the words of PALLES, C.B., at pp. 34, 35, seem to mean that, where "means of knowledge" are relied upon by a plaintiff as a basis of liability, he must also prove *mala fides*, but there seems to be no other authority for this proposition.

(*l*) See *Gwinne* v. *Poole* (1692), 2 Lut. 935, 1560, and *per* POWEL, B., at p. 1567 (not followed upon another point in *Moravia* v. *Sloper* (1737), Willes, 30, where the earlier cases upon this subject are reviewed); *Lowther* v. *Radnor* (*Earl*) (1806), 8 East, 113; *Pike* v. *Carter* (1825), 10 Moore (C. P.), 376; *Calder* v. *Halket* (1839), 3 Moo. P. C. C. 28; *Houlden* v. *Smith* (1850), 14 Q. B. 841; and the cases cited in notes (*i*), (*k*), *supra*.

(*m*) Thus, in proceedings to enforce a rate, the justices must decide at their own peril whether the rate is valid, and whether the defendant is an occupier within the parish (*Milward* v. *Caffin* (1779), 2 Wm. Bl. 1330;

676. A court which has jurisdiction is protected even where it proceeds *inverso ordine* or irregularly within that jurisdiction (*n*).

Irregular proceeding within jurisdiction.

SUB-SECT. 3.—*Special Provisions as to Habeas Corpus.*

677. By the Habeas Corpus Acts, 1640 and 1679 (*o*), an exception to the rule of judicial privilege is established in favour of the paramount right of personal liberty. Any judicial officer, however high, who does any act contrary to the Habeas Corpus Act, 1640 (*p*), is liable to an action for heavy penalties at the suit of the party aggrieved or his representatives (*q*) and for treble damages (*r*). Judges of the High Court who unlawfully refuse to grant a writ of *habeas corpus* are liable to pay treble damages (*s*), and to a fine of £500, to be paid to the prisoner, if the refusal is in vacation time (*t*).

Exception to rule regarding judicial protection.

Amherst (*Lord*) v. *Sommers* (*Lord*) (1788), 2 Term Rep. 372; *Fawcett* v. *Fowlis* (1827), 7 B. & C. 394; *Weaver* v. *Price* (1832), 3 B. & Ad. 409; *Newbould* v. *Coltman* (1851), 6 Exch. 189; *Pedley* v. *Davis* (1861), 10 C. B. (N. S.) 492; *Nichols* v. *Walker and Carter* (1635), Cro. Car. 394). But the question whether the defendant is rightly liable to the rate is one for the justices' decision; they are protected if they decide it in good faith, and the objection to the rate should be tried by appeal; see *Hutchins* v. *Chambers* (1758), 1 Burr. 580; *Bonnell* v. *Beighton* (1793), 5 Term Rep. 182; *Durrant* v. *Boys* (1796), 6 Term Rep. 580; *Patchett* v. *Bancroft* (1797), 7 Term Rep. 367; *Fawcett* v. *Fowlis*, *supra*; *Marshall* v. *Pitman* (1833), 9 Bing. 595; *Birmingham* (*Churchwardens*) v. *Shaw* (1849), 10 Q. B. 868, 881 (where the distinction between the two classes of cases is explained); *Simpkin* v. *Robinson* (1881), 45 L. T. 221; *R.* v. *Simmonds* (1893), 57 J. P. 324. As to the enforcement of poor rates, see, further, p. 334, *post*.

(*n*) *Marshalsea Case* (1612), 10 Co. Rep. 68 b; *Massey* v. *Johnson* (1810), 12 East, 67; *Ackerley* v. *Parkinson* (1815), 3 M. & S. 411 (commented on in *Brittain* v. *Kinnaird* (1819), 1 Brod. & Bing. 432, by PARK, J., at p. 440); *Ratt* v. *Parkinson* (1851), 20 L. J. (M. C.) 208; *Bott* v. *Ackroyd* (1859), 5 Jur. (N. S.) 1053; *Johnson* v. *Cooke* (1872), 17 Sol. Jo. 30. It is often difficult to distinguish between cases falling under this rule and cases where an excessive exercise of power is held to amount to an excess of jurisdiction. The distinction is probably a question of degree; compare, *e.g.*, *Ackerley* v. *Parkinson*, *supra*, with *Barton* v. *Bricknell* (1850), 13 Q. B. 393, where it was held that, but for the protection afforded by the Justices Protection Act, 1848 (11 & 12 Vict. c. 44), s. 1 (see p. 333, *post*), the defendant would have been liable (see *Barton* v. *Bricknell*, *supra*, *per* COLERIDGE, J., at p. 396; and compare *Clark* v. *Woods* (1848), 2 Exch. 395).

(*o*) 16 Car. 1, c. 10; 31 Car. 2, c. 2; see titles CONSTITUTIONAL LAW, Vol. VI., p. 379, note (*c*); CROWN PRACTICE, Vol. X., pp. 44 *et seq.*

(*p*) 16 Car. 1, c. 10. This applies only to attempts to continue or re-establish the peculiar jurisdiction over life and liberty formerly exercised by the Privy Council, the Star Chamber, and certain local courts in Wales, Lancashire and elsewhere, which were abolished by the Act; see *ibid.*, ss. 1, 2, 9.

(*q*) *Ibid.*, s. 4.

(*r*) *Ibid.*, s. 5.

(*s*) *Ibid.*, s. 6. This, apparently, applies only to the offences mentioned in note (*p*), *supra*, and to cases of illegal imprisonment by Royal Warrant or by the Privy Council (Habeas Corpus Act, 1679 (31 Car. 2, c. 2), s. 6).

(*t*) *Ibid.*, s. 9. This provision seems to apply to every case of unlawful refusal of the writ.

Exercise of Judicial Powers.

General protection and liability of magistrates.

678. The position of justices of the peace when acting in the exercise of their judicial functions (*a*) and within their jurisdiction (*b*) is probably the same as that of other judges (*c*). There is no doubt that they are absolutely protected in actions for defamation (*d*) and that they have the protection of the record of the court while valid and subsisting (*e*). In other cases, subject to the special provisions mentioned below (*f*), it is doubtful whether they may not be liable for damages in respect of injury to other persons arising in consequence of any orders or other acts done in excess of their jurisdiction (*g*).

(*a*) As distinguished from administrative or merely ministerial functions; see note (*k*), p. 325, *ante*.

(*b*) As to excess of jurisdiction, see p. 333, *post*.

(*c*) This question is doubtful, owing to the wording of the Justices Protection Act, 1848 (11 & 12 Vict. c. 44), s. 1 (see p. 333, *post*), in which it is enacted that "every action against a justice of the peace for any act done in execution of his duty as a justice with respect to any matter within his jurisdiction . . . shall be an action on the case," alleging and proving that the defendant acted maliciously and without reasonable and probable cause; see, further, note (*g*), *infra*.

(*d*) See title LIBEL AND SLANDER, Vol. XVIII., p. 680.

(*e*) See note (*y*), p. 323, *ante*; Y. B. 9 Edw. 4 (1469), 3, pl. 10; Y. B. 21 Edw. 4 (1481), 67, pl. 49; *Gray* v. *Cookson* (1812), 16 East, 13; *Brittain* v. *Kinnaird* (1819), 1 Brod. & Bing. 432; *Basten* v. *Carew* (1825), 3 B. & C. 649; *Gelen* v. *Hall* (1857), 2 H. & N. 379.

(*f*) See the text, *infra*, and p. 339, *post*. As to the protection of constables and persons acting under the warrants of justices, see pp. 320, 321, *ante*.

(*g*) In favour of liability the authorities are—(1) the wording of the statute cited in note (*c*), *supra*; (2) the fact that such liability appears to have been assumed by the court in *Kirby* v. *Simpson* (1854), 10 Exch. 358 (see, however, the explanation of this case given in *Gelen* v. *Hall* (1857), 2 H. & N. 379, by WATSON, B., at p. 391), and in *Burley* v. *Bethune* (1814), 1 Marsh. 220; (3) the following *obiter dicta*, many of which will be seen to be somewhat weak:—*West* v. *Smallwood* (1838), 3 M. & W. 418, *per* Lord ABINGER, C.B., at p. 421; *Cave* v. *Mountain* (1840), 1 Man. & G. 257, *per* TINDAL, C.J., at p. 263; *Linford* v. *Fitzroy* (1849), 13 Q. B. 240, *per* Lord DENMAN, C.J., at p. 247; *Taylor* v. *Nesfield* (1854), 2 W. R. 474, *per* COLERIDGE, J.; *Kendall* v. *Wilkinson* (1855), 4 E. & B. 680, *per* Lord CAMPBELL, C.J., at p. 689; see also *Lane* v. *Santeloe* (1718), 1 Stra. 79 (not followed upon another point in *Lowfield* v. *Bancroft* (1731), 2 Stra. 910). The whole subject was fully argued and discussed, but not decided, in *Gelen* v. *Hall*, *supra*. The authorities for the proposition that justices stand in the same position as other judges are—(1) the title and object of the Justices Protection Act, 1848 (11 & 12 Vict. c. 44), which is an enabling, not a restraining, Act (*Barton* v. *Bricknell* (1850), 13 Q. B. 393, *per* COLERIDGE, J., at pp. 395, 396, and *per* ERLE, J., at p. 398; *Rat* v. *Parkinson* (1851), 20 L. J. (M. C.) 208); (2) *Gelen* v. *Hall*, *supra*, *per* POLLOCK, B., at p. 393, where he says, "The question is not whether a magistrate who, without any evidence, wilfully and maliciously convicts . . . is liable to an action, but whether a man who has really acted as a judge shall have that question tried before a jury"; quoted and approved in *Scott* v. *Stansfield* (1868), L. R. 3 Exch. 220, by BRAMWELL, B., at p. 224; (3) there is no distinction in principle between the case of a magistrate and that of any other inferior tribunal, and the absolute immunity of such tribunals was not established until after the decision in *Gelen* v. *Hall*, *supra*; see the cases cited in note (*d*), p. 324, *ante*; (4) there is no distinction in principle between an action for defamation and an

SECT. 3. Exercise of Judicial Powers.

Justices acting within their jurisdiction.

679. Justices of the peace acting within their jurisdiction are protected against actions brought for any act done by them, unless it is proved to have been done maliciously and without reasonable and probable cause (*h*).

Meaning of "acting within their jurisdiction."

The phrase "acting within their jurisdiction" means where the justices have acted with such irregularity as to be liable for exceeding their jurisdiction, but the irregularity is comparatively trivial (*i*) or, in other words, means acting just outside their jurisdiction.

Justices acting without jurisdiction.

680. A lesser degree of protection is afforded to justices of the peace who act in matters in which they have no jurisdiction, or who exceed their jurisdiction in such a manner that the act for which they are sued could by no possibility be justified by the statute under which they are proceeding (*j*). In such cases, no action lies for anything done under a conviction or order (*k*) until the conviction (*l*) has been quashed; and no action lies for anything done under a warrant to ensure appearance unless the conviction or order (if any) has been quashed, or, if a previous summons to

other, the object of the privilege being to secure the independence of the courts (see *Law* v. *Llewellyn*, [1906] 1 K. B. 487, C. A., and the cases cited in note (*z*), p. 324, *ante*); (5) there is (with the possible exception of *Lane* v. *Santeloe* (1718), 1 Stra. 79; not followed upon another point in *Lowfield* v. *Bancroft* (1731), 2 Stra. 910) no recorded case of a magistrate being held liable when acting within his jurisdiction.

(*h*) Justices Protection Act, 1848 (11 & 12 Vict. c. 44), s. 1; and see title MAGISTRATES, Vol. XIX., pp. 556, 557 646, note (*h*).

(*i*) The Justices Protection Act, 1848 (11 & 12 Vict. c. 44), "is one for the protection of justices and therefore assumes that the justice has been guilty of some irregularity or he would not need protection" (*Barton* v. *Bricknell* (1850), 13 Q. B. 393, *per* COLERIDGE, J., at p. 396); see *Ratt* v. *Parkinson* (1851), 20 L. J. (M. C.) 208.

(*j*) For this explanation of the words "exceeded his jurisdiction," see *Ratt* v. *Parkinson*, *supra*, *per* JERVIS, C.J., at p. 212 (where he gives as an example for such excess the case of *Leary* v. *Patrick* (1850), 15 Q. B. 266); see *Barton* v. *Bricknell* (1850), 13 Q. B. 393; *Kendall* v. *Wilkinson* (1855), 4 E. & B. 680; *Bott* v. *Ackroyd* (1859), 5 Jur. (N. S.) 1053; *Pedley* v. *Davis* (1861), 10 C. B. (N. S.) 492; *Pease* v. *Chaytor* (1861), 1 B. & S. 658; *R.* v. *Nunneley* (1858), E. B. & E. 852. The judicial acts of a justice of the peace fall, therefore, into four classes:—(1) He may have acted wholly without jurisdiction or have so grossly exceeded his jurisdiction as to be deprived of all protection except that provided by the Justices Protection Act, 1848 (11 & 12 Vict. c. 44), s. 2 (see the text, *infra*); (2) he may have exceeded his jurisdiction in a matter not the basis of the complaint, and in such a way that his acts could have been justified if the procedure had been regular, and yet have so exceeded his jurisdiction as to be liable at common law, but entitled to the protection of the Justices Protection Act, 1848 (11 & 12 Vict. c. 44), s. 1, unless acting maliciously and without reasonable and probable cause (see note (*i*), *supra*); (3) he may have been guilty of an irregularity so slight as not to render him liable at common law or to vitiate his warrant or conviction (see p. 331, *ante*); or (4) he may have acted regularly and within his jurisdiction, and thus be entitled to full judicial protection ((*c*), p. 332, *ante*).

(*k*) See *Massey* v. *Johnson* (1810), 12 East, 67; *Gray* v. *Cookson* (1812), 16 East, 13. The necessity for quashing before action applies only where there has been a conviction, not to a mere remand warrant (*R.* v. *Isle of Ely Justices, Ex parte Gilling* (1855), 4 W. R. 13).

(*l*) The words "or order" seem to have been dropped out of the Justices Protection Act, 1848 (11 & 12 Vict. c. 44), s. 2, here.

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appear (*m*) has been duly served upon the plaintiff, unless such summons has been obeyed (*n*).

Justices issuing distress or commitment warrants.

681. No action lies against a justice who, in good faith and without collusion, issues a distress or commitment warrant upon a conviction or order made by another justice (*o*).

Where a poor rate has been made, allowed, and published, no action lies against a justice for the wrongful issue of a distress warrant on the ground of an irregularity or defect in the rate, or on the ground that the plaintiff was not liable thereto (*p*).

No action lies against a justice who has granted a distress or commitment warrant for any defect in the conviction or order upon which it was granted, if such conviction or order is confirmed on appeal (*q*).

Justices exercising discretion.

682. No action lies against a justice for anything done by him in the exercise of any discretion conferred upon him by statute (*r*).

Court in which proceedings taken.

683. No action against a justice for anything done in the execution of his office may be brought in the county court, if the justice objects (*s*); and, if any action forbidden by any of the above-mentioned provisions (*t*) is commenced in any court, the proceedings may be set aside by such court on an affidavit of the facts (*u*).

Extent of remedy of plaintiff.

684. If, in any action against a justice for acts done in the execution of his office, it is proved that the plaintiff was guilty of the offence charged, and that the punishment was not greater than the maximum allowed by law, he may not recover more than twopence for damages, and no costs may be allowed him (*a*).

SECT. 4.—*Exercise of Quasi-Judicial Powers.*

Nature of protection afforded.

685. Besides judicial persons and bodies strictly so called, there are many other persons and bodies who have authority or discretion

(*m*) This provision does not apply to a summons after conviction to show cause against a committal for default of payment of a fine (*Bessell* v. *Wilson* (1853), 1 E. & B. 489); and an appearance by counsel is an adequate appearance to a summons (*ibid.*).

(*n*) Justices Protection Act, 1848 (11 & 12 Vict. c. 44), s. 2.

(*o*) *Ibid.*, s. 3; and see title DISTRESS, Vol. XI., p. 222. The action, if any, must be brought against the justice who made the order (Justices Protection Act, 1848 (11 & 12 Vict. c. 44), s. 3).

(*p*) *Ibid.*, s. 4; and see title DISTRESS, Vol. XI., p. 212. Here also the justice must act within his jurisdiction (*R.* v. *Great Yarmouth Justices* (1850), 4 New Sess. Cas. 313, *per* PATTESON, J., at p. 315; see also note (*m*), p. 330, *ante*).

(*q*) Justices Protection Act, 1848 (11 & 12 Vict. c. 44), s. 6.

(*r*) *Ibid.*, s. 4. This provision is, however, merely declaratory of the general law, as it has been held that it applies only where the magistrate acts within his jurisdiction (*R.* v. *Great Yarmouth Justices, supra*; see also note (*b*), p. 335, *post*).

(*s*) Justices Protection Act, 1848 (11 & 12 Vict. c. 44), s. 10, as amended by the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61) (see p. 339, *post*), and the Statute Law Revision Act, 1894 (57 & 58 Vict. c. 56). As to the proper procedure for objection, see *Weston* v. *Sneyd* (1857), 1 H. & N. 703; title COUNTY COURTS, Vol. VIII., p. 491.

(*t*) See the text, *supra*.

(*u*) Justices Protection Act, 1848 (11 & 12 Vict. c. 44), s. 7.

(*a*) *Ibid.*, s. 13.

SECT. 4. Exercise of Quasi-Judicial Powers.

to decide upon matters affecting other persons (*b*). All persons exercising such *quasi*-judicial powers, and all parties, advocates, and witnesses before them (*c*), are entitled to a lesser degree of protection if the full judicial protection is not available. That is to say, in the absence of fraud, collusion, or malicious motive (*d*), they are not liable to any civil action at the suit of any person aggrieved by their decisions or by words used in the course of the proceedings (*e*).

Persons within the protection.

686. This rule extends not merely to persons exercising judicial discretion in a formal manner upon the arising of a dispute and upon evidence, but also to *quasi*-arbitrators appointed to decide matters upon their own knowledge or professional skill for the purpose of preventing disputes between the parties to a contract (*f*). Such persons are protected from all liability for negligence even at the suit of the party who employs them, unless the negligence arises in a matter outside the scope of the questions in the determination of which they owe a duty to be fair and impartial towards both parties (*g*). The case of an arbitrator appointed by the court has

(*b*) These include justices (see title MAGISTRATES, Vol. XIX., pp. 531 *et seq.*), local councils (see title LOCAL GOVERNMENT, Vol. XIX., pp. 229 *et seq.*), and other public officials exercising administrative powers, arbitrators (see title ARBITRATION, Vol. I., pp. 437 *et seq.*), and purely domestic tribunals, such as committees of clubs (see title CLUBS, Vol. IV., pp. 405 *et seq.*; and see note (*l*), p. 337, *post*).

(*c*) Witnesses and advocates are protected by the ordinary law of privilege; see title LIBEL AND SLANDER, Vol. XVIII., pp. 677 *et seq.*; and see note (*h*), p. 336, *post*.

(*d*) The only direct decision that such *quasi*-judicial tribunals are liable in case of malice being proved is *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson*, [1892] 1 Q. B. 431, C. A. (as to which see p. 324, *ante*, p. 344, *post*); but there are many *dicta*, and there is little or no doubt as to the law; see *Wills* v. *Maccarmick* (1762), 2 Wils. 148, 149; *Cullen* v. *Morris* (1819), 2 Stark. 577, *per* ABBOTT, C.J., at pp. 587 *et seq.*; *Ludbrooke* v. *Barrett* (1877), 46 L. J. (Q. B.) 798, *per* GROVE, J., at p. 800; *Stevenson* v. *Watson* (1879), 4 C. P. D. 148, *per* DENMAN, J., at p. 161; *Tullis* v. *Jacson*, [1892] 3 Ch. 441, *per* CHITTY, J., at p. 446; *Chambers* v. *Goldthorpe*, *Restell* v. *Nye*, [1901] 1 K. B. 624, C. A., *per* A. L. SMITH, M.R., at p. 633.

(*e*) *Pappa* v. *Rose* (1871), L. R. 7 C. P. 32; affirmed (1872), L. R. 7 C. P. 525, Ex. Ch.; *Tharsis Sulphur Co.* v. *Loftus* (1872), L. R. 8 C. P. 1; see the cases cited in note (*d*), *supra*; and see title LIBEL AND SLANDER, Vol. XVIII., pp. 677 *et seq.* It has been said that, after the setting aside of an award for such negligence as amounts to fraud, the arbitrator could be sued for the return of his fees as upon a total failure of consideration; see *Re Hall and Hinds* (1841), 2 Man. & G. 847, 853; title ARBITRATION, Vol. I., p. 459.

(*f*) *Chambers* v. *Goldthorpe*, *Restell* v. *Nye*, [1901] 1 K. B. 624, C. A. (compare, however, the dissentient judgment of ROMER, L.J., at pp. 642 *et seq.*). As to the circumstances in which a person occupies this position of *quasi*-arbitrator as distinguished from that of true arbitrator, see title ARBITRATION, Vol. I., p. 440, and the cases cited *ibid.*, note (*i*); see also *Carmichael* v. *Stonewood Patent Fire-proof Flooring Co.* (1911), *Times*, 30th January.

(*g*) See title ARBITRATION, Vol. I., p. 459. Instances where a defendant has been held liable are:—*Jenkins* v. *Betham* (1854), 15 C. B. 168; *Turner* v. *Goulden* (1873), L. R. 9 C. P. 57; *Saunders and Collard* v. *Broadstairs Local Board* (1890), reported in 2 Hudson on Building Contracts, 3rd ed., p. 159; *Rogers* v. *James* (1891), 8 T. L. R. 67, C. A. As to the

SECT. 4. Exercise of Quasi-Judicial Powers.

not yet been decided, but it would probably fall within the rules of complete immunity (*h*).

Rules essential to the application of the protection.

687. All persons exercising judicial or *quasi*-judicial functions must observe the following rules: (1) if the tribunal consists of several members, they must sit and deliberate together and not separately (*i*); (2) they must have due regard to the dictates of natural justice—that is to say, the members of the tribunal must not be judges in their own cause, or have any interest or bias in the matter (*k*); and (3) the parties must be afforded an opportunity of being heard (*l*).

liability of architects acting as arbitrators under a building contract, see title BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., pp. 283, 292.

(*h*) The case of an arbitrator nominated by statute appears to be analogous to that of commissioners (see note (*f*), p. 325, *ante*), where the arbitration is under the terms of a statute other than the Arbitration Act, 1889 (52 & 53 Vict. c. 49), but, where the arbitrator is not named by the statute, he would probably be upon the same footing as if appointed by the parties by submission under that Act (see title ARBITRATION, Vol. I., p. 492); see also notes (*i*), (*k*), *infra*. The position of witnesses probably depends upon whether the tribunal has power to compel their attendance or not; in the former case they enjoy complete immunity, and in the latter mere ordinary privilege; see *Moore* v. *Booth* (1797), 3 Ves. 350; *Ex parte Temple* (1814), 2 Ves. & B. 391, *per* Lord ELDON, L.C., at p. 395 (where the somewhat analogous question of freedom from arrest was considered).

(*i*) For this purpose, the nomination of overseers of the poor by justices (*R.* v. *Forrest* (1789), 3 Term Rep. 38; *Penney* v. *Slade* (1839), 7 Scott, 285), and the making of an award by arbitrators (*Stalworth* v. *Inns* (1844), 13 M. & W. 466), have been held to be judicial acts; see also title ARBITRATION, Vol. I., p. 470, note (*m*).

(*k*) Interest to disqualify the tribunal may be pecuniary or otherwise. The least pecuniary interest, however unlikely to bias the judge's mind, is fatal (*Dimes* v. *Grand Junction Canal* (*Proprietors*) (1852), 3 H. L. Cas. 759; *R.* v. *Cambridge* (*Recorder*) (1857), 8 E. & B. 637; *London and North Western Rail. Co.* v. *Lindsay* (1858), 3 Macq. 99, H. L.; *R.* v. *Gaisford* (1891), 66 L. T. 24). Indebtedness to a party is not, however, such interest (*Morgan* v. *Morgan* (1832), 1 Dowl. 611); nor is bare trusteeship (*R.* v. *Rand* (1866), L. R. 1 Q. B. 230). Non-pecuniary interest must be such as to create a real bias (*R.* v. *Rand, supra*; *R.* v. *Meyer* (1875), 1 Q. B. D. 173; *R.* v. *Gaisford, supra*; *R.* v. *London County Council, Ex parte Akkersdyk, Ex parte Fermenia*, [1892] 1 Q. B. 190); for example, see *R.* v. *Milledge* (1879), 40 L. T. 748 (membership of prosecuting sanitary authority); *R.* v. *Allan* (1864), 4 B. & S. 915 (membership of committee of prosecuting association); *Becquet* v. *Lempriere* (1830), 1 Knapp, 376, P. C. (relationship); not, however, mere membership of a prosecuting association (*Leeson* v. *General Council of Medical Education and Registration* (1889), 43 Ch. D. 366, C. A.); nor previous engagement as counsel, although it is usual in such case for a judge to withdraw (*Thellusson* v. *Rendlesham* (1859), 7 H. L. Cas. 429; see title BARRISTERS, Vol. II., p. 397); nor the prior expression of an opinion (*R.* v. *Alcock, Ex parte Chilton* (1878), 37 L. T. 829; see *R.* v. *Farrant* (1887), 20 Q. B. D. 58; *Re Empire Theatre, R.* v. *London County Council* (1894), 71 L. T. 638). As to the exceptional position of the House of Lords in regard to this rule, see *London and North Western Rail. Co.* v. *Lindsay* (1858), 3 Macq. 99, H. L. It has been held that, where the judge is interested, his mere deputy is disqualified (*Brookes* v. *Rivers* (*Earl*) (1668), Hard. 503); but not if the deputy is really an independent judge (*Ex parte Medwin* (1853), 1 E. & B. 609 (chancellor

(*l*) For note (*l*), see next page.

If the rules of natural justice are not observed, the decision will be voidable, not absolutely void (*m*). If such a decision involves a right of property, the right will be protected by injunction (*n*), or if it involves a breach of contract an action for damages may lie (*o*). If the rules of natural justice are not broken, the courts will not interfere with the judgment of any domestic tribunal acting within its jurisdiction (*p*).

of a diocese); *Dimes* v. *Grand Junction Canal* (*Proprietors*) (1852), 3 H. L. Cas. 759 (vice-chancellor)). See also the case of the Mayor of Hereford, who was "laid by the heels for sitting in judgment in a cause where he himself was lessor of the plaintiff in ejectment, though he by the charter was the sole judge of the court" (*Anon.* (1698), 1 Salk. 396, *per* HOLT, C.J.; and see the facts set out in *Wright* v. *Crump* (1702), 2 Ld. Raym. 766); see also titles INTOXICATING LIQUORS, Vol. XVIII., p. 54; MAGISTRATES, Vol. XIX., pp. 551 *et seq.* The rule is not confined to tribunals imposed by law, but applies to contractual tribunals, arbitrators or referees; see title ARBITRATION, Vol. I., pp. 478 *et seq.*; *Earl* v. *Stocker* (1692), 2 Vern. 251. In such cases the rule as to pecuniary interest is different, and it is not fatal unless there is real bias (*Bright* v. *River Plate Construction Co.*, [1900] 2 Ch. 835; *Nuttall* v. *Manchester Corporation* (1892), 8 T. L. R. 513; *Eckersley* v. *Mersey Docks and Harbour Board*, [1894] 2 Q. B. 667, C. A.); and an arbitrator may be appointed expressly to represent a party (*Ives and Barker* v. *Willans*, [1894] 2 Ch. 478, C. A.; *Scott* v. *Liverpool Corporation* (1858), 1 Giff. 216); and he may even have a further interest unknown to the other party (*Ranger* v. *Great Western Rail. Co.* (1854), 5 H. L. Cas. 72; *Jackson* v. *Barry Rail. Co.*, [1893] 1 Ch. 238, C. A.; *Hutchinson* v. *Hayward* (1866), 15 L. T. 291); unless he is actually biassed or his mind is made up (*Kemp* v. *Rose* (1858), 1 Giff. 258; *Kimberley* v. *Dick* (1871), L. R. 13 Eq. 1; *Nuttall* v. *Manchester Corporation, supra*; *Jackson* v. *Barry Rail. Co., supra*). It is possible to waive objections to an arbitrator on the ground of interest or bias (*Re Elliot and South Devon Rail. Co.* (1848), 2 De G. & Sm. 17; *Re Clout and Metropolitan and District Rail. Cos.* (1882), 46 L. T. 141); and in some cases such waiver is implied from the circumstances; see *Ellis* v. *Hopper* (1858), 3 H. & N. 766. As to the special application of these general rules to magistrates, see title MAGISTRATES, Vol. XIX., pp. 551 *et seq.*

(*l*) The rule as to the observance of the rules of natural justice applies to all courts (*Re Pollard* (1868), L. R. 2 P. C. 106), and to all domestic tribunals (*Fisher* v. *Keane* (1878), 11 Ch. D. 353; *Labouchere* v. *Wharncliffe* (*Earl*) (1879), 13 Ch. D. 346; *Dawkins* v. *Antrobus* (1881), 17 Ch. D. 615, C. A., *per* JAMES, L.J., at p. 630; *Baird* v. *Wells* (1890), 44 Ch. D. 661, *per* STIRLING, J., at p. 670; *Carmichael* v. *Stonewood Patent Fire-Proof Flooring Co.* (1911), *Times*, 30th January; see *Hope* v. *I'Anson and Weatherby* (1901), 18 T. L. R. 201, C. A., *per* STIRLING, L.J., at p. 205; and see the cases cited in note (*k*), p. 336, *ante*). As to how far waiver of this rule is possible, see *Labouchere* v. *Wharncliffe* (*Earl*), *supra*, and *Kerakoose* v. *Serle* (1844), 4 Moo. P. C. C. 459 (where it was held to be contrary to public policy that an officer of the court should be authorised to institute suits in which, by reason of a right to fees, he might have a direct personal interest).

(*m*) *Dimes* v. *Grand Junction Canal* (*Proprietors*), *supra*.

(*n*) *Fisher* v. *Keane*, *supra*; *Labouchere* v. *Wharncliffe* (*Earl*), *supra*; *Dawkins* v. *Antrobus*, *supra*; *Baird* v. *Wells*, *supra*; *Rigby* v. *Connol* (1880), 14 Ch. D. 482; compare *Osborne* v. *Amalgamated Society of Railway Servants*, [1911] 1 Ch. 540, C. A.; and see title CLUBS, Vol. IV., pp. 415 *et seq.*

(*o*) *Baird* v. *Wells*, *supra*, *per* STIRLING, J., at p. 670.

(*p*) *Manby* v. *Gresham Life Assurance Society* (1861), 29 Beav. 439; *Inderwick* v. *Snell* (1850), 2 Mac. & G. 216; *Hopkinson* v. *Exeter* (*Marquis*) (1867), L. R. 5 Eq. 63. The courts have no appellate jurisdiction over

Part III.—Statutory Protection.

SECT. 1. **In General.**

SECT. 1.—*In General.*

General provisions as to private and public Acts.

688. There are a large number of statutes, public and private (*q*), which contain provisions protecting certain persons, usually public authorities, against legal proceedings (*r*) by (1) a brief period of limitation (*s*); (2) a right to tender amends (*t*); (3) specially advantageous terms as to costs (*a*); and (4) a right to notice of action (*b*).

These statutes must be read in the light of two general Acts, passed in 1842 (*c*) and 1893 (*d*), the result of which is as follows.

As to public general statutes:—

All such provisions in Acts prior to the 1st January, 1894, relating to proceedings within the scope of the Act of 1893 are repealed (*e*).

All such provisions in Acts subsequent to the 31st December, 1893, are in force, but the grant by any such Act of a lesser degree of protection to a wider class of defendants does not operate as a repeal of the Act of 1893 in the matter (*f*).

As to private Acts:—

All such provisions in Acts prior to the 1st January, 1894, as relate to proceedings within the scope of the Act of 1893 are repealed if inconsistent with that Act (*g*).

All such provisions in Acts prior to the 10th August, 1842, if not

decisions of the universities or colleges (see titles COURTS, Vol. IX., pp. 149, 187; EDUCATION, Vol. XII., pp. 90 *et seq.*), if arrived at within their jurisdiction and in accordance with natural justice (*R.* v. *Grundon* (1775), 1 Cowp. 315; *Ex parte Death* (1852), 18 Q. B. 647). As to the position of the Inns of Court, see title BARRISTERS, Vol. II., pp. 361 *et seq.* As to diocesan courts, see title ECCLESIASTICAL LAW, Vol. XI., pp. 412, 505 *et seq.*; and see *Ferguson* v. *Kinnoull* (*Earl*) (1842), 9 Cl. & Fin. 251, H. L., for a comparison between the tribunals of the Church of England and the Church of Scotland.

(*g*) These are far too numerous to be mentioned here; the repealing schedule to the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), alone contains 108 public Acts of this description. For examples, see title LIMITATION OF ACTIONS, Vol. XIX., p. 177, note (*o*).

(*r*) These provisions are merely "procedural," and are therefore retrospective (*The Ydun*, [1899] P. 236, C. A.).

(*s*) See p. 346, *post*; and see title LIMITATION OF ACTIONS, Vol. XIX., p. 177.

(*t*) See p. 348, *post*.

(*a*) See p. 348, *post*.

(*b*) See p. 349, *post*; and title ACTION, Vol. I., p. 24.

(*c*) *I.e.*, Limitations of Actions and Costs Act, 1842 (5 & 6 Vict. c. 97) (frequently called "Pollock's Act").

(*d*) *I.e.*, the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61).

(*e*) *Ibid.*, s. 2 and Sched. Among the provisions so repealed are those of the Constables Protection Act, 1751 (24 Geo. 2, c. 44); see note (*i*), p. 320, *ante*. As to what are "proceedings within the scope of the Act of 1893," see pp. 339, 344 *et seq.*, *post*, the Acts so repealed, and note (*b*), p. 340, *post*.

(*f*) *Kent County Council* v. *Folkestone Corporation*, [1905] 1 K. B. 620, C. A.

(*g*) This is the general rule applying to statute law; see title STATUTES.

repealed by the Act of 1893, are repealed as to costs (*h*), and amended as to limitations (*i*) and as to notice of action (*k*).

All such provisions in Acts subsequent to the 9th August, 1842, unless repealed by the Act of 1893, are in force (*l*).

Protection of this nature may therefore now be claimed under (1) the Act of 1893; (2) a public Act subsequent to 1893, or not within the scope of the Act of 1839; (3) a private Act prior to 1842, not inconsistent with the Act of 1893, and read as amended by the Act of 1842; (4) a private Act subsequent to 1842, and, if prior to 1893, not inconsistent with the Act of 1893.

SECT. 2.—*Public Authorities Protection Act* (*m*).

SUB-SECT. 1.—*In General.*

General application.

689. The protection applies to all actions, prosecutions, or other proceedings (*n*) commenced against any person (*o*), for any act done in pursuance or execution or intended execution (*p*) of any Act of Parliament (*q*), or of any public duty (*r*), or authority, or in respect

(*h*) Limitations of Actions and Costs Act, 1842 (5 & 6 Vict. c. 97), s. 1 and see pp. 348, 349, *post.*

(*i*) Limitations of Actions and Costs Act, 1842 (5 & 6 Vict. c. 97), s. 5; and see p. 346, *post.*

(*k*) Limitations of Actions and Costs Act, 1842 (5 & 6 Vict. c 97), s. 4; and see p. 349, *post.*

(*l*) The Limitations of Actions and Costs Act, 1842 (5 & 6 Vict. c. 97), is not prospective; see *Hasker* v. *Wood* (1885), 54 L. J. (Q. B.) 419, C. A.

(*m*) Many of the cases cited in the notes to this section, namely, all those decided earlier than 1894, are decisions upon statutes repealed by, and consolidated in, the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), but it is submitted that they are still of authority.

(*n*) See pp. 344 *et seq.*, *post.*

(*o*) See p. 340, *post.*

(*p*) See p. 343, *post.* Where the protection is claimed under a private Act, a mere omission to do something which ought to be done to complete the performance of a duty is an act done in pursuance of such Act (*Jolliffe* v. *Wallasey Local Board* (1873), L. R. 9 C. P. 62; *R.* v. *Williams* (1884), 9 App. Cas. 418, P. C.); but in the interpretation of a statute incorporating a trading company only such acts as are specifically commanded, not merely authorised, are protected (*Palmer* v. *Grand Junction Rail. Co.* (1839), 4 M. & W. 749; *Carpue* v. *London and Brighton Rail. Co.* (1844), 5 Q. B. 747).

(*q*) This applies to private as well as to public Acts; see p. 341, *post.* This provision does not, however, apply to a Scottish Act containing similar provisions (Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 3), whether passed before or after 1893 (*Montgomerie & Co., Ltd.* v. *Haddington Corporation*, [1908] S. C. 6, 127; *Duncan* v. *Hamilton Magistrates* (1902), 5 F. (Ct. of Sess.) 160), or, presumably, to duties under the Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), which is not repealed by the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61); see p. 338, *ante;* and as to the Crown's foreign jurisdiction, see title CONSTITUTIONAL LAW, Vol. VI., pp. 448 *et seq.;* and see note (*n*), p. 349, *post.* The Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), does not apply to claims for compensation under the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58); see p. 346, *post.*

(*r*) See pp. 341 *et seq.*, *post.* Apparently the duty imposed by the Act must be a public duty, and the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1, must be construed as though it ran "execution of an Act of Parliament or other public duty"; see *Parker* v. *London County Council*, [1904] 2 K. B. 501, *per* CHANNELL, J., at p. 505.

SECT. 2. **Public Authorities Protection Act.**

of any alleged neglect or default in the execution of any such Act, duty, or authority (*s*).

SUB-SECT. 2.—*Persons Entitled to Protection.*

Persons who are public authorities.

690. Although the protection in terms applies to "any person" (*t*), there is authority for saying that only those persons who are in some sense public authorities are entitled to claim it (*u*). It is, however, possible that the true restriction may be rather as to the duty performed; and that, in the performance of the duties hereafter mentioned (*a*), any person is protected (*b*). This point, however, has not been definitely decided.

(*s*) Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1. For a recent case of mere default, see *Hart* v. *St. Marylebone Borough Council* (1912), 76 J. P. 257.

(*t*) Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1.

(*u*) *Christie* v. *Glasgow Corporation* (1899), 36 Sc. L. R. 694, *per* the LORD PRESIDENT and Lord MACLAREN, at p. 698; *The Ydun*, [1899] P. 236, C. A., *per* JEUNE, P., at p. 239; *Lyles* v. *Southend-on-Sea Corporation*, [1905] 2 K. B. 1, C. A., *per* VAUGHAN WILLIAMS, L.J., at pp. 12, 13; *The Johannesburg*, [1907] P. 65, *per* BARNES, P., at p. 72.

(*a*) See pp. 341 *et seq.*, *post*.

(*b*) The argument in favour of this view is as follows:—The scope of the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), must be deduced from its titles both short and long (*Fielden* v. *Morley Corporation*, [1899] 1 Ch. 1, C. A.; affirmed [1900] A. C. 133; *A.-G.* v. *Margate Pier and Harbour (Company of Proprietors)*, [1900] 1 Ch. 749; *Milford Docks Co.* v. *Milford Haven Urban District Council* (1901), 65 J. P. 483, 484, C. A.; *Ambler (Jeremiah) & Sons, Ltd.* v. *Bradford Corporation*, [1902] 2 Ch. 585, C. A.; *Tilling (T.), Ltd.* v. *Dick Kerr & Co., Ltd.*, [1905] 1 K. B. 562; compare *Middlesex Justices* v. *R.* (1884), 9 App. Cas. 757, *per* Lord SELBORNE, L.C., at p. 772); and the longer title and the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 2, show that its object was to generalise and amend certain then existing statutory protections. Among the provisions so amended a number protected mere private persons performing public duties, *e.g.*, the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 113 (arresting an offender under *ibid.*, s. 103; see *Chamberlain* v. *King* (1871), L. R. 6 C. P. 474); the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), s. 71 (arresting an offender under *ibid.*, s. 61; see *Hughes* v. *Buckland* (1846), 15 M. & W. 346); the Coinage Offences Act, 1861 (24 & 25 Vict. c. 99), s. 33 (arresting an offender under *ibid.*, s. 31); Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 267 (acting in aid of an officer). It is submitted that the wording of the short title is not sufficient to deprive these persons of the protection hitherto enjoyed. Further, in each case where protection has been denied, the defendant has been held not to be performing a public duty; see *Salisbury* v. *Gould* (1904), 68 J. P. 158 (a medical man, in private practice, giving notice of a case of small-pox); *Christie* v. *Glasgow Corporation* (1899), 36 Sc. L. R. 694 (owners of premises adjoining a highway doing repairs under notice). The terms of the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 2, and Sched., raise the question as to whether all the enactments thereby repealed are not merely repealed in so far as they apply to proceedings to which the Act applies, and are therefore still in force as to all other proceedings; see title LIMITATION OF ACTIONS, Vol. XIX., pp. 176, 177. No case has yet been decided in which the contention that any of these statutes is still in force has been urged, and if the view here suggested as to the scope of the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), is correct, the importance of this distinction is much reduced. It would, in view of this difficulty, be perhaps wiser for a defendant to plead both the Public Authorities Protection Act, 1893 (56 & 57 Vict.

SUB-SECT. 3.—*Duties the Performance of which is Protected.*

SECT. 2. Public Authorities Protection Act.

Duties in relation to the public.

691. The protection applies only to the performance of duties towards the public (*c*). These may be statutory in origin or otherwise (*d*); and they include the judicial, administrative, and executive duties of all Government officers, civil or military (*e*).

Public duties performed by public authority.

692. There are some duties which are only to be regarded as public when they are performed by a public authority (*f*). Thus, while public authorities perform public duties when acting not only in the collection of rates (*g*) and as harbour (*h*), burial (*i*), highway (*k*), education (*l*) and sanitary authorities (*m*), but also as purveyors of water (*n*) and electricity (*o*), as holders of a market (*p*)

c. 61), and any prior Act upon which, if not repealed, he would be entitled to rely; see, *e.g.*, title PRISONS, pp. 240, 241, *ante*.

(*c*) See note (*r*), p. 339, *ante*; *Walsh* v. *Southwark Borough Council* (1908), 72 J. P. 71.

(*d*) See Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), title, s. 1.

(*e*) See the wording of *ibid.*, ss. 1, 2; and see *Polley* v. *Fordham*, [1904] 2 K. B. 345 (magistrates); *Turley* v. *Daw* (1906), 94 L. T. 216 (high bailiff of county court); *M'Ternan* v. *Bennett* (1898), 1 F. (Ct. of Sess.) 333 (police constables); compare the judgment of the LORD JUSTICE-CLERK, *ibid.*, at p. 337; see also *Wilson* v. *1st Edinburgh City Royal Garrison Artillery Volunteers* (1904), 7 F. (Ct. of Sess.) 168 (volunteer regiment and colonel); *Salisbury* v. *Gould* (1904), 68 J. P. 158. Prior to the 1st January, 1894, there was no statute which protected sheriffs acting in obedience to process (see *Copland* v. *Powell* (1823), 1 Bing. 369), but it is submitted, for the reasons above stated (see note (*b*), p. 340, *ante*), that they are now entitled to protection.

(*f*) See *English* v. *Metropolitan Water Board* (1907), 23 T. L. R. 313, and the cases cited in note (*s*), p. 342, *post*.

(*g*) *M'Fadzean* v. *Glasgow Corporation* (1903), 40 Sc. L. R. 339.

(*h*) *The Ydun*, [1899] P. 236, C. A.; *Williams* v. *Mersey Docks and Harbour Board*, [1905] 1 K. B. 804, C. A.

(*i*) *Toms* v. *Clacton Urban District Council* (1898), 78 L. T. 712; see title BURIAL AND CREMATION, Vol. III., pp. 445 *et seq.*

(*k*) *Southwark and Vauxhall Water Co.* v. *Wandsworth Board of Works*, [1898] 2 Ch. 603, C. A.; *Christie* v. *Glasgow Corporation* (1899), 36 Sc. L. R. 694; *Grand Junction Waterworks Co.* v. *Hampton Urban District Council* (1899), 63 J. P. 503; *Greenwell* v. *Howell*, [1900] 1 Q. B. 535, C. A.; *Bostock* v. *Ramsey Urban Council*, [1900] 2 Q. B. 616, C. A.; *Harvey* v. *Truro Rural Council*, [1903] 2 Ch. 638; *Offin* v. *Rochford Rural Council*, [1906] 1 Ch. 342; see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 162.

(*l*) *Reid* v. *Blisland School Board* (1901), 17 T. L. R. 626; see title EDUCATION, Vol. XII., pp. 15 *et seq.*

(*m*) *Fielden* v. *Morley Corporation*, [1899] 1 Ch. 1, C. A.; affirmed [1900] A. C. 133; *Cree* v. *St. Pancras Vestry*, [1899] 1 Q. B. 693; overruled upon another point in *Bostock* v. *Ramsey Urban Council*, *supra*; *Markey* v. *Tolworth Joint Isolation Hospital District Board*, [1900] 2 Q. B. 454; *Harrington* (*Earl*) v. *Derby Corporation*, [1905] 1 Ch. 205; *Hague* v. *Doncaster Rural District Council* (1908), 100 L. T. 121.

(*n*) *Clippens Oil Co., Ltd.* v. *Edinburgh and District Water Trustees* (1905), 42 Sc. L. R. 698; see title WATER SUPPLY.

(*o*) *Chamberlain and Hookham, Ltd.* v. *Bradford Corporation* (1900), 83 L. T. 518; *Ambler* (*Jeremiah*) *& Sons, Ltd.* v. *Bradford Corporation*, [1902] 2 Ch. 585, C. A.; see title ELECTRIC LIGHTING AND POWER, Vol. XII., pp. 560 607.

(*p*) *Newcastle* (*Duke*) v. *Worksop Urban Council*, [1902] 2 Ch. 145; see title MARKETS AND FAIRS, Vol. XX., pp. 1 *et seq.*

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and as undertakers of tramways (*q*) and light railways (*r*), similar undertakings by private companies or individuals acting for their own profit, or for that of particular persons, are not the performance of public duties, notwithstanding recitals in private Acts that the undertakings are for the benefit of the public, or express statutory commands to act in pursuance of the Acts (*s*).

Absence of express statutory command is immaterial.

The public nature of such duties when undertaken by public authorities is not destroyed by the absence of any express statutory command, but is implied from the fact that the undertaking is confided by the legislature to a public authority and its profits assigned to the relief of the rates (*t*).

Who are public authorities.

For this purpose public authorities include not only municipal bodies and public officers, but also bodies rendering a public service without thought of private gain or the benefit of particular persons (*a*).

Servants and agents.

Servants and other persons acting under the mandate of a public authority, in furtherance of a public duty of such authority, are themselves performing a public duty (*b*), but an independent contractor acting under contract with the public authority is not (*c*). Nevertheless, where an Act expressly protects persons acting under the direction of a particular body, a contractor working for such body under the direction of its engineer is entitled to the protection (*d*).

Performance of contract in pursuance of public duty.

693. The performance of a specific contract made in pursuance of a public duty is not the performance of a public duty (*e*), even

(*q*) *Parker* v. *London County Council*, [1904] 2 K. B. 501; *Spittal* v. *Glasgow Corporation* (1904), 6 F. 828; *Gawley* v. *Belfast Corporation*, [1908] 2 I. R. 34, C. A.

(*r*) *Lyles* v. *Southend-on-Sea Corporation*, [1905] 2 K. B. 1, C. A.; see title TRAMWAYS AND LIGHT RAILWAYS.

(*s*) *A.-G.* v. *Margate Pier and Harbour (Company of Proprietors)*, [1900] 1 Ch. 749; *O'Brien* v. *Mitchelstown Loan Fund*, [1903] 1 I. R. 282, C. A.; *Parker* v. *London County Council*, *supra*, *per* CHANNELL, J., at pp. 504, 505; *Lyles* v. *Southend-on-Sea Corporation*, *supra*, *per* VAUGHAN WILLIAMS, L.J., at pp. 11 *et seq.*, following *Parker* v. *London County Council*, *supra*, and distinguishing *Palmer* v. *Grand Junction Rail. Co.* (1839), 4 M. & W. 749, and *Carpue* v. *London and Brighton Rail. Co.* (1844), 5 Q. B. 747; *Lanarkshire Upper Ward District Committee* v. *Airdrie and Coatbridge and District Water Trustees* (1906), 8 F. (Ct. of Sess.) 777; *English* v. *Metropolitan Water Board* (1907), 23 T. L. R. 313.

(*t*) *Lyles* v. *Southend-on-Sea Corporation*, *supra*, at p. 17.

(*a*) *The Johannesburg*, [1907] P. 65.

(*b*) *Greenwell* v. *Howell*, [1900] 1 Q. B. 535, C. A.; *Tilling* (*T.*), *Ltd.* v. *Dick Kerr & Co., Ltd.*, [1905] 1 K. B. 562, *per* WARRINGTON, J., at p. 570; and see title MASTER AND SERVANT, Vol. XX., p. 262.

(*c*) *Tilling* (*T.*), *Ltd.* v. *Dick Kerr & Co., Ltd.*, *supra*; and, therefore, the public authority is not protected for the acts of such contractor if otherwise liable (*Kent County Council* v. *Folkestone Corporation*, [1905] 1 K. B. 620, C. A.); and see title MASTER AND SERVANT, Vol. XX., pp. 264 *et seq.*

(*d*) *Newton* v. *Ellis* (1855), 5 E. & B. 115.

(*e*) *Milford Docks Co.* v. *Milford Haven Urban District Council* (1901), 65 J. P. 483, C. A.; *Clarke* v. *Lewisham District Council* (1902), 19 T. L. R. 62; *National Telephone Co., Ltd.* v. *Kingston-upon-Hull Corporation* (1903), 1 L. G. R. 777; *Sharpington* v. *Fulham Guardians*, [1904] 2 Ch. 449; *M'Phie* v. *Greenock Magistrates* (1904), 7 F. (Ct. of Sess.) 246; *Holsworthy Urban Council* v. *Holsworthy Rural Council*, [1907] 2 Ch. 62; but see *Holford* v. *Acton Urban Council*, [1898] 2 Ch. 240. As to the protection afforded by certain private Acts, see *Kent* v. *Great Western Rail. Co.* (1846),

though the defendant is a public authority and the making of such contract would have been *ultra vires* save for statutory powers (*f*); nor is the performance, even by a public authority, of acts merely incidental to the ownership of property the performance of a public duty (*g*). Similarly, the duty to respect the proprietary rights of others is not a public duty, and therefore the protection is not granted in actions for the recovery of land (*h*); but where the substance of the claim is not a disputed title to land, but a claim to resist an encroachment, the duty not to trespass upon land is one which is protected (*i*).

Acts incidental to ownership.

694. Private individuals are probably protected in the performance of duties which received protection under any statute repealed by the Act of 1893 (*k*), or of administrative duties performed with no thought of gain for themselves or others (*l*). They are probably also protected in the performance of any act under the mandate of a public authority which would have been protected if performed by the public authority itself (*m*).

Extent of protection to private individuals.

SUB-SECT. 4.—*Acts or Omissions in respect of which Protection is Afforded.*

695. The act, or omission, need not be directly justifiable, as this would reduce the protection to a nullity (*n*). It is sufficient if the defendant has a *bonâ fide* belief, even without reasonable foundation (*o*), in a state of facts which, if true, would give him a

Act or omission need not be directly justifiable.

3 C. B. 714; and see *Edwards* v. *Great Western Rail. Co.* (1851), 11 C. B. 588, where railway overcharges were within the protection; and see also *Davies* v. *Swansea Corporation* (1853), 8 Exch. 808, 812, where a breach of contract was held not protected.

(*f*) *Sharpington* v. *Fulham Guardians*, [1904] 2 Ch. 449; approved and distinguished in *Lyles* v. *Southend-on-Sea Corporation*, [1905] 2 K. B. 1, C. A.

(*g*) This appears to be the *ratio decidendi* of *Walsh* v. *Southwark Borough Council* (1908), 72 J. P. 71, where a public authority, having adopted the Public Libraries Act, 1892 (55 & 56 Vict. c. 53), injured the plaintiff's premises by negligently demolishing an old building upon their own property; see also *Edge* v. *Parker* (1828), 8 B. & C. 697.

(*h*) See *Foot* v. *Margate Corporation* (1883), 11 Q. B. D. 299, 301.

(*i*) See *Offin* v. *Rochford Rural Council*, [1906] 1 Ch. 342.

(*k*) See note (*b*), p. 340, *ante*.

(*l*) See *Christie* v. *Glasgow Corporation* (1899), 36 Sc. L. R. 694, *per* Lord MACLAREN, at p. 698; *The Johannesburg*, [1907] P. 65, *per* BARNES, P., at p. 81.

(*m*) See *Tilling* (*T.*), *Ltd.* v. *Dick Kerr & Co., Ltd.*, [1905] 1 K. B. 562, *per* WARRINGTON, J., at p. 570; but see note (*c*), p. 342, *ante*.

(*n*) *Greenway* v. *Hurd* (1792), 4 Term Rep. 553; *Pratt* v. *Hillman* (1825), 4 B. & C. 269; see *Jones* v. *Gooday* (1842), 9 M. & W. 736, *per* ALDERSON, B., at p. 745.

(*o*) This appears to be the result of the cases; see *Wedge* v. *Berkeley* (1837), 6 Ad. & El. 663; *Jones* v. *Gooday*, *supra*; *Horn* v. *Thornborough* (1849), 3 Exch. 846; *Gosden* v. *Elphick* (1849), 4 Exch. 445; *Read* v. *Coker* (1853), 13 C. B. 850, 863; *Chamberlain* v. *King* (1871), L. R. 6 C. P. 474; *Rochfort* v. *Rynd* (1881), 8 L. R. Ir. 204; compare *Cook* v. *Leonard* (1827), 6 B. & C. 351; explained in *Jones* v. *Gooday*, *supra*, at pp. 739, 743, 745, and *Charlesworth* v. *Rudgard* (1835), 1 Cr. M. & R. 896, *per curiam*, at p. 897; *Hughes* v. *Buckland* (1846), 15 M. & W. 346, *per* POLLOCK, C.B., ROLFE, B., and PARKE, B.; *Leete* v. *Hart* (1868), L. R. 3 C. P. 322, *per* BYLES, J., and KEATING, J., at p. 325; *Graham* v. *Newcastle-on-Tyne Corporation*, [1893] 1 Q. B. 643, C. A., *per* LOPES, L.J., at p. 647.

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right to act as he does (*p*); or if he acts in pursuance of his office and has an honest intention of putting the law into force (*q*). His error may be one of law (*r*), and he need not have any knowledge of the particular statute, if any, under which he acts (*s*).

Act must relate to official capacity.

He must, however, have acted *colore officii* and not for his own benefit (*t*); and the act complained of must be in execution of the duty and not merely contemporaneous with such execution (*a*). It may, however, consist of a threat to act in a particular way, where the substance of the action is the right so to act (*b*).

Act must have been *bonâ fide*.

696. In every case the defendant must have acted in good faith, and therefore actions for deceit or malicious prosecution may be commenced after the expiration of the six months' limit (*c*). But the implied "malice" requisite for defamation does not exclude the possibility of *bona fides* (*d*).

SUB-SECT. 5.—*Proceedings against which Protection is Afforded.*

Nature of proceedings within the protection.

697. Protection may be claimed before any court in the United Kingdom (*e*), and in any action, whether for legal or equitable

(*p*) *Hughes* v. *Buckland* (1846), 15 M. & W. 346, explaining *Hopkins* v. *Crowe* (1836), 4 Ad. & El. 774; *Horn* v. *Thornborough* (1849), 3 Exch. 846; *Burling* v. *Harley* (1858), 3 H. & N. 271; *Roberts* v. *Orchard* (1863), 2 H. & C. 769, Ex. Ch.; *Heath* v. *Brewer* (1864), 9 L. T. 653; *Downing* v. *Capel* (1867), L. R. 2 C. P. 461; *Leete* v. *Hart* (1868), L. R. 3 C. P. 322; explained in *Chamberlain* v. *King* (1871), L. R. 6 C. P. 474; *Griffith* v. *Taylor* (1876), 2 C. P. D. 194, C. A.; *Lea* v. *Facey* (1887), 19 Q. B. D. 352, C. A.

(*q*) *Hazeldine* v. *Grove* (1842), 3 Q. B. 997; *Booth* v. *Clive* (1851), 10 C. B. 827; *Hermann* v. *Seneschal* (1862), 13 C. B. (N. S.) 392; *Selmes* v. *Judge* (1871), L. R. 6 Q. B. 724, 728; *Wheatcroft* v. *Matlock Local Board* (1885), 52 L. T. 356; *M'Fadzean* v. *Glasgow Corporation* (1903), 40 Sc. L. R. 339.

(*r*) *Selmes* v. *Judge* (1871), L. R. 6 Q. B. 724, *per* BLACKBURN, J., at p. 728, following *Wordsworth* v. *Harley* (1830), 1 B. & Ad. 391, and *Hardwick* v. *Moss* (1861), 7 H. & N. 136; see *Weller* v. *Toke* (1808) 9 East, 364; *Hazeldine* v. *Grove*, *supra*.

(*s*) See *Read* v. *Coker* (1853), 13 C. B. 850; *Hardwick* v. *Moss* (1861), 7 H. & N. 136, overruling *Smith* v. *Hopper* (1847), 9 Q. B. 1005.

(*t*) *Irving* v. *Wilson* (1791), 4 Term Rep. 485; *Morgan* v. *Palmer* (1824), 2 B. & C. 729; *Lawton* v. *Miller* (1818) (unreported), referred to in 6 B. & C. 355; see *M'Ternan* v. *Bennett* (1898), 1 F. (Ct. of Sess.) 333, *per* Lord MACDONALD, at p. 338.

(*a*) *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson*, [1892] 1 Q. B. 431, C. A.

(*b*) *Grand Junction Waterworks Co.* v. *Hampton Urban District Council* (1899), 63 J. P. 503.

(*c*) Because there can be no *bona fides* in the commission of a fraudulent or malicious act; see *Pearson* v. *Dublin Corporation*, [1907] 2 I. R. 27, 82, C. A.; [1907] A. C. 351; *M'Ternan* v. *Bennett*, *supra*; *Keighly* v. *Bell* (1866), 4 F. & F. 763, *per* WILLES, J., at p. 793; compare *Taylor* v. *Nesfield* (1854), 3 E. & B. 724; *Kirby* v. *Simpson* (1854), 10 Exch. 358. As to actions for malicious prosecution, see title MALICIOUS PROSECUTION AND PROCEDURE, Vol. XIX., pp. 676 *et seq.*

(*d*) *Reid* v. *Blisland School Board* (1901), 17 T. L. R. 626; and see *Murray* v. *M'Swiney* (1876), 9 I. R. C. L. 545; but it is otherwise, however, in the case of express malice; see *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson*, *supra*; and see, generally, title LIBEL AND SLANDER, Vol. XVIII., pp. 608, 711 *et seq.*

(*e*) Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1.

relief, for damages, for an injunction (*f*), for a declaration of right (*g*), for more than one of such remedies (*h*), or in any other proceedings (*i*) or prosecution whatsoever (*k*). The proceedings must, however, be hostile proceedings against the person entitled to protection, and therefore do not include actions *in rem*, however much persons exercising public duties may be affected by the result (*l*), or such proceedings as claims for compensation under the Lands Clauses Consolidation Act, 1845 (*m*), or upon a *quo warranto* (*n*), the objects of which are merely to liquidate agreed damages due, or to determine a disputed right to an office.

Costs of appeals etc.

698. The protection respecting costs does not apply to appeals or to interlocutory applications (*o*).

No protection in proceedings by Government department.

699. No protection under the Act of 1893 can be claimed by any local authority or its officer in any proceedings instituted by any department of the Government (*p*).

Protection only affects tortious acts.

700. The protection is against proceedings for wrongs, and does not extend to proceedings in respect of breaches of contract or implied contract (*q*), but the substance of the action must be regarded, and the protection accorded to the defendant cannot be avoided by waiving the tort, where the substance of the claim is

(*f*) *Harrop* v. *Ossett Corporation*, [1898] 1 Ch. 525; *Holford* v. *Acton Urban Council*, [1898] 2 Ch. 240; *Southwark and Vauxhall Water Co.* v. *Wandsworth Board of Works*, [1898] 2 Ch. 603, C. A.; *Fielden* v. *Morley Corporation*, [1899] 1 Ch. 1, C. A.; affirmed, [1900] A. C. 133; and see note (*a*), p. 349, *post*.

(*g*) *Grand Junction Waterworks Co.* v. *Hampton Urban District Council* (1899), 63 J. P. 503; see *A.-G.* v. *West Ham Corporation* (1910), 26 T. L. R. 683, 684.

(*h*) *Offin* v. *Rochford Rural Council*, [1906] 1 Ch. 342.

(*i*) This word is not defined by the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), but presumably includes proceedings by counterclaim and mandamus.

(*k*) But not, apparently, penal actions; see *Humphriss* v. *Worwood* (1894), 64 L. J. (Q. B.) 437. This case, however, was decided rather upon the ground that the particular section of the statute instituting the penal action was not repealed; see *Charlesworth* v. *Rudgard* (1835), 1 Cr. M. & R. 896; and compare *Lea* v. *Facey* (1887), 19 Q. B. D. 352, C. A.

(*l*) *The Burns*, [1907] P. 137, C. A., following *The Longford* (1889), 14 P. D. 34, C. A.; see *Fletcher* v. *Wilkins* (1805), 6 East, 283, as to the old action for replevin.

(*m*) 8 & 9 Vict. c. 18; *Delany* v. *Metropolitan Board of Works* (1867), L. R. 2 C. P. 532; affirmed L. R. 3 C. P. 111, Ex. Ch.

(*n*) *R.* v. *Carter* (1904), 68 J. P. 466.

(*o*) *Ambler* (*Jeremiah*) *& Sons, Ltd.* v. *Bradford Corporation*, [1902] 2 Ch. 585, C. A., following *Fielden* v. *Morley Corporation*, *supra*.

(*p*) Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1, last paragraph. Neither of the phrases "local authority" and "department of the Government" is defined in the Act or has been the subject of judicial interpretation. Apparently the Attorney-General suing at the relation of certain ratepayers is not such a "department" (*A.-G.* v. *West Ham Corporation*, *supra*, at p. 684).

(*q*) *Milford Docks Co.* v. *Milford Haven Urban District Council* (1901), 65 J. P. 483, C. A., *per* ROMER, L.J., at p. 484; see *Holsworthy Urban Council* v. *Holsworthy Rural Council*, [1907] 2 Ch. 62, and the other cases cited in note (*e*), p. 342, *ante*.

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in tort (*r*). Actions for money had and received are substantially claims in tort, notwithstanding the fact that the old form of action in such cases was *assumpsit* (*s*). Protection may be claimed in actions for infringement of patents (*t*); but proceedings to obtain compensation under the Workmen's Compensation Act, 1906 (*u*), are not protected and do not in any way depend upon tort (*v*).

SUB-SECT. 6.—*Nature of the Protection.*

(i.) *Period of Limitation.*

General rule.

701. In all cases to which the Act of 1893 (*a*) applies the proceedings must be commenced (*b*) within six months (*c*).

Special periods.

Special periods of limitation are prescribed by many local and personal Acts; but in the case of Acts passed before the 10th August, 1842, the period is now to be read as two years or, in the case of continuing damage, one year from the end of such damage (*d*).

When time begins to run.

702. The statutory period, whether under the Act of 1893 (*a*) or any other statute, begins to run, as in the case of the Statutes of Limitation (*e*), from the date at which the cause of action arose (*f*).

Continuing cause of action.

If, however, there is a continuing cause of action, that is to say, either a repetition of acts or omissions of the same kind, each

(*r*) *Lyles* v. *Southend-on-Sea Corporation*, [1905] 2 K. B. 1, 11, 14, 18—20, C. A.

(*s*) *Midland Rail. Co.* v. *Withington Local Board* (1883), 11 Q. B. D. 788, 794, C. A.; approved in *Lyles* v. *Southend-on-Sea Corporation*, *supra*; and see *Greenway* v. *Hurd* (1792), 4 Term Rep. 553; *Waterhouse* v. *Keen* (1825), 4 B. & C. 200, distinguishing *Umphelby* v. *M'Lean* (1817), 1 B. & Ald. 42; *Selmes* v. *Judge* (1871), L. R. 6 Q. B. 724; *Cree* v. *St. Pancras Vestry*, [1899] 1 Q. B. 693; overruled in *Bostock* v. *Ramsey Urban Council*, [1900] 2 Q. B. 616, C. A., upon another point.

(*t*) *Chamberlain and Hookham, Ltd.* v. *Bradford Corporation* (1900), 83 L. T. 518.

(*u*) 6 Edw. 7, c. 58.

(*v*) *Fry* v. *Cheltenham Corporation* (1911), 81 L. J. (K. B.) 41, C. A.

(*a*) Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61).

(*b*) An action is commenced by the issue of the writ, not by service thereof on the defendant; see R. S. C., Ord. 2, r. 1; *O'Malley* v. *Kilmallock Union Guardians* (1888), 22 L. R. Ir. 326. For Scottish cases on this point, see *Alston* v. *Macdougal* (1887), 15 R. (Ct. of Sess.) 78; and *M'Ternan* v. *Bennett* (1898), 1 F. (Ct. of Sess.) 333.

(*c*) Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1 (a). It must be noted that the combined operation of this provision and of the Justices Protection Act, 1848 (11 & 12 Vict. c. 44), s. 2, which requires convictions to be quashed before any action is commenced in respect of them (see p. 333, *ante*), sometimes makes it impossible to bring an action against a justice who has exceeded his jurisdiction. The court, however, takes all possible steps to expedite the quashing; see *Re Wilson, R.* v. *Trafford* (1855), 4 W. R. 55.

(*d*) Limitations of Actions and Costs Act, 1842 (5 & 6 Vict. c. 97), s. 5. This, although itself a public general Act, is not, it is submitted, repealed by the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 2, where operating merely as an amendment of statutes of the kind referred to in the text, *supra*; and see pp. 338, 339, *ante*.

(*e*) See title LIMITATION OF ACTIONS, Vol. XIX., pp. 176 *et seq.*

(*f*) It is submitted that this is so, in spite of the contrary decision in *Turley* v. *Daw* (1906), 94 L. T. 216 (where the wording of the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), which dates the running of the period of limitation from "after the act, neglect, or default complained of," was construed strictly); see *Polley* v. *Fordham*, [1904] 2 K. B. 345, C. A.; *Roberts* v. *Read* (1812), 16 East, 215; *Gillon* v. *Boddington*

causing damage (*g*) or a new damage recurring day by day in respect of an act done once for all (*h*), the period runs from the last of such acts (*i*) or items of damage (*k*). The duration of a trespass for which an action could have been brought at the beginning of the trespass (*l*), or the duration or subsequent aggravation of damage caused by an act done once for all, is not a continuing cause of action (*m*).

Lord Campbell's Act.

703. In actions under the Fatal Accidents Act, 1846 (*n*), for the death of a person, the time runs from the injury and not from the death, the cause of action being a single one (*o*).

Declaration of right.

704. A claim for a declaration of right will not enlarge the time for proceeding, which will run from the act of which the plaintiff complains (*p*).

(1824), Ry. & M. 161; *Carey* v. *Bermondsey Borough Council* (1903), 67 J. P. 111. Cases on the Statutes of Limitation have been cited as governing the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), in *Crumbie* v. *Wallsend Local Board*, [1891] 1 Q. B. 503, C. A.; *Harrington (Earl)* v. *Derby Corporation*, [1905] 1 Ch. 205, 227; and see *Paterson* v. *Glasgow Corporation* (1908), 46 Sc. L. R. 10, *per* LORD JUSTICE-CLERK, at p. 11.

(*g*) The phrase "continuing cause of action" occurs in R. S. C., Ord. 36, r. 58, and is interpreted in *Hole* v. *Chard Union*, [1894] 1 Ch. 293, C. A., *per* LINDLEY, L.J., at pp. 295—296. It is held to be equivalent to the words in the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1 (a) ("continuance of injury or damage"); see *Harrington (Earl)* v. *Derby Corporation, supra*; *Whiteholuse* v. *Fellowes* (1861), 10 C. B. (N. S.) 765, 779, 784; *Hague* v. *Doncaster Rural District Council* (1908), 100 L. T. 121. The negligent non-performance of a duty is a new breach every day the duty is allowed to remain unperformed (*Hart* v. *St. Marylebone Borough Council* (1912), 76 J. P. 257, *per* A. T. LAWRENCE, J., at p. 259).

(*h*) See *Harrington (Earl)* v. *Derby Corporation, supra*; *A.-G.* v. *Lewes Corporation*, [1911] 2 Ch. 495.

(*i*) *Hague* v. *Doncaster Rural District Council, supra*; *Harrington (Earl)* v. *Derby Corporation, supra*; but, as to damages, compare *English* v. *Metropolitan Water Board* (1907), 23 T. L. R. 313, where, however, *Harrington (Earl)* v. *Derby Corporation, supra*, was not cited.

(*k*) Though contrary to the words of WALTON, J., in *Hague* v. *Doncaster Rural District Council, supra*, at p. 123, this appears to be the true point of departure in the cases cited in note (*g*), *supra*; and see *Barnett* v. *Woolwich Borough Council* (1910), 74 J. P. 441.

(*l*) See *Wordsworth* v. *Harley* (1830), 1 B. & Ad. 391; and see title LIMITATION OF ACTIONS, Vol. XIX., p. 52.

(*m*) *Lloyd* v. *Wigney* (1830), 6 Bing. 489; *Carey* v. *Bermondsey Borough Council, supra*; *Spittal* v. *Glasgow Corporation* (1904), 6 F. (Ct. of Sess.) 828; *Harrington (Earl)* v. *Derby Corporation, supra, per* BUCKLEY, J., at p. 227.

(*n*) 9 & 10 Vict. c. 93 (Lord Campbell's Act); see titles LIMITATION OF ACTIONS, Vol. XIX., p. 181; MASTER AND SERVANT, Vol. XX., p. 147; NEGLIGENCE, Vol. XXI., pp. 455 *et seq.*

(*o*) *Markey* v. *Tolworth Joint Isolation Hospital District Board*, [1900] 2 Q. B. 454; followed in *Williams* v. *Mersey Docks and Harbour Board*, [1905] 1 K. B. 804, C. A., and in *Gawley* v. *Belfast Corporation*, [1908] 2 I. R. 34, C. A. The Maritime Conventions Act, 1911 (1 & 2 Geo. 5, c. 27), s. 8, extends the time within which an action may be brought against a vessel or her owners under the Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), for damages for loss of life occasioned by the collision of that vessel with another from one year to two years (*The Caliph* (1912), 28 T. L. R. 597). As to the retrospective effect of the Maritime Conventions Act, 1911 (1 & 2 Geo. 5, c. 27), with regard to collisions, see *The Enterprise* (1912), 28 T. L. R. 598.

(*p*) *Offin* v. *Rochford Rural Council*, [1906] 1 Ch. 342.

SECT. 2.

Public Authorities Protection Act.

(ii.) *Tender of Amends.*

Tender of amends in proceedings within the Act of 1893.

705. In cases to which the Act of 1893 (*q*) applies, the defendant may tender a sum in satisfaction of a claim for damages (*r*), despite the general rule of law that tender is only applicable to liquidated demands (*s*); and if, despite such tender, the plaintiff proceeds with the action, the defendant may plead the tender before action as a defence, alone or together with other defences (*r*), but must, apparently, pay the money into court (*t*). If the amount awarded as damages does not exceed the tender, the defendant is entitled to judgment (*u*). Besides serving as a defence the tender may affect the question of costs (*v*).

Tender in other cases.

In other cases the terms of the special Act (if any) must be regarded.

(iii.) *Costs.*

Effect of the Act of 1893.

706. In proceedings to which the Act of 1893 (*q*) applies, a defendant who has recovered a judgment (even by consent (*a*)) is entitled (*b*) to costs taxed as between solicitor and client (*c*) upon the scale in force in the court in which the action was brought (*d*). This provision also applies to the costs of any issue or counterclaim upon which the defendant succeeds (*e*). Further, in the event of a tender or a payment into court proving sufficient to satisfy a judgment, including a judgment by consent (*f*), the defendant is entitled (*b*) to costs upon the same scale (other than the costs of any injunction in the action) as from the time of such tender or payment in (*g*).

Discretion of court not affected.

This provision does not exclude the usual discretion of the court to deprive a successful defendant of costs (*h*), or to award to the

(*q*) Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61).

(*r*) *Ibid.*, s. 1 (c).

(*s*) See *Davys* v. *Richardson* (1888), 21 Q. B. D. 202, 205, 206, C. A., and generally, as to tender, see title CONTRACT, Vol. VII., pp. 417 *et seq.*

(*t*) R. S. C., Ord. 22, r. 4. This is the general rule as to pleas of tender; but, as to statutory tenders, see *Jones* v. *Gooday* (1842), 9 M. & W. 736.

(*u*) *Griffiths* v. *Ystradyfodwg School Board* (1890), 24 Q. B. D. 307.

(*v*) See the text, *infra.*

(*a*) *Shaw* v. *Hertfordshire County Council*, [1899] 2 Q. B. 282, C. A.

(*b*) But see the cases cited in note (*h*), *infra.*

(*c*) Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1 (b). As to taxation of costs generally, see title SOLICITORS.

(*d*) *Tory* v. *Dorchester Corporation*, [1907] 1 K. B. 393.

(*e*) *Roberts* v. *Gwyrfai Rural Council*, [1899] 1 Ch. 583; *Leckhampton Quarries Co., Ltd.* v. *Ballinger and Cheltenham Rural District Council* (1905), 93 L. T. 93, C. A. This provision does not, however, apply to the costs of appeals or interlocutory proceedings; see p. 345, *ante.*

(*f*) *Shaw* v. *Hertfordshire County Council*, [1899] 2 Q. B. 282, C. A. There must be a judgment; it is not sufficient if the plaintiff takes money out of court, giving notice of discontinuance under R. S. C., Ord. 26, r. 1. In such case the defendant is entitled only to the ordinary party and party costs from the date of the payment in (*Smith* v. *Northleach Rural Council*, [1902] 1 Ch. 197).

(*g*) Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1 (c).

(*h*) *Bostock* v. *Ramsey Urban Council*, [1900] 2 Q. B. 616, C. A., affirming S. C., [1900] 1 Q. B. 357, 363, overruling *Cree* v. *St. Pancras Vestry*, [1899] 1 Q. B. 693, upon this point, and explaining *Harrop* v. *Ossett Corporation*, [1898] 1 Ch. 525; see also *East* v. *Berkshire County Council* (1911), 106 L. T. 65.

plaintiff costs of issues upon which he has succeeded (*i*) or costs unduly incurred by the defendant (*k*), or to allot the costs in cases where both parties have partly succeeded (*l*). Its effect merely is that, in the absence of an order to the contrary, the taxing master must tax as between solicitor and client (*m*).

If in the opinion of the court the defendant has not been given sufficient opportunity to make a tender of amends, it may award him his costs as between solicitor and client (*n*).

Protection in the case of other statutes.

707. Where similar protection is claimed under any other statute, its terms must be regarded (*o*). The Act of 1893 repeals all such provisions in previous public Acts (*p*); and all such provisions in Acts prior to the 10th August, 1842, whether public or private, have also been repealed (*q*).

(iv.) *Notice of Action.*

Where notice required.

708. In cases to which the Act of 1893 (*r*) applies, the plaintiff need not give any notice of action, unless such notice is required by any private Act (*s*). The plaintiff should, however, give sufficient information to enable the defendant to make a tender before action, or he may render himself liable to pay costs (*t*), although he need not do so in the case of a claim for an injunction, for otherwise the defendant would be given a period in which to do as he pleased and would stultify the remedy (*a*).

(*i*) Or of the action less the cost of certain issues, where the plaintiff has substantially succeeded (*Leckhampton Quarries Co., Ltd.* v. *Ballinger and Cheltenham Rural District Council* (1905), 93 L. T. 93, C. A.).

(*k*) See *The Johannesburg*, [1907] P. 65, 87; and see *Clippens Oil Co., Ltd.* v. *Edinburgh and District Water Trustees* (1905), 42 Sc. L. R. 698, *per* Lord KINNEAR, at p. 700, not following *Christie* v. *Glasgow Corporation* (1899), 36 Sc. L. R. 694, upon this point.

(*l*) *Smith* v. *Northleach Rural Council*, [1902] 1 Ch. 197.

(*m*) *North Metropolitan Tramways Co.* v. *London County Council*, [1898] 2 Ch. 145.

(*n*) Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1 (d), a provision which takes the place of all notice of action clauses in the Acts repealed by the statute. This power of awarding costs would probably be exercised only where the defendant had at a later stage made a sufficient payment into court. As to notice of action, see the text, *infra*. In proceedings for acts done or omitted under the Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), or any enactment thereby repealed, the court has no such power; and see note (*q*), p. 339, *ante*, As to tender of amends, see p. 348, *ante*.

(*o*) The phrase "full costs" in a statute does not convey anything more than the ordinary costs between party and party (*Avery* v. *Wood*, [1891] 3 Ch. 115, C. A.); see title SOLICITORS.

(*p*) Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 2 (d).

(*q*) Limitations of Actions and Costs Act, 1842 (5 & 6 Vict. c. 97), ss. 1, 2.

(*r*) Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61).

(*s*) The Public Authorities Protection Acts, 1893 (56 & 57 Vict. c. 61), itself does not prescribe any such notice, and by *ibid.*, s. 2 (a), repeals such provision of any public Act falling within its scope. As to notice of action generally, see title ACTION, Vol. I., pp. 24 *et seq.*

(*t*) See the text, *supra*.

(*a*) See *A.-G.* v. *Hackney Local Board* (1875), L. R. 20 Eq. 626; *Flower* v. *Low Leyton Local Board* (1877), 5 Ch. D. 347, C. A. Damages in lieu of an injunction can be awarded under the Chancery Amendment Act, (1858) 21 & 22 Vict. c. 27), s. 2 (Lord Cairns' Act), without notice of action

SECT. 2. Public Authorities Protection Act.

Where such notice is required, the period is that prescribed by the special Act, or, in case of a private Act prior in date to the 10th August, 1842, or one stating no particular period, a period of one month (*b*).

Length of notice.

SUB-SECT. 7.—*Pleading and Waiver.*

Pleading and waiver.

709. The special facts entitling the defendant to protection must be pleaded (*c*), or the court will not take notice of them (*d*); and if issue is joined upon them the jury must determine it (*e*).

The protection can, it is submitted, be waived by agreement between the parties, and the defendant may be estopped by his conduct from setting up the statutes (*f*); but protection may be claimed even after negotiations for a settlement which led the plaintiff to believe that the defendant would acknowledge liability and so cause him to postpone the bringing of his action (*g*).

Part IV.—Offences by and against Public Officers.

SECT. 1.—*Sale of Offices.*

Sale of office or salary.

710. The sale of any public office is contrary to public policy, and constitutes a misdemeanour (*h*); and the sale or alienation of salaries or pensions by certain public officers is contrary to public policy and consequently void (*i*).

having been given (*Chapman, Morsons & Co.* v. *Auckland Union Guardians* (1889), 23 Q. B. D. 294, C. A.); and see title INJUNCTION, Vol. XVII., pp. 212 *et seq.*

(*b*) Limitations of Actions and Costs Act, 1842 (5 & 6 Vict. c. 97), s. 4; and see title ACTION, Vol. I., pp. 24, 25; and compare note (*e*), *infra*.

(*c*) *Gregory* v. *Torquay Corporation*, [1911] 2 K. B. 556. The Act is a Statute of Limitation (*ibid.*); and see title LIMITATION OF ACTIONS, Vol. XIX., p. 176.

(*d*) For the form of plea, see Bullen and Leake's Precedents of Pleading, 6th ed., p. 901; and see *Gregory* v. *Torquay Corporation, supra*, as to pleading in county courts.

(*e*) *Hazeldine* v. *Grove* (1842), 3 Q. B. 997; *Kirby* v. *Simpson* (1854), 10 Exch. 358. But, if a statute requires notice of action as a condition precedent to the giving of any evidence, the judge must decide whether notice is required (*Arnold* v. *Hamel* (1854), 9 Exch. 404).

(*f*) See *Paterson* v. *Glasgow Corporation* (1908), 46 Sc. L. R. 10, *per* Lord ARDWALL, at p. 12.

(*g*) *Hewlett* v. *London County Council* (1908), 24 T. L. R. 331.

(*h*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 486.

(*i*) See titles CHOSES IN ACTION, Vol. IV., pp. 400—402; EXECUTION, Vol. XIV., pp. 94 *et seq.*, 121, 122; ROYAL FORCES. As to the appropriation of a portion of the salary of public officers for distribution in bankruptcy, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 190, 191.

SECT. 2.—*Corruption in Office, and Other Offences* (*j*).

SECT. 2. Corruption in Office, and Other Offences.

Criminal offences.

711. A great number of acts committed by or towards public officers are criminal offences either at common law or by statute. These include disclosure of official secrets or of naval or military information (*k*); extortion (*l*) and similar offences by sheriffs, undersheriffs, bailiffs, or sheriff's officers (*m*), coroners (*n*), clerks of assize, clerks of the peace, clerks of the court or their deputies or officers, and gaolers (*o*); oppression (*p*); bribery and corruption at parliamentary and municipal elections (*q*); bribery of judicial (*r*) and ministerial officers (*r*) and of members or servants of a public body (*s*); breaches of trust by public officers (*t*); obstinate refusal to serve as such (*t*); larceny by public servants (*u*); and "enormous misdemeanours tending to disturb or endanger the King's Government, or to molest or affront him in the discharge of his royal functions" (*a*). In addition to these, there are further offences, both statutory and at common law, applicable to particular officers, such as sheriffs (*b*), justices of the peace (*c*), overseers (*d*), relieving officers (*e*), gaolers and prison officers (*f*), officers in the army (*g*), post office servants (*h*), and revenue officers and collectors (*i*).

(*j*) As to the trial of offences committed abroad by public officers, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 55, 289; Criminal Jurisdiction Act, 1802 (42 Geo. 3, c. 85), ss. 1, 6; evidence in such cases may be taken on mandamus to a colonial court or by examiners; see *ibid.*, ss. 2—4; titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 387, note (*b*); EVIDENCE, Vol. XIII., pp. 609 *et seq.*; and see also titles CONSTITUTIONAL LAW, Vol. VI., p. 415; Vol. VII., p. 33; DEPENDENCIES AND COLONIES, Vol. X., pp. 532, 579.

(*k*) See titles CONSTITUTIONAL LAW, Vol. VII., pp. 30 *et seq.*; CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 480, 481; Official Secrets Act, 1911 (1 & 2 Geo. 5, c. 28).

(*l*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 481, 482 (common law offences).

(*m*) *Ibid.*, p. 482 (offences under the Statute of Westminster the First (1275), 3 Edw. 1, c. 26; the Sheriffs Act, 1887 (50 & 51 Vict. c. 55); and the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 51); see also titles COUNTY COURTS, Vol. VIII., p. 424; SHERIFFS AND BAILIFFS.

(*n*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 482; see also title CORONERS, Vol. VIII., p. 252.

(*o*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 482, 483.

(*p*) See *ibid.*, p. 483.

(*q*) See *ibid.*, p. 484; title ELECTIONS, Vol. XII., pp. 525—535.

(*r*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 484.

(*s*) See *ibid.*, pp. 484, 485.

(*t*) See *ibid.*, p. 485.

(*u*) See *ibid.*, p. 644.

(*a*) See *ibid.*, pp. 329, 330, note (*r*).

(*b*) See *ibid.*, p. 487; title SHERIFFS AND BAILIFFS.

(*c*) See title MAGISTRATES, Vol. XIX., pp. 557 *et seq.*

(*d*) See title POOR LAW, Vol. XXII., p. 530.

(*e*) See *ibid.*, pp. 541 *et seq.*

(*f*) See titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 487; PRISONS, pp. 235 *et seq.*, *ante*.

(*g*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 488; title ROYAL FORCES.

(*h*) See titles CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 488, 489, 644, 645; POST OFFICE, Vol. XXII., pp. 659 *et seq.*, 668 *et seq.*; TELEGRAPHS AND TELEPHONES.

(*i*) See titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 489; REVENUE.

Part V.—Tenure and Compensation for Abolition of Office.

SECT. 1. Tenure of Office.

SECT. 1.—*Tenure of Office.*

Tenure of office.

712. The various methods of appointment (*k*), the oaths of office (*l*), remuneration (*m*), superannuation (*n*), and tenure of office (*o*), applicable to different public officers and authorities, are dealt with elsewhere (*p*).

SECT. 2.—*Compensation for Abolition of Office.*

SUB-SECT. 1.—*In General.*

713. At common law no public officer has any right to compensation for the abolition of his office; but, when such an office is abolished by statute, it is not unusual for the legislature to grant the right. In such cases the extent of the right and the person entitled thereto must be ascertained from the particular statute (*q*). In recent years compensation has usually been granted in the manner and subject to the conditions prescribed by the Local

(*k*) See title CONSTITUTIONAL LAW, Vol. VII., pp. 19 *et seq.*; and see the titles referred to in the list of particular authorities and officers at pp. 300 *et seq.*, *ante*. For the terms of appointment to the Home Civil Service, the Army, the Navy, the Civil Service of India etc., see the "Abstract of Rules and Regulations respecting Examinations therefor" issued by the Civil Service Commissioners, which sets out the age limits, the fees, the subjects for examination, and the requirements as to health, nationality etc. The General Regulations issued on the 27th February, 1912, by the Civil Service Commissioners (and liable to alteration at any time) regulate the examinations for certain situations included in Sched. A. of the Order in Council of the 10th January, 1910. Other Orders in Council relating to the Civil Service are those of 21st May, 1855; 26th April, 1862; 4th June, 1870, and 12th August, 1907.

(*l*) See titles CONSTITUTIONAL LAW, Vol. VII., pp. 24 *et seq.*

(*m*) As to the appropriation of the salaries, half-pay, or pension of officers or clerks engaged in the Civil Service amongst their creditors, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 190, 191. As to the non-assignability of salaries or pensions of public officers, see titles CHOSES IN ACTION, Vol. IV., pp. 400 *et seq.*; EXECUTION, Vol. XIV., p. 94; and as to the consequent impracticability of obtaining satisfaction of a creditor's claim by the appointment of a receiver, see titles EXECUTION, Vol. XIV., pp. 121, 122; RECEIVERS. As to who is a "public officer" for this purpose, see cases cited in title RECEIVERS.

(*n*) As to the provision out of the public funds of money for the superannuation and pensions of the Civil Service, see title REVENUE.

(*o*) As a general rule, it may be said that all officers of the Crown are dismissible at the Crown's pleasure (see title CONSTITUTIONAL LAW, Vol. VII., pp. 80, 81), and that the members of the various statutory public authorities, for example, corporations and county councils, hold office in accordance with the terms of the charter or statute creating the authority.

(*p*) See also, generally, the titles referred to in the list of particular authorities and officers at pp. 300 *et seq.*, *ante*.

(*q*) See, for example, Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76) (repealed); Coroners Act, 1844 (7 & 8 Vict. c. 92), ss. 4, 6; Super-

Government Act, 1888 (*r*), with such variations or additions as are deemed applicable to the particular case (*a*).

SECT. 2. Compensation for Abolition of Office.

SUB-SECT. 2.—*Under the Local Government Act*, 1888.

General operative effect of compensation provisions.

714. The following provisions (*b*) apply primarily to persons whose offices were abolished or transferred upon the creation of county councils in 1888. So far as such persons are concerned, these provisions are largely, if not entirely, spent; but they are often incorporated in new enactments and in orders altering local boundaries, and are therefore still in operation (*c*).

Nature of and considerations affecting compensation.

715. Compensation must be paid to any existing officer (*d*) who suffers any direct pecuniary loss by abolition of office or by diminution or loss of fees or salary (*e*). In ascertaining its amount,

annuation Act, 1859 (22 Vict. c. 26), s. 7; Metropolitan Poor Act, 1867 (30 & 31 Vict. c. 6), s. 76; Poor Law Amendment Act, 1867 (30 & 31 Vict. c. 106), s. 20; Telegraph Act, 1868 (31 & 32 Vict. c. 110), s. 8; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 309; Metropolis Toll Bridges Act, 1877 (40 & 41 Vict. c. xcix.), s. 20; Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 120; Metropolis Management (Plumstead and Hackney) Act, 1893 (56 & 57 Vict. c. 55), s. 11; Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 81; Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37), ss. 109, 115, 119; Poor Law Officers' Superannuation Act, 1896 (59 & 60 Vict. c. 50); London Government Act, 1899 (62 & 63 Vict. c. 14), s. 30; Metropolis Water Act, 1902 (2 Edw. 7, c. 41), s. 47; Education Act, 1902 (2 Edw. 7, c. 42), Sched. II., r. 21; Superannuation Act, 1909 (9 Edw. 7, c. 10), s. 6.

(*r*) 51 & 52 Vict. c. 41, s. 120; see the text, *infra*.

(*a*) See the later statutes cited in note (*q*), p. 352, *ante*.

(*b*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 120. When the provisions referred to in the text apply, no action for damages for wrongful dismissal lies (*Clarke* v. *Lewisham Borough Council* (1903), 67 J. P. 195).

(*c*) The provisions referred to in the text are also applied by the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 81, and by the London Government Act, 1899 (62 & 63 Vict. c. 14), s. 30 (2); see also the text, *infra*.

(*d*) An "officer" is one who holds any office, place, situation, or employment (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 100, applied by Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 75 (1)). It includes all servants; see *Legg* v. *Stoke Newington Vestry* (1895), 59 J. P. 696, *per* DAY, J., at p. 697). A solicitor, who for years has been engaged, when occasion required, to transact the legal business of the authority upon the usual remuneration by way of costs is not such an officer (*Re Carpenter and Bristol Corporation*, [1907] 2 K. B. 617, C. A.; *R.* v. *Armagh Urban District Council*, [1901] 2 I. R. 28); but it is otherwise if the solicitor is appointed for the arrangement of legal matters and remunerated by a lump sum (*R.* v. *Local Government Board* (1874), L. R. 9 Q. B. 148; see also *Drew* v. *Metropolitan Board of Works* (1883), 50 L. T. 138, C. A.). A public vaccinator is not an "officer or servant" under the Poor Law Officers' Superannuation Act, 1896 (59 & 60 Vict. c. 50) (*Lawson* v. *Marlborough Union*, [1912] 2 Ch. 154). As to the position of officers of any authority whose powers are transferred, see *R.* v. *London County Council, Ex parte Norris*, [1906] 1 K. B. 346; *R.* v. *London County Council, Ex parte Scriven* (1907), 23 T. L. R. 493; compare *West* v. *Wilts County Council* (1893), 28 L. J. 745, and *R.* (*O'Malley*) v. *Westport District Council*, [1903] 2 I. R. 179, C. A.

(*e*) As to what constitutes "removal" from office, see *A.-G.* v. *Poole*

SECT. 2. Compensation for Abolition of Office.

regard must be had to the conditions of the appointment (*f*), to the nature of the office and employment, to the duration of the officer's service, to any additional emoluments (*g*) he is to receive under new conditions, and to the emoluments which he might have acquired if he had not refused to accept office under the new conditions, and generally to all the circumstances of the case. But the compensation is limited in amount to what under the statutes and rules of the Civil Service would be payable to a person on the abolition of office (*h*).

Claim for compensation.

716. The claim must be made in writing, verified by a statutory declaration, stating the whole amount received and expended by the claimant or his predecessors in office in every year during the preceding five years before the passing of the Act or order, on account of the emoluments in respect of which the claim arises, and distinguishing the offices in respect of which they have been received (*i*).

Consideration for claim and decision.

717. The authority must then consider and decide upon the claim (*k*), and inform the claimant of its decision, but before doing so it may require the claimant to give evidence on oath, and to produce all necessary documents (*l*).

Appeal.

718. An appeal from the decision of the authority lies to the Commissioners of the Treasury (*m*), whose decision is final (*n*). It

Corporation (1844), 8 Beav. 75; *R.* v. *Bridgewater Corporation* (1837), 1 Nev. & P. (K. B.) 466. Compensation for "decrease of salary" does not entitle an applicant to compensation for increase of work; his remedy is to resign (*Gray* v. *Hackney Borough Council* (1904), 2 L. G. R. 429).

(*f*) The fact that he holds office for a year only or even at pleasure does not of itself disentitle him to compensation (*R.* v. *Norwich Corporation* (1838), 8 Ad. & El. 633; *R.* v. *Harwich Corporation* (1842), 2 Q. B. 909); nor does the fact of some trivial informality in his appointment, if in fact appointed (*R.* v. *Cambridge Corporation* (1840), 12 Ad. & El. 702), nor the fact that he was appointed while the abolishing bill was before Parliament, although this may reduce the amount of his compensation to a nominal sum (*Re Lyme Regis, Ex parte Lee* (1837), 2 Nev. & P. (K. B.) 63).

(*g*) As to what are "emoluments," see *R.* v. *Postmaster-General* (1878), 3 Q. B. D. 428, C. A.; *Livingstone* v. *Westminster Corporation*, [1904] 2 K. B. 109; *R.* v. *Poor Law Board* (1871), L. R. 6 Q. B. 785; *Lawson* v. *Marlborough Union*, [1912] 2 Ch. 154.

(*h*) For the statutes referring to this subject, see title REVENUE. The authority is not bound to follow the exact course adopted by the Treasury, but must exercise its discretion by taking the whole matter and circumstances into consideration (*R.* v. *Stepney Corporation*, [1902] 1 K. B. 317). Its finding of fact cannot be reversed by the court, and a resolution of the authority after such findings cannot be rescinded by a subsequent resolution (*Livingstone* v. *Westminster Corporation, supra*).

(*i*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 120 (1), (2). The declaration is made under the Statutory Declarations Act, 1835 (5 & 6 Will. 4, c. 62); see title EVIDENCE, Vol. XIII., p. 592.

(*k*) It may be compelled to do so by mandamus if the appeal to the Treasury (see the text, *infra*) affords no adequate remedy (*R.* v. *Stepney Corporation, supra*).

(*l*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 120 (3), (5).

(*m*) As to the Commissioners of His Majesty's Treasury, see title CONSTITUTIONAL LAW, Vol. VII., pp. 100 *et seq.*

(*n*) The appeal under this statute is both as to amount and as to title

may be brought either by the claimant or, if not less than one-third of the members of the authority have subscribed a protest against the amount, by any subscriber to that protest (*o*).

Payment.

719. The compensation is payable at the date fixed by the authority, or by the Treasury in the event of an appeal. It is a specialty debt recoverable as upon a bond (*p*). When paid by a county council the compensation is payable out of the county fund as general expenses (*q*).

Suspension of compensation on new appointment.

720. When the person entitled to compensation is appointed to an office under the compensating authority, payment of the compensation is suspended during his tenure of the new office if its emoluments are equal to, or greater than, those of the old one. If they are less, he may not receive more than the difference between them (*r*).

Officers of parish council.

721. All existing officers affected by the establishment or disestablishment of a parish council are entitled to compensation as above mentioned (*s*).

SUB-SECT. 3.—*Under the Public Health Act*, 1875.

Public authorities.

722. Under the Public Health Act, 1875 (*a*), compensation is awarded by the Local Government Board (*b*) to any officer of a body entrusted with the execution of any local Act or to any officer of any sanitary authority under the Sanitary Acts thereby repealed (*c*), or to any officer of any local authority who, without receiving any equivalent, is removed from his office or deprived of all or any part of the emoluments (*d*) of his office by virtue of the Public Health Acts, 1872 (*e*) or 1875 (*f*), or any provisional order made thereunder.

(*R.* v. *Newbury Corporation* (1841), 1 Q. B. 751; *R.* v. *Sandwich Corporation* (1842), 2 Q. B. 895; *R.* v. *Sandwich Corporation* (1846), 10 Q. B. 563, 571, Ex. Ch.). An order of the Treasury may be invalid if void upon its face for excess of jurisdiction (*R.* v. *Lichfield Corporation* (1851), 16 Q. B. 781).

(*o*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 120 (4).

(*p*) *Ibid.*, s. 120 (6). An action to recover the compensation was held maintainable although the order giving rise to the claim for compensation provided that it should be paid out of such fund as the county council should direct (*West* v. *Wilts County Council* (1893), 10 T. L. R. 19).

(*q*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 120 (8); and see title LOCAL GOVERNMENT, Vol. XIX., p. 358.

(*r*) Local Government Act, 1888 (51 & 52 Vict, c. 41), s. 120 (7).

(*s*) Local Government Act, 1894 (56 & 57 Vict. c. 73); and see title LOCAL GOVERNMENT, Vol. XIX., pp. 249, 250.

(*a*) 38 & 39 Vict. c. 55.

(*b*) *Ibid.*, s. 309; and, as to the Local Government Board, see title CONSTITUTIONAL LAW, Vol. VII., pp. 103 *et seq.* It would appear from the statute that the award of compensation is discretionary; but *quære*, see *R.* v. *Local Government Board* (1874), L. R. 9 Q. B. 148. The compensation may be by way of annuity or otherwise.

(*c*) As defined in the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 4.

(*d*) As to what are emoluments, see *R.* v. *Poor Law Board* (1871), L. R. 6 Q. B. 785; *R.* v. *Postmaster-General* (1878), 3 Q. B. D. 428, C. A.

(*e*) 35 & 36 Vict. c. 79.

(*f*) 38 & 39 Vict. c. 55.

PUBLIC BATHS.

See PUBLIC HEALTH AND LOCAL ADMINISTRATION.

PUBLIC COMPANY.

See COMPANIES; CORPORATIONS.

PUBLIC DOCUMENT.

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Part I.—Public Health Authorities and Areas.

SECT. 1.—*The Public Health Acts.*

SUB-SECT. 1.—*Scope and Extent.*

(i.) *In General.*

723. The scope of the Public Health Acts (*a*) is not so restricted as their general title would seem to imply, but extends to many

The general scope as to subjects.

(*a*) These Acts (frequently referred to in this title as "the Public Health Acts") comprise the Public Health Act, 1875 (38 & 39 Vict.

SECT. 1. The Public Health Acts.

other matters of local administration, such as streets (*b*), buildings (*c*), pleasure grounds (*d*), markets (*e*), slaughter-houses (*f*), fire prevention (*g*), hackney carriages (*h*), public bathing (*i*), and sky-signs (*k*).

The Public Health Acts (*l*) deal also with sanitary authorities (*m*) and their districts, their officers (*n*), their rating (*o*) and borrowing (*p*) powers, the audit of their accounts (*q*), and other machinery of administration, including the controlling powers of the Local Government Board (*r*).

An incomplete code.

The Public Health Acts (*l*) form a code, far from complete, of the statute law relating to sanitary authorities and their powers and duties (*s*). Several matters dealt with by other enactments are included in this title.

c. 55); Public Health (Water) Act, 1878 (41 & 42 Vict. c. 25); Public Health (Interments) Act, 1879 (42 & 43 Vict. c. 31); Public Health (Fruit Pickers' Lodgings) Act, 1882 (45 & 46 Vict. c. 23); Public Health Act, 1875 (Support of Sewers) Amendment Act, 1883 (46 & 47 Vict. c. 37); Public Health (Confirmation of Byelaws) Act, 1884 (47 & 48 Vict. c. 12); Public Health (Officers) Act, 1884 (47 & 48 Vict. c. 74); Public Health (Ships, etc.) Act, 1885 (48 & 49 Vict. c. 35); Public Health (Members and Officers) Act, 1885 (48 & 49 Vict. c. 53); Housing of the Working Classes Act, 1885 (48 & 49 Vict. c. 72), ss. 7—10; Public Health (Buildings in Streets) Act, 1888 (51 & 52 Vict. c. 52); Public Health Act, 1889 (52 & 53 Vict. c. 64); Public Health (Rating of Orchards) Act, 1890 (53 & 54 Vict. c. 17); Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59); Private Street Works Act, 1892 (55 & 56 Vict. c. 57); see Short Titles Act, 1896 (59 & 60 Vict. c. 14), s. 2, Sched. II.; to which have been added the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53); Public Health Act, 1908 (8 Edw. 7, c. 6). The group is somewhat artificial. It does not include the Public Health and Local Government Conferences Act, 1885 (48 & 49 Vict. c. 22); the Public Health Act, 1896 (59 & 60 Vict. c. 19); the Public Health (Ports) Act, 1896 (59 & 60 Vict. c. 20); the Public Health Act, 1904 (4 Edw. 7, c. 16); the Public Health (Regulations as to Food) Act, 1907 (7 Edw. 7, c. 32); and the other amending Acts, namely, the Epidemic and other Diseases Prevention Act, 1883 (46 & 47 Vict. c. 59), and the Allotments Rating Exemption Act, 1891 (54 & 55 Vict. c. 33). The Infectious Disease (Notification) Acts, 1889 (52 & 53 Vict. c. 72), and 1899 (62 & 63 Vict. c. 8), and the Infectious Disease (Prevention) Act, 1890 (53 & 54 Vict. c. 34), are also not within the group.

(*b*) See title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 1 *et seq.*

(*c*) See pp. 414 *et seq.*, *post*.

(*d*) See title OPEN SPACES AND RECREATION GROUNDS, Vol. XXI., pp. 587 *et seq.*

(*e*) See title MARKETS AND FAIRS, Vol. XX., pp. 1 *et seq.*

(*f*) See pp. 553 *et seq.*, *post*.

(*g*) See title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 259; and see pp. 548 *et seq.*, *post*.

(*h*) See title STREET AND AERIAL TRAFFIC.

(*i*) See pp. 500 *et seq.*, *post*.

(*k*) See pp. 401 *et seq.*, *post*.

(*l*) See note (*a*), p. 361, *ante*.

(*m*) See pp. 372, 373, *post*.

(*n*) See titles LOCAL GOVERNMENT, Vol. XIX., pp. 272, 311, 332, 333; METROPOLIS, Vol. XX., pp. 455 *et seq.*

(*o*) See pp. 380 *et seq.*, *post*; and see title RATES AND RATING.

(*p*) See pp. 382 *et seq.*, *post*.

(*q*) See p. 387, *post*.

(*r*) See pp. 374 *et seq.*, *post*.

(*s*) This title does not deal with all the matters relating to and under

SECT. 1. The Public Health Acts.

724. The Public Health Acts (*t*) extend to England and Wales, exclusive of the administrative county of London (*u*). Many of their provisions expressly apply to urban districts (*v*) only; but means are provided whereby any powers and duties of an urban district council may be acquired by a rural district council for the whole or part of its district (*a*). Powers under certain of the Public Health Acts (*b*) can only be acquired by adoption or by an order of the central authority (*c*).

Application of provisions.

(ii.) *Public Health Acts Amendment Act*, 1890.

725. The Public Health Acts Amendment Act, 1890 (*d*), Part I., is in force in every urban and rural district (*e*); but any or all of the other Parts (*f*) may be adopted by an urban district council (*g*), and certain provisions of Part III. (*h*) may be adopted by a rural district council (*i*).

Adoption by urban or rural council.

726. Adoption must be by a resolution passed at a meeting of the council (*k*). The resolution must be published by

Method of adoption.

the jurisdiction of sanitary authorities. For matters dealt with elsewhere, see titles referred to in the list of cross references at pp. 360, 361, *ante*.

(*t*) See note (*a*), p. 361, *ante*.

(*u*) Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 2, 4; Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 2 (2); Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 2 (2). The law as to public health in the administrative county of London (see title METROPOLIS, Vol. XX., p. 393) is contained in the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), and the several London County Council (General Powers) Acts hereinafter referred to, see *e.g.*, pp. 403, 459, 461 *et seq.*, 502, 513 *et seq.*, 567, 569, 573, 608, *post*. As to local administration in London generally, see title METROPOLIS, Vol. XX., pp. 389—494.

(*v*) See the text, *infra*; and see p. 372, *post*.

(*a*) See title LOCAL GOVERNMENT, Vol. XIX., p. 332.

(*b*) See note (*a*), p. 361, *ante*.

(*c*) See Public Health (Water) Act, 1878 (41 & 42 Vict. c. 25); title WATER SUPPLY; Private Street Works Act, 1892 (55 & 56 Vict. c. 57); title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 227 *et seq.*; see title LOCAL GOVERNMENT, Vol. XIX., pp. 385 *et seq.*; and the statutes referred to in the text, *infra*.

(*d*) 53 & 54 Vict. c. 59.

(*e*) *Ibid.*, s. 2 (2).

(*f*) As to their scope, see title LOCAL GOVERNMENT, Vol. XIX., p. 385, note (*o*). As to expenses and proceedings, see *ibid.*, pp. 386, 387.

(*g*) Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 3 (1).

(*h*) The following provisions of the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), Part III., are made applicable in rural sanitary districts:—Ss. 16—18 (see title SEWERS AND DRAINS); s. 19 (see titles NUISANCE, Vol. XXI., p. 570; SEWERS AND DRAINS); s. 21 (see p. 605, *post*); s. 23 (in part) (see p. 417, *post*); s. 25 (see p. 426, *post*); s. 26 (2) (see p. 608, *post*); s. 28 (see title FOOD AND DRUGS, Vol. XV., pp. 35 *et seq.*); s. 32 (see note (*i*), p. 512, *post*); s. 33 (see p. 425, *post*); s. 47 (see title WATERS AND WATERCOURSES); s. 48 (see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 117); s. 49 (see note (*d*), p. 381, *post*).

(*i*) Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), ss. 3 (2), 50.

(*k*) *Ibid.*, s. 3 (3). One calendar month at least before the meeting, special notice of it and of the intention to propose the resolution must be given to every member of the council in the usual mode, or, where there is no such mode, by delivering the notice, signed by the clerk, to the member or left at his usual or last known place of abode in England, or forwarding

SECT. 1. The Public Health Acts.

advertisement (*l*) in the local newspapers, by being fixed to the principal doors of every church and chapel where notices are usually fixed, and by such further notification as the council may think proper. A copy must be sent to the Local Government Board in all cases, to the Board of Trade when Part II. (*m*) is adopted, and to a Secretary of State when Part. IV. is adopted (*n*). The resolution comes into operation at such time, not less than one month after the first publication of the advertisement, as may be fixed by the council, and the Parts adopted then extend to the district (*o*).

Application of provisions to rural districts by Local Government Board.

727. A rural district council may also be invested by the Local Government Board with any of the powers, rights, and liabilities which an urban council may acquire by adopting any Part of the Act (*p*). Such investment is made in the like manner and subject to the same provisions as when rural councils are invested with urban powers under the Public Health Act, 1875 (*q*). The date of the Board's declaration is substituted for the date of adoption (*p*).

(iii.) *Public Health Acts Amendment Act*, 1907.

Order of Local Government Board or Secretary of State declaring provisions in force.

728. Any part or section of the Public Health Acts Amendment Act, 1907 (*r*), may, on the application of the local authority (*s*), be declared to be in force in an urban district, or in any contributory place (*t*) within a rural district (*u*). The Secretary of State alone can make a declaratory order as to the Parts of the Act (*r*) relating to police, fire brigades, and sky-signs (*a*); and the Local Government Board alone makes an order as to all other Parts of the Act. Both the Local Government Board and the Secretary of State may cause inquiries to be held as to the exercise of the powers conferred upon them (*b*).

it by post in a prepaid letter addressed to him at such abode (Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 3 (3)).

(*l*) A copy of the advertisement is conclusive evidence of the resolution having been passed unless the contrary is shown. No objection to the effect of the resolution on the ground that preliminaries have not been complied with can be made after three months from the first publication of the advertisement (*ibid.*, s. 3 (6)).

(*m*) See title LOCAL GOVERNMENT, Vol. XIX., p. 385, note (*o*).

(*n*) Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 3 (4), (5); and see title LOCAL GOVERNMENT, Vol. XIX., p. 385, note (*o*).

(*o*) Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 3 (4).

(*p*) *Ibid.*, s. 5.

(*q*) 38 & 39 Vict. c. 55, s. 276; see title LOCAL GOVERNMENT, Vol. XIX., p. 332.

(*r*) 7 Edw. 7, c. 53. It does not apply to the administrative county of London, but *ibid.*, Part I., extends to the rest of England and Wales and Ireland, and all or any of the remaining Parts (or sections) extend to any district to which they applied (*ibid.*, s. 2 (2)); see the text, *infra*. As to the machinery of the Act, see, generally, title LOCAL GOVERNMENT, Vol. XIX., pp. 387, 388.

(*s*) The term "local authority" means an urban sanitary authority, or an urban district council or a rural district council (Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 13); see p. 372, *post*.

(*t*) As to what are contributory places, see title LOCAL GOVERNMENT, Vol. XIX., pp. 335, 336.

(*u*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 3 (1).

(*a*) *Ibid.*, s. 3 (4); see pp. 401, 549, *post*.

(*b*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 5. The section provides for the payment of the expenses of the inquiry. As to inquiries by the Local Government Board, see p. 375, *post*.

The order (*c*) may specify conditions upon which it is granted, and may declare the Part or section of the Act (*d*) which is applied to be subject to such adaptations as may be specified, a statement of which conditions and adaptations must be published in the *London Gazette* as directed by the Local Government Board or the Secretary of State (*e*).

Contents of the order.

SUB-SECT. 2.—*Construction and Savings.*

729. The Public Health Acts (*f*) are generally to be construed together as one Act (*g*); and all powers given to a local authority (*h*) under each of the Acts are deemed to be in addition to and not in derogation of any other powers conferred upon the authority by statute, law, or custom, but no person is liable to pay, except in the case of a daily penalty, more than one penalty in respect of the same offence (*i*).

Construction as one Act. Cumulative powers. Single penalty.

730. Nothing in the Public Health Acts (*f*) is to authorise any local authority (*k*), without the consent in writing of the Government department, Commissioners of Sewers, body or person concerned (*l*), to interfere with :—

Savings for :—

(*c*) Notice of intention to apply for the order must be advertised in one or more of the local newspapers once at least in two successive weeks before making the application. The order cannot be made until proof of this having been done is given, and one month has elapsed since the date of the advertisement (Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 3 (2)).

(*d*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53).

(*e*) *Ibid.*, s. 3 (3), (4). Bye-laws made under any enactment for which any provisions of the Act are substituted remain in force as if made under the corresponding provisions of the Act (*ibid.*, s. 2 (4)). As to bye-laws, see pp. 388 *et seq.*, *post.*

(*f*) For a list of the Public Health Acts, see note (*a*), p. 361, *ante.*

(*g*) Speaking broadly this is so, and the exceptions among the Acts mentioned in note (*a*), p. 361, *ante*, are the Housing of the Working Classes Act, 1885 (48 & 49 Vict. c. 72), ss. 7—10, and the Public Health (Rating of Orchards) Act, 1890 (53 & 54 Vict. c. 17) ; but the subject-matter of these enactments make their exception immaterial. With respect to the construction as one Act, see s. 1 (or s. 2) of the various Acts. The Public Health (Ports) Act, 1896 (59 & 60 Vict. c. 20), is also to be construed as one (*ibid.*, s. 2) with the Acts. The Public Health Act, 1875 (38 & 39 Vict. c. 55), and the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), consolidated and amended the Acts relating to public health in the provinces and London respectively. As to the effect of consolidating enactments, see title STATUTES.

(*h*) See p. 372, *post.*

(*i*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 341 ; Public Health (Water) Act, 1878 (41 & 42 Vict. c. 25), s. 13 ; Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 10 ; Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 11. There is a similar provision in the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 138. As to the effect of these provisions, see *Re Blake and Croydon Rural Sanitary Authority* (1886), 2 T. L. R. 336 ; *A.-G.* v. *Tod Heatley*, [1897] 1 Ch. 560, C. A. As to the vesting in urban and borough councils of powers under local Acts, see Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 10 ; and see title LOCAL GOVERNMENT, Vol. XIX., pp. 266, 267, 310, 311.

(*k*) See pp. 372 *et seq.*, *post.*

(*l*) In the case of a corporation, such consent must be expressed in writing under its common seal, and, in the case of any other body of persons, under the hand of their clerk or other duly authorised officer or agent (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 327). As to whether

SECT. 1. **The Public Health Acts.**

Admiralty and War Office;

(1) Any lands or property vested in the Admiralty or War Office (*m*);

Commissioners of Sewers;

(2) Any sluices, floodgates, sewers, groynes or sea defences, or other works made under the authority of any Commissioners of Sewers appointed by the Crown (*n*), or any sewers or other works made and used by any body or person for draining, preserving, or improving land under any local Act, or for irrigating land;

Rivers, canals etc.;

(3) Any river, canal, dock, harbour, lock, reservoir or basin (*o*), so as injuriously to affect the navigation thereon or the use thereof, or any towing-path (*p*) so as to interrupt the traffic thereof, where any body or person is by virtue of any Act entitled to navigate on or use such river, canal, dock, harbour, lock, reservoir or basin, or to receive any tolls in respect of such navigation or use (*q*);

Reservoirs etc.;

(4) Any watercourse so as injuriously to affect the supply of water to any river, canal, dock, harbour, reservoir or basin, where any such body or person could, if the Public Health Act, 1875 (*r*), had not been passed, have been entitled to prevent or be relieved against such interference (*s*);

Bridges etc.;

(5) Any bridges crossing any river, canal, dock, harbour, or basin, in cases where any body or person is authorised by any Act to navigate or use such river, canal, dock, harbour or basin, or to demand any tolls or dues in respect of the navigation thereon or use thereof; or

Docks etc.;

(6) To execute any works in, through, or under any wharves,

acquiescence may imply consent, see *A.-G.* v. *Luton Local Board of Health* (1856), 2 Jur. (N. S.) 180; *A.-G.* v. *Bradford Canal* (*Proprietors*) (1866), L. R. 2 Eq. 71; and see title INJUNCTION, Vol. XVII., p. 220.

(*m*) These Government departments seem to be referred to *ex majore cautelâ*, as otherwise the Crown is not bound by statute unless specially mentioned; see titles CONSTITUTIONAL LAW, Vol. VI., p. 409; STATUTES. The rights of the Crown are not affected by anything done under the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53); see *ibid.*, s. 12; title CONSTITUTIONAL LAW, Vol. VII., pp. 205, 206.

(*n*) See title SEWERS AND DRAINS.

(*o*) There are savings in the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), for water rights (see *ibid.*, s. 136), and for the Thames Conservators (see *ibid.*, s. 137). As to the Thames Conservators, see titles METROPOLIS, Vol. XX., pp. 413, 414; WATERS AND WATERCOURSES; as to rights to water, see titles WATER SUPPLY; WATERS AND WATERCOURSES.

(*p*) Even temporary interference, which never interrupts at any time the traffic over more than half the towing-path, may not take place without the consent required by this provision (*River Thames Conservators* v. *Walton-upon-Thames Urban District Council* (1907), 96 L. T. 555).

(*q*) No such body or person is, by reason of any transfer of powers or privileges under the Public Health Act, 1875 (38 & 39 Vict. c. 55) (see *ibid.*, ss. 10, 270, 275, 310; title LOCAL GOVERNMENT, Vol. XIX., pp. 311, 334), deprived of any powers or privileges vested in them by any Act (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 330). As to the power of any such body or person to alter and divert sewers, drains, and pipes of a local authority, see *ibid.*, ss. 331, 333; title SEWERS AND DRAINS.

(*r*) 38 & 39 Vict. c. 55.

(*s*) There is also a saving for water rights generally, so that no reservoir, canal, river, or stream, or its feeders, or the water therein, may be injuriously affected without the consent of the body or person interested (*ibid.*, s. 332; and see title WATER SUPPLY).

quays, docks, harbours or basins to the exclusive use of which any body or person by any Act is entitled, or for the use of which any body or person by any Act may demand tolls (*a*).

Notice of works, and reference to arbitration.

731. Where matters or things proposed to be done by a local authority, for which consent is not required (*b*), interfere with the improvement of any such river, canal, dock, harbour, lock, reservoir, basin (*c*) or towing-path, or with any works belonging to such river, canal, dock, harbour or basin, or with any land necessary for the enjoyment or improvement thereof, the local authority must give notice (*d*) to the body or person concerned, and any difference between them must be referred to arbitration (*e*), the result of which is final (*f*).

When works may be proceeded with.

If the arbitrators are of opinion that no injury will be caused, the local authority may forthwith proceed to do the proposed matters or things (*f*). If the arbitrators are of opinion that injury will be caused, but that it is capable of being fully compensated by money, the local authority may proceed on payment of the sum assessed by the arbitrators as compensation (*f*). If the arbitrators are of opinion that injury will be caused, and that it cannot be fully compensated by money, then the local authority must not proceed (*f*).

Saving for mines and metal works.

732. Nothing in the Public Health Acts (*g*) is to interfere or obstruct the efficient working of mines, or of smelting or puddling works (*h*).

SUB-SECT. 3.—*Legal Proceedings* (*i*).

(i.) *Recovery of Penalties.*

Recovery before a court of summary jurisdiction.

733. All offences under the Public Health Acts (*g*), and all

(*a*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 327. An injunction to restrain work in contravention of this provision will be granted (*Grand Junction Canal Co.* v. *Shugar* (1871), 6 Ch. App. 483; see title INJUNCTION, Vol. XVII., p. 216); and the remedy in respect of unauthorised work is an action for damages (*R.* v. *Darlington Local Board of Health* (1865), 6 B. & S. 562).

(*b*) For the cases where consent is required, see pp. 365, 366, *ante*.

(*c*) As to such properties, see the last preceding paragraph in the text, *supra*.

(*d*) As to notices, see pp. 370 *et seq.*, *post*.

(*e*) As to arbitration under the Public Health Act, 1875 (38 & 39 Vict. c. 55), see *ibid.*, ss. 179, 180; and see titles ARBITRATION, Vol. I., pp. 437 *et seq.*, 492; COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 163; LOCAL GOVERNMENT, Vol. XIX., p. 271. The questions to be decided by the arbitration are whether the things proposed to be done will cause injury, whether any such injury can be fully compensated by money (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 328), and the amount of compensation (*ibid.*, s. 329). As to the circumstances which give rise to a claim for compensation, see, further, title LOCAL GOVERNMENT, Vol. XIX., p. 271; *Lingke* v. *Christchurch Corporation* (1912), 76 J. P. 265; and see title NEGLIGENCE, Vol. XXI., pp. 516 *et seq.*

(*f*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 329.

(*g*) For a list of the Public Health Acts, see note (*a*), p. 361, *ante*.

(*h*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 334. As to this saving provision, see, further, titles MINES, MINERALS, and QUARRIES, Vol. XX., p. 593; NUISANCE, Vol. XXI., p. 543; as to its effect upon orders of the Local Government Board confirmed by local Acts, see *Bessemer & Co., Ltd.* v. *Gould* (1912), 76 J. P. 349.

(*i*) As to legal proceedings by and against district councils generally, see title LOCAL GOVERNMENT, Vol. XIX., pp. 289—291.

SECT. 1. The Public Health Acts.

penalties (*k*), forfeitures, costs, and expenses (*l*) directed to be recovered summarily, or the recovery of which is not otherwise provided for (*m*), may be prosecuted and recovered under the Summary Jurisdiction Acts (*n*) before a court of summary jurisdiction (*o*).

Proceedings in the county court.

Proceedings may, at the option of the local authority, be taken in the county court where demands, recoverable summarily, are below £50 (*p*).

(*k*) Where not otherwise provided for, one half of the penalty goes to the informer, and the other half to the local authority; but the whole goes to the local authority if it is the informer (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 254). As to the application of fines in London, see Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 119 (1); and see title METROPOLIS, Vol. XX., p. 468.

(*l*) The provisions for the recovery of expenses for the repayment whereof the owner of premises is made liable under the Public Health Acts (see Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 257; title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 222, 223, 225) apply where the liability arises "by any agreement with the local authority" (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 257).

(*m*) For definition of these Acts, see Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 13 (7), (10); titles MAGISTRATES, Vol. XIX., p. 589, note (*a*); STATUTES.

(*n*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 251; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 117 (1); and see title METROPOLIS, Vol. XX., pp. 467, 468. For procedure under the Summary Jurisdiction Acts, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.* As to the effect of the distinction in the Summary Jurisdiction Acts between an information and a complaint (see title MAGISTRATES, Vol. XIX., p. 589), upon proceedings under the Public Health Acts (as to these Acts see note (*a*), p. 361, *ante*), see 1 Lumley, Public Health, 7th ed., pp. 562, 563. Any information, complaint, warrant, or summons may contain in its body or schedule several sums (Public Health Acts Amendment Acts, 1890 (53 & 54 Vict. c. 59), s. 8; 1907 (7 Edw. 7), c. 53), s. 8). Summary proceedings must be instituted within six months from the time when the subject-matter arose (Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 11); and see title MAGISTRATES, Vol. XIX., p. 591.

(*o*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 251; Public Health Acts Amendment Acts, 1890 (53 & 54 Vict. c. 59), s. 6; 1907 (7 Edw. 7, c. 53), s. 6. As to courts of summary jurisdiction, see title MAGISTRATES, Vol. XIX., pp. 567 *et seq.* The court is constituted of two or more justices in petty sessions or of some magistrate or officer empowered to act alone (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 251). No justice is incapable of acting by reason of being a member of a local authority or a ratepayer (*ibid.*, s. 258); see also Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 122; title METROPOLIS, Vol. XX., p. 468. As to interest or bias of justices, see titles MAGISTRATES, Vol. XIX., pp. 551—555; PUBLIC AUTHORITIES AND PUBLIC OFFICERS, p. 336, *ante*. Any local authority may appear before any court or in any legal proceeding by its clerk, or by any duly authorised officer or member (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 259; see title LOCAL GOVERNMENT, Vol. XIX., pp. 290, 291; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 123; title METROPOLIS, Vol. XX., p. 468). It is not necessary for the plaintiff to prove the corporate name of the local authority, or the constitution or limits of its district (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 260).

(*p*) *Ibid.*, s. 261; Public Health Acts Amendment Acts, 1890 (53 & 54 Vict. c. 59), s. 6; 1907 (7 Edw. 7, c. 53), s. 6; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 117 (2); and see titles COUNTY COURTS, Vol. VIII., pp. 677—679; METROPOLIS, Vol. XX., p. 468. The remedies prescribed by the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 251, 261, and the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 117 (1), (2), preclude an action for the penalties and such other sums being maintainable (*St. Pancras Vestry* v. *Batterbury* (1857), 3 Jur. (N. S.) 1106;

Parties who may institute proceedings.

734. Proceedings for the recovery of any penalty cannot, except as is otherwise expressly provided (*q*), be taken by any person other than a party aggrieved (*r*) or by the local authority (*s*) of the district in which the offence is committed, without the written consent (*a*) of the Attorney-General (*b*).

Appeal to quarter sessions.

735. Any person deeming himself aggrieved by any rate (*c*) under the Public Health Acts (*d*), or by any order, conviction, judgment or determination of, or by any matter or thing done by, any court of summary jurisdiction (*e*), may appeal therefrom to the next practicable (*f*) court of quarter sessions (*g*).

Blackburn Corporation v. *Parkinson* (1858), 1 E. & E. 71; *Great Western Rail. Co.* v. *Sharman* (1892), 61 L. J. (Q. B.) 600); and the High Court cannot under R. S. C., Ord. 25, r. 5, make a declaration as to the proceedings available (*Barraclough* v. *Brown*, [1897] A. C. 615, 623; see Yearly Practice of the Supreme Court, 1912, p. 319).

(*q*) This refers to a person, other than a party aggrieved or the local authority, expressly authorised by the statute (*Fletcher* v. *Hudson* (1880), 5 Ex. D. 287, C. A., *per* BRAMWELL, L.J., at p. 290).

(*r*) *Primâ facie*, anybody may take proceedings to recover a penalty, but the application of the general rule may be prevented by the plain terms of a particular Act (*R.* v. *Stewart*, [1896] 1 Q. B. 300, *per* KAY, L.J., at p. 303; see *Allman* v. *Hardcastle* (1903), 89 L. T. 553). A party aggrieved is supposed to exist apart from the statute which gives him the remedy of an action for the penalty (*Robinson* v. *Currey* (1881), 7 Q. B. D. 465, C. A., *per* BRAMWELL, L.J., at p. 470; see also *Drapers Co.* v. *Haddon* (1892), 57 J. P. 200). A person cannot be aggrieved by an act in which he has acquiesced (*Harrup* v. *Bayley* (1856), 6 E. & B. 218). As to the interest which may make a "party aggrieved," see *Garrett* v. *Middlesex Justices* (1884), 12 Q. B. D. 620; *Ross* v. *Taylerson* (1898), 62 J. P. 181. It was held that a surveyor of a corporation could lay an information under the Public Health Act, 1848 (11 & 12 Vict. c. 63), though not authorised under seal (*Harring* v. *Stockton Corporation* (1867), 31 J. P. 420), and a police superintendent can also do so under the Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 28, although he was neither a party aggrieved nor a party authorised by the local authority (*Jobson* v. *Henderson* (1900), 82 L. T. 260). A local authority, however, cannot generally delegate prosecutions to the police (*Kyle* v. *Barbor* (1888), 58 L. T. 229); and see title POLICE, Vol. XXII., p. 505.

(*s*) See p. 372, *post*.

(*a*) Consent should be alleged in the pleadings (*Hollis* v. *Marshall* (1858), 22 J. P. 210); and see title ACTION, Vol. I., p. 23. A police constable cannot without such consent prosecute under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 117 (*Dodd* v. *Pearson*, [1911] 2 K. B. 383); and see title FOOD AND DRUGS, Vol. XV., p. 39. Consent is not required to proceedings taken by a local authority, in respect of nuisances outside its district, under the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 108, 115 (*ibid.*, s. 253); see title NUISANCE, Vol. XXI., p. 571; and see p. 564, *post*.

(*b*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 253. As to the Attorney-General, see titles CONSTITUTIONAL LAW, Vol. VII., pp. 71—76; NUISANCE, Vol. XXI., pp. 552 *et seq.*

(*c*) See title RATES AND RATING.

(*d*) For a list of the Public Health Acts, see note (*a*), p. 361, *ante*.

(*e*) The wording of this enactment confers no right of appeal where a summons is dismissed (*R.* v. *Middlesex Justices* (1881), 45 J. P. 420; *R.* v. *London County Keepers of the Peace and Justices* (1890), 25 Q. B. D. 357; *R.* v. *Wright, Ex parte Bradford Corporation* (1907), 72 J. P. 23).

(*f*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 32; and see title MAGISTRATES, Vol. XIX., p. 643.

(*g*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 269. There is also

SECT. 1. **The Public Health Acts.**

Proceedings not quashed for want of form.

736. No rate (*h*), order (*i*), conviction, or thing made or done or relating to the execution of the Public Health Acts (*k*) may be vacated, quashed, or set aside for want of form, or, unless otherwise expressly provided, be removed (*l*) by *certiorari* (*m*) or any other process into the High Court (*n*).

Proceedings where a local Act is in force.

737. Where any local Act is in force in a district providing for purposes the same as or similar to those of the Public Health Acts (*k*), proceedings may be instituted by the local authority (*o*) or other person either under the local Act or the Public Health Acts (*k*), or both (*p*); but no person can be punished under both enactments, and the local authority (*o*) is not, by reason of the local Act, exempted from any duty or obligation under the Public Health Acts (*q*).

(ii.) *Notices, Orders etc.*

Authentication of notices and other documents.

738. Notices, orders, and other similar documents under the Public Health Acts (*k*) may be in writing (*r*) or print, or partly in writing (*r*) and partly in print; and if they require authentication by the local authority (*a*), the signature thereof (*b*) by its

an appeal to quarter sessions under the Public Health Acts Amendment Acts, 1890 (53 & 54 Vict. c. 59), s. 7 (2); 1907 (7 Edw. 7, c. 53), s. 7 (1); see title LOCAL GOVERNMENT, Vol. XIX., p. 387. The term "court of quarter sessions" means the court of general or quarter sessions having jurisdiction over the whole or any part of the district or place in which the matter requiring their cognisance arises (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 4); see definition in the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 13 (14); and see title MAGISTRATES, Vol. XIX., p. 618). As to appeals to quarter sessions under the Public Health (London) Act, 1901 (54 & 55 Vict. c. 76), s. 125, see title METROPOLIS, Vol. XX., p. 468; as to such appeals, generally, see title MAGISTRATES, Vol. XIX., pp. 638, 639.

(*h*) See title RATES AND RATING.

(*i*) See the text, *infra;* and see note (*m*), p. 377, *post.*

(*k*) For a list of the Public Health Acts, see note (*a*), p. 361, *ante.*

(*l*) But this does not prevent the removal of any case stated (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 262); and see title CROWN PRACTICE, Vol. X., pp. 165, 166.

(*m*) Independently of the provision in the text, *supra*, *certiorari* lies only in respect of judicial acts as opposed to purely ministerial acts; see title CROWN PRACTICE, Vol. X., pp. 171, 172. But, although in terms taken away, *certiorari* lies in certain cases, *e.g.* where an act has been done without or in excess of jurisdiction (see *ibid.*, p. 177; *R.* v. *Wood* (1855), 5 E. & B. 49; and see the cases cited in note (*f*), p. 376, *post*). As to *certiorari*, generally, see title CROWN PRACTICE, Vol. X., pp. 155 *et seq.*

(*n*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 262.

(*o*) See p. 372, *post.*

(*p*) It may be important to ascertain under what power a local authority acts (*Burton* v. *Salford Corporation* (1883), 11 Q. B. D. 286).

(*q*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 340. The latter provision means that a local Act affords no excuse for neglect to enforce the Public Health Acts (*Ashton-under-Lyne* v. *Pugh*, [1898] 1 Q. B. 45, C. A.; *Lodge* v. *Huddersfield Corporation*, [1898] 1 Q. B. 847, 859, C. A.).

(*r*) This seems here to include a reference to lithography, photography, and other modes of representing or reproducing words in a visible form (Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 20; and see title STATUTES).

(*a*) See p. 372, *post.*

(*b*) A printed signature was held sufficient in *Brydges* v. *Dix* (1891), 7 T. L. R. 215, distinguishing *R.* v. *Cowper* (1890), 24 Q. B. D. 60, 533, C. A. As to block signatures, see *Osgood* v. *Nelson* (1872), L. R. 5 H. L.

clerk, surveyor, or inspector of nuisances (*c*) is sufficient authentication (*d*).

Service of documents.

739. Any such notice, order, and other document (*e*) required or authorised to be served under the Public Health Acts (*f*) may be served by delivering the same at the residence (*g*) of the addressee or, where addressed to the owner (*h*) or occupier of premises (*i*), by delivering it or a true copy to some person on the premises (*i*), or, if there is no person on the premises who can be served, by fixing it on some conspicuous part of the premises (*k*); and it may also be served by post by prepaid letter (*l*).

636; *Blades* v. *Lawrence* (1874), L. R. 9 Q. B. 374. It is doubtful whether signature by a clerk to an officer would suffice; but see *France* v. *Dutton*, [1891] 2 Q. B. 208.

(*c*) As to these officers, see titles LOCAL GOVERNMENT, Vol. XIX., pp. 272 *et seq.*, 313, 332 *et seq.*; METROPOLIS, Vol. XX., pp. 454, 455, 466. Each officer should sign such documents as relate to his particular functions.

(*d*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 266. For the similar provision in the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 127, which varies in some particulars, see title METROPOLIS, Vol. XX., p. 469.

(*e*) Including a summons; see *R.* v. *Mead*, [1894] 2 Q. B. 124; and see title MAGISTRATES, Vol. XIX., pp. 593 *et seq.*

(*f*) For a list of the Public Health Acts, see note (*a*), p. 361, *ante*.

(*g*) The meaning of the word "residence" in a statute depends upon the purpose of the enactment (*Blackwell* v. *England* (1857), 8 E. & B. 541; *Powell* v. *Guest* (1864), 18 C. B. (N. S.) 72). In the Public Health Acts (see note (*a*), p. 361, *ante*) it generally means a place of abode, and not necessarily a place where a person sleeps. Business premises may be a "residence" (*Mason* v. *Bibby* (1864), 2 H. & C. 881; *Newport Corporation* v. *Lang* (1892), 57 J. P. 199); and a man may have more than one residence (*Walcot* v. *Botfield* (1854), Kay, 534; *Wescomb's Case* (1868), L. R. 4 Q. B. 110). Compare, however, *R.* v. *Lilley*, *Ex parte Taylor* (1910), 104 L. T. 77, where "place of abode" in the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 1 (see title MAGISTRATES, Vol. XIX., p. 594), was held not to include a lock-up shop. Documents not served or fixed on the premises as provided in the text, *supra*, must, in the case of a limited company, be left at, or posted to, their registered office (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 116, 285); see *Pearks, Gunston and Tee, Ltd.* v. *Richardson*, [1902] 1 K. B. 91; and see titles COMPANIES, Vol. V., p. 83; FOOD AND DRUGS, Vol. XV., p. 31.

(*h*) For the meaning of the term "owner," see note (*o*), p. 427, *post*.

(*i*) The term "premises" includes messuages, buildings, lands, easements and hereditaments of any tenure (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 4); and see Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 141. For a somewhat similar definition of "land" (which omits a reference to easements), see the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 3; and see title STATUTES.

(*k*) Where a notice is required by the Public Health Acts (see note (*a*), p. 361, *ante*) to be given to the owner or occupier, it is sufficient if it is addressed "owner" [or "occupier"] of the premises (naming them) (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 267). If the address is on the outside, its omission in the body of the document seems immaterial (*Linforth* v. *Butler*, [1899] 1 Q. B. 116). A notice affixed on the premises is good, although the name and residence of the owner may be known (*Woodford Urban District Council* v. *Henwood* (1899), 64 J. P. 148; *Sharpley* v. *Bear* (1903), 67 J. P. 442).

(*l*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 267; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 128; and see title METROPOLIS, Vol. XX., p. 469. The document is deemed to have been served at the time the letter containing it would be delivered in the ordinary course of

SECT. 2. Extra-Metropolitan Areas.

SECT. 2.—*Extra-Metropolitan Areas.*

SUB-SECT. 1.—*Sanitary Authorities.*

Local authorities.

740. For the purposes of the Public Health Acts (*m*), England and Wales, outside the administrative county of London (*n*), are divided into urban and rural districts, which are under the jurisdiction respectively of urban and rural sanitary authorities (*o*). In the Public Health Acts (*m*) these authorities are generally referred to as the "local authority" (*p*).

Urban authorities.

741. Urban districts comprise every municipal borough and every other district constituted an urban district (*q*). The corporation of the borough acting by the council (*r*), or the urban district council, as the case may be, is the urban sanitary authority (*s*).

Rural authorities.

742. A rural district consists of one or more parishes not within any urban district (*t*). It is for administrative purposes divided into contributory places (*a*), the areas of which are generally, but not always, coincident with parochial areas, and is under the jurisdiction of a rural district council (*b*).

post, and it is sufficient to prove that it was properly addressed and posted (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 267), and that the postage was prepaid (*Walthamstow Urban District Council* v. *Henwood*, [1897] 1 Ch. 41). As to judicial interpretation of the words "sent by post," see *Retail Dairy Co., Ltd.* v. *Clarke*, [1912] 2 K. B. 388; *Browne* v. *Black*, [1912] 1 K. B. 316, C. A.; and title POST OFFICE, Vol. XXII., pp. 657, 658.

(*m*) For a list of the Public Health Acts, see note (*a*), p. 361, *ante*.

(*n*) See title METROPOLIS, Vol. XX., p. 393.

(*o*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 5. As to the scheme of the Act, see the observations of WILLS, J., in *Lea* v. *Facey* (1886), 17 Q. B. D. 139, at p. 142.

(*p*) See Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 4.

(*q*) *Ibid.*, s. 6. Under *ibid.*, in addition to boroughs, urban districts consisted of Improvement Act districts and local government districts, provision being made for certain overlapping areas, and in particular for some exceptional boroughs. At the present time (1912) part of the borough of Folkestone is still in the Sandgate Urban District, but the other exceptional cases have been adjusted, and the general statement in the text holds good. Newport has been dealt with by the Newport (Isle of Wight) Borough Act, 1876 (39 & 40 Vict. c. lxi.), s. 8, and the other boroughs (including Oxford, concerning which see also Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 342), by provisional orders of the Local Government Board under the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 52. As to urban districts generally, see title LOCAL GOVERNMENT, Vol. XIX., pp. 262 *et seq.*

(*r*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 6. As to municipal corporations, see title LOCAL GOVERNMENT, Vol. XIX., pp. 293 *et seq.*

(*s*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 6; Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 21 (1).

(*t*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 9. A rural sanitary district, under that Act, is now called a rural district (Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 21 (2)). As to rural districts generally, see title LOCAL GOVERNMENT, Vol. XIX., pp. 329 *et seq.* The Isles of Scilly are a rural district, and the Council of the Isles of Scilly acts as a county council as well as a rural district council; see title STATUTES.

(*a*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 229; and see title LOCAL GOVERNMENT, Vol. XIX., p. 335.

(*b*) Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 5, 9; Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 21 (2). For forms applicable to alteration of areas, see Encyclopædia of Forms and Precedents, Vol. VIII., pp. 147—191.

743. For the area of a customs port, or any part of such port, a special authority, called a port sanitary authority (*c*), may be temporarily or permanently constituted by an order (*d*) of the Local Government Board, and the order may make provision for the duties and expenses of the authority (*e*).

Port sanitary authorities.

744. Urban and rural districts, or parts of such districts, may be united under a joint board by provisional order of the Local Government Board for the purpose of water supply, sewerage, or for any other purpose under the Public Health Act, 1875 (*f*).

Joint boards.

Urban and rural district councils may also combine in other ways for the execution of their duties (*g*), and may appoint joint committees (*h*).

Other joint action.

SUB-SECT. 2.—*Other Authorities.*

745. Powers and duties of a sanitary character are possessed by some other authorities. County councils are required to appoint medical officers of health (*i*), and have considerable powers of control over other councils and local areas (*k*). Parish councils have limited powers as to water supply, offensive ditches, and other matters, and may make certain representations to county councils and the Local Government Board (*l*).

County councils.

Parish councils.

SECT. 3.—*Metropolitan Areas.*

746. Within the administrative county of London (*m*), the sanitary authorities for the purpose of the Public Health (London) Act, 1891 (*n*), are, in the City, the Common Council (*o*), and, in a metropolitan borough, the borough council (*p*). The Corporation

City Corporation and metropolitan borough councils.

(*c*) See title LOCAL GOVERNMENT, Vol. XIX., p. 292.

(*d*) Which may, on objection, become provisional (Public Health (Ships, etc.) Act, 1885 (48 & 49 Vict. c. 35), s. 3).

(*e*) *Ibid.*, and Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 287; Public Health (Ports) Act, 1896 (59 & 60 Vict. c. 20); and see p. 505 and compare note (*q*), p. 450, *post*.

(*f*) 38 & 39 Vict c. 55, ss. 279—281. Joint boards existing in 1875 were preserved (*ibid.*, s. 326). As to joint boards generally, see title LOCAL GOVERNMENT, Vol. XIX., p. 339.

(*g*) In providing a common hospital (see pp. 432, 434, *post*); in executing works (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 285); and in appointing a medical officer of health (*ibid.*, s. 286); and see title LOCAL GOVERNMENT, Vol. XIX., pp. 291, 338. Local authorities may be required to act together for the purposes of the provisions as to epidemic diseases (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 139; see p. 467, *post*).

(*h*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 57. For form of agreement to appoint a joint committee, see Encyclopædia of Forms and Precedents, Vol. X., pp. 527, 433.

(*i*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 17; Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 68; and see title LOCAL GOVERNMENT, Vol. XIX., p. 346.

(*k*) See title LOCAL GOVERNMENT, Vol. XIX., pp. 375 *et seq.*

(*l*) See *ibid.*, pp. 246 *et seq.*

(*m*) See title METROPOLIS, Vol. XX., p. 393.

(*n*) 54 & 55 Vict. c. 76.

(*o*) As successors of the Commissioners of Sewers (*ibid.*, s. 99 (1) (a); City of London Sewers Act, 1897 (60 & 61 Vict. c. cxxxiii.), ss. 2, 5, 7).

(*p*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 99 (1) (b), (c), (d), (e); London Government Act, 1899 (62 & 63 Vict. c. 14), s. 4 (1); and see title METROPOLIS, Vol. XX., p. 404. Sanitary authorities may be

SECT. 3. Metropolitan Areas.

of the City is the port sanitary authority of the Port of London (*q*).

London County Council.

The London County Council appoints a medical officer of health, and has extensive jurisdiction as to sewerage, housing of the working classes, and other sanitary matters. It may also act in default of a metropolitan sanitary authority (*r*).

Metropolitan Asylums Board.

The Metropolitan Asylums Board also have some sanitary powers and duties (*s*).

Part II.—Control by Local Government Board.

SECT. 1.—*In General.*

Powers and duties of the Board.

747. Although it has been said that the chief duty of the Local Government Board (*t*) in connection with the administration of the laws relating to public health is to encourage, instruct, and guide the local authorities in the discharge of their responsible duties (*a*), yet in many directions distinct duties and obligations are imposed upon the Board by the Public Health Acts (*b*) and other kindred enactments. These duties and obligations are hereinafter stated in their appropriate places, and in other relevant titles (*c*).

Consultative and guiding functions.

The consultative and guiding functions of the Local Government Board are performed in many ways, for example, by the issue of model bye-laws dealing with the principal branches of local administrative activities (*d*), by the direct control exercised over the borrowing powers of local authorities (*e*), and over their expenditure by means of the audit of accounts (*f*), by settling differences between local authorities and determining grievances (*g*), by holding local

required to act together for the purposes of the provisions as to epidemic diseases (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 84; and see p. 467, *post*).

(*q*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 111, 112; and see title METROPOLIS, Vol. XX., p. 411.

(*r*) For metropolitan administration, see, generally, *ibid.*, pp. 389—494; and see *post, passim*.

(*s*) See title METROPOLIS, Vol. XX., p. 411.

(*t*) For the constitution of the Board, see title CONSTITUTIONAL LAW, Vol. VII., p. 103.

(*a*) Report of Local Government Board, 1877—1878.

(*b*) For a list of the Public Health Acts, see note (*a*), p. 361; *ante*.

(*c*) See, for examples, titles BURIAL AND CREMATION, Vol. III., pp. 401 *et seq.*; FOOD AND DRUGS, Vol. XV., pp. 1 *et seq.*; HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 30 *et seq.*; LOCAL GOVERNMENT, Vol. XIX., pp. 229 *et seq.*; METROPOLIS, Vol. XX., pp. 389 *et seq.*; OPEN SPACES AND RECREATION GROUNDS, Vol. XXI., pp. 577 *et seq.*; POOR LAW, Vol. XXII., pp. 524 *et seq.*; RATES AND RATING; SEWERS AND DRAINS; WATER SUPPLY.

(*d*) See note (*s*), p. 391, *post*.

(*e*) See pp. 382, 383, *post*; and see title LOCAL GOVERNMENT, Vol. XIX., pp. 244, 282, 283, 317, 337, 361.

(*f*) See p. 387, *post*.

(*g*) See title LOCAL GOVERNMENT, Vol. XIX., pp. 289, 384 *et passim*. For a list of the principal matters in which the Board has jurisdiction to

SECT. 1. In General.

inquiries on numerous matters (*h*), by conducting inspections locally for the investigation and prevention of disease and the stimulation of local sanitary administration (*i*), and by examining and reporting upon all Bills for local Acts presented to Parliament (*k*); while, in addition, the Board possesses and exercises large powers of making rules and regulations having the force of laws, and of issuing orders and provisional orders creating, altering, or determining the rights, duties, powers, and obligations of the local authorities entrusted with the administration of the laws relating to public health and safety (*l*).

SECT. 2.—*Inquiries* (*m*).

Holding of inquiries.

748. Besides inquiries directed to be made by the Public Health Acts (*n*), the Local Government Board may cause inquiries to be made as to matters concerning the public health in any place, or with respect to which its sanction, approval, or consent is required (*o*).

Powers of inspectors.

For the purposes of any such inquiry, an inspector of the Board has similar powers as to witnesses, the production of papers and accounts, and the inspection of places and matters, to those of a poor law inspector (*a*), and his report is privileged (*b*).

Costs.

The Local Government Board may make orders (*c*) as to the costs of inquiries or proceedings instituted by, or of appeals to it, and

hear and determine appeals, see Encyclopædia of Local Government Law, Vol. IV., p. 260.

(*h*) See the text, *infra*.

(*i*) See pp. 445 *et seq.*, 596 *et seq.*, *post*.

(*k*) See title PARLIAMENT, Vol. XXI., p. 735.

(*l*) For a list of the principal enactments under which the Board is empowered to issue rules and orders, see Encyclopædia of Local Government Law, Vol. IV., p. 258.

(*m*) The provisions in the text, *supra*, apply also to inquiries directed by the Local Government Board in regard to the exercise of its powers under the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53) (see *ibid.*, s. 5), the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70) (see *ibid.*, s. 85), and the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76) (see *ibid.*, s. 129).

(*n*) For a list of the Public Health Acts, see note (*a*), p. 361, *ante*. For instances of such inquiries, see Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 33 (objection to sewage works outside district; see title SEWERS AND DRAINS); Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 53 (objection to construction of reservoir; see title WATER SUPPLY); Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 176 (compulsory acquisition of land; see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 8 *et seq.*); Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 234 (borrowing; see note (*t*), p. 383, *post*); Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 287 (provisional orders; see p. 376, *post*).

(*o*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 293.

(*a*) *Ibid.*, s. 296. For the powers of poor law inspectors, see the Poor Law Board Act, 1847 (10 & 11 Vict. c. 109), ss. 20, 21, 26; and title POOR LAW, Vol. XXII., pp. 527, 528.

(*b*) *A.-G.* v. *Nottingham Corporation*, [1904] 1 Ch. 673; and see title EVIDENCE, Vol. XIII., p. 573.

(*c*) The Board deals only with its own expenses, including travelling expenses of its inspectors, under this provision. When the inquiry is directed under the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 5, the local authority must pay also the expenses of witnesses and a sum fixed by the Board, not exceeding £3 3*s.* a day, for the inspector's services.

SECT. 2. Inquiries.

as to the parties by whom, or the rates out of which, the costs must be borne (*d*).

SECT. 3.—*Orders.*

SUB-SECT. 1.—*In General.*

Authority and publication.

749. Orders of the Local Government Board under the Public Health Acts (*e*) are binding and conclusive (*f*), and must be published as the Board directs (*g*).

SUB-SECT. 2.—*Provisional Orders.*

Preliminary proceedings.

750. Before the Local Government Board makes a provisional order (*h*), public notice of its purport must be advertised (*i*) in two successive weeks in a local newspaper, and the Board must consider any objections made by persons affected, and, in cases where the subject-matter is one to which a local inquiry is applicable, must

(*d*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 294; and as to costs of provisional orders, see p. 377, *post*. An order may be made a rule of the High Court (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 294). As to the enforcement of such a rule, see the Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 18; R. S. C., Ord. 42, r. 31; title JUDGMENTS AND ORDERS, Vol. XVIII., p. 219.

(*e*) For a list of the Public Health Acts, see note (*a*), p. 361, *ante*.

(*f*) There must, however, be jurisdiction to make the order (*Clayton* v. *Fenwick* (1856), 6 E. & B. 114; *North Eastern Rail. Co.* v. *Tynemouth Corporation* (1868), L. R. 3 Q. B. 723; *A.-G.* v. *Hanwell Urban Council*, [1900] 1 Ch. 51, 56; affirmed 2 Ch. 377, C. A.); and this must be taken into account in interpreting it (*Turner* v. *Halifax Corporation* (1868), 9 B. & S. 623, n.; *Fenwick* v. *Croydon Union Rural Sanitary Authority*, [1891] 2 Q. B. 216). An order may apparently be set aside partly if the valid part is severable (*R.* v. *Robinson* (1851), 17 Q. B. 466). It cannot be set aside for want of form, or removed into the High Court (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 262), unless made without jurisdiction (see *R.* v. *Wood* (1855), 5 E. & B. 49; *R.* v. *Gosse* (1860), 3 E. & E. 277; *Colonial Bank of Australasia* v. *Willan* (1874), L. R. 5 P. C. 417; *Ex parte Bradlaugh* (1878), 3 Q. B. D. 509; *R.* v. *Bradley* (1894), 63 L. J. (M. C.) 183; p. 370, *ante*). An order may be enforced in some circumstances, perhaps, by indictment (*R.* v. *Walker* (1875), L. R. 10 Q. B. 355), or by mandamus. The latter mode is sometimes specified (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 299; see p. 378, *post*).

(*g*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 295. Sometimes a particular mode of publication is required (*ibid.*, ss. 130, 135; see pp. 464, 466, note (*d*), *post*; Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 3 (3); see p. 365, *ante*).

(*h*) Annually, in September, the Board issues circular letters and instructions to the several local authorities as to applications for provisional orders. The making of an order is *primâ facie* evidence of due compliance with the previous statutory requirements (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 297 (7)). As to the effect of such provisional orders upon local Acts, see *ibid.*, s. 303; *Bessemer & Co., Ltd.* v *Gould* (1912), 76 J. P. 349; title LOCAL GOVERNMENT, Vol. XIX., p. 384; and as to the effect of such a local Act upon public general law, see *Bessemer & Co., Ltd.* v. *Gould, supra*; title STATUTES. As to provisional orders conferring powers to acquire land, see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 8—11.

(*i*) The Local Government Board frames the advertisement, which usually combines notice of the purport of the order and of any public inquiry to be held. It is published by the local authority at its own expense. As to the advertisement where the order authorises the compulsory acquisition of land, see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 9.

cause an inquiry to be made (*j*), of which public notice must be similarly advertised (*k*), and at which interested persons may attend and make objections (*l*).

Confirmation.

751. The Local Government Board may submit any provisional order to Parliament for confirmation (*m*), and no such order has any effect until so confirmed (*n*). If an order included in any confirming Bill is petitioned against, the petitioner may appear before the Select Committee to which the opposed order is referred (*o*).

Revocation and amendment.

752. A provisional order may be revoked by the Local Government Board before the confirming Bill is submitted to Parliament (*p*). An Act confirming a provisional order or any Order in Council (*q*) made under the Sanitary Acts (*r*) may be repealed, altered, or amended by a provisional order duly confirmed (*s*).

Costs.

753. The reasonable costs (*t*) of any local authority, whether in promoting or opposing a provisional order, may, as sanctioned by the Local Government Board, be paid by the authority (*u*), who may, if thought expedient by the Board, borrow for the purpose (*a*).

SECT. 4.—*Enforcement of Performance of Duties of Defaulting Authorities* (*b*).

Orders of Local Government Board.

754. If complaint is made to the Local Government Board that a local authority has made default in providing or maintaining

(*j*) An inquiry under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 176 (4), may in some cases perhaps be waived, *e.g.*, where there is merely disability to sell, or where a party unwilling to sell without a provisional order voluntarily forbears to oppose the order; see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 9.

(*k*) See note (*i*), p. 376, *ante*.

(*l*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 297 (1), (2).

(*m*) Accordingly, a provisional order cannot be quashed on *certiorari* (*R.* v. *Hastings Local Board of Health* (1865), 6 B. & S. 401); but an authority may be restrained by injunction from applying for such an order (*Telford* v. *Metropolitan Board of Works* (1872), L. R. 13 Eq. 574).

(*n*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 297 (3). Although the confirming Act is a public general Act (*ibid.*, s. 297 (8)), it is printed with local Acts. It may in its body contain amendments of the general law springing from the subject-matter of the order.

(*o*) *Ibid.*, s. 297 (4). The defence of the order is left to the promoting authority. As to proceedings before the Select Committee, the examination of witnesses, and award of costs, see title PARLIAMENT, Vol. XXI., pp. 727 *et seq.*

(*p*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 297 (6).

(*q*) Some local boards were constituted by Orders in Council. They were saved, but power was given to repeal, alter, or amend such Orders (*ibid.*, s. 339).

(*r*) See note (*q*), p. 382, *post*.

(*s*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 297 (5).

(*t*) As to taxation of costs, see title PARLIAMENT, Vol. XXI., p. 745. Law costs in the matter should not be taxed by the clerk of the peace. The taxed bill of costs, with the certificate of taxation and vouchers for other payments, should be sent to the Local Government Board when application for its sanction to payment is made.

(*u*) The requirements of the Borough Funds Acts, 1872 (35 & 36 Vict. c. 91), and 1903 (3 Edw. 7, c. 14), do not apply to such payment; see *Brooks, Jenkins & Co.* v. *Torquay Corporation*, [1902] 1 K. B. 601; and see title LOCAL GOVERNMENT, Vol. XIX., pp. 380 *et seq.*

(*a*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 298.

(*b*) As to the application of these provisions where complaint is made by

SECT. 4. Enforcement of Performance of Duties.

sufficient sewers (*c*), or in providing a supply of water where the existing supply is insufficient or unwholesome (*d*), or in enforcing the Public Health Acts (*e*), and the Board is satisfied, after due inquiry, that the authority has made such default, the Board must make an order limiting a time for the performance of the duty (*f*). The order, if not complied with, may be enforced by writ of mandamus (*g*), or the Board may appoint some person to perform such duty (*h*).

Expenses where person appointed to perform duties.

755. The Local Government Board must by order direct that the expenses of performing the duty, including the remuneration of the person appointed, amounting to a specified sum, together with the costs of the proceedings, shall be paid by the defaulting authority (*i*), and the Board may certify the expenses from time to

a parish council to a county council of the default of a district council, see title LOCAL GOVERNMENT, Vol. XIX., p. 375. For the provisions in force in London with respect to defaults of sanitary authorities, see Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 100, 101, 134, 135; and see title METROPOLIS, Vol. XX., pp. 409, 421, 468, 469.

(*c*) See title SEWERS AND DRAINS.

(*d*) See title WATER SUPPLY.

(*e*) For a list of the Public Health Acts, see note (*a*), p. 361, *ante*. The Local Government Board regards these words as applying to the duty of a local authority to require others to comply with the Acts, and not to the duties which the authority itself should perform. The Board does not treat the provision (namely, the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 299) as applicable to the making up of private streets, the enforcement of bye-laws, the provision of privies, hydrants etc., or the levying of water rates. In practice the provision is restricted to defaults as to sewerage and water supply. It is the duty of every local authority entrusted with the execution of the laws relating to public health and local government to put in force its powers so as to secure the proper sanitary condition of all premises (Housing of the Working Classes Act, 1885 (48 & 49 Vict. c. 72), s. 7).

(*f*) Such an order is no justification for the creation of a nuisance (*A.-G.* v. *Dorchester Corporation* (1906), 94 L. T. 682, C. A.), and an injunction to restrain may issue (*Hewinson* v. *Cheltenham Rural District Council* (1903), 25 Municipal Corporations Chronicle (hereinafter cited as "M. C. C."), 403). Where the provision (namely, the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 299) is applicable, private persons cannot bring an action (*Robinson* v. *Workington Corporation*, [1897] 1 Q. B. 619, C. A.; *Pasmore* v. *Oswaldtwistle Urban Council*, [1898] A. C. 387; *Jones* v. *Barking Urban District Council* (1898), 20 M. C. C. 502; *Harrington* (*Earl*) v. *Derby Corporation*, [1905] 1 Ch. 205).

(*g*) See, for instances, *R.* v. *Staines Union*, *R.* v. *Staines Local Board* (1893), 62 L. J. (Q. B.) 540; and as reported (1894), *Times*, 27th February; *R.* v. *Sunbury-on-Thames Urban District Council* (1896), 18 M. C. C. 300, 408; *R.* v. *Worcester Corporation* (1905), 69 J. P. 296; and see title CROWN PRACTICE, Vol. X., pp. 89, 106.

(*h*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 299. The person appointed has all the powers of the local authority except the power of levying rates (*ibid.*). For an order appointing such a person under a similar repealed provision, see *R.* v. *Cockerell* (1871), L. R. 6 Q. B. 252. But the Local Government Board has considered it impracticable to make such appointments.

(*i*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 299. The order for payment may be removed into the High Court and enforced as it if were an order of the court (*ibid.*). As to such enforcement, see the Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 18, and R. S. C., Ord. 42, r. 31; title JUDGMENTS AND ORDERS, Vol. XVIII., pp. 219 *et seq.*

time (*k*). If the defaulting authority refuses to pay the specified sum, with the costs, the Board may empower a person to levy by and out of the local rate a sufficient sum to defray the debt (*l*).

SECT. 4. Enforcement of Performance of Duties.

Loans to defray expenses.

756. The Local Government Board may certify the amount of any loan required to be raised for defraying the expenses incurred in the performance of the duty of a defaulting authority, and the Public Works Loans Commissioners (*m*) may advance the amount to the Board or to the person appointed. The repayment of the principal money or interest is chargeable upon the local rate (*n*), and is taken to be a debt due from the local authority (*o*).

SECT. 5.—*Appeal against Expenses Charged by Local Authority.*

Memorial to Local Government Board.

757. Any person who deems himself aggrieved by the decision of the local authority (*p*) in any case where it is empowered to recover summarily any expenses incurred by it, or to declare such expenses to be private improvement expenses (*q*), may, within twenty-one days after notice of such decision (*r*), address a memorial to the Local Government Board stating the grounds of his complaint (*s*), and must deliver a copy of the memorial to the local authority. Any pending proceedings for the recovery of such

(*k*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 301.

(*l*) *Ibid.*, s. 300.

(*m*) See title MONEY AND MONEY-LENDING, Vol. XXI., pp. 58 *et seq.*

(*n*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 301.

(*o*) *Ibid.*, s. 302; and see p. 372, *ante*.

(*p*) See p. 372, *ante*.

(*q*) As to what expenses may be so declared, see title LOCAL GOVERNMENT, Vol. XIX., pp. 281, 282, 336, 337; and see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 223, 236.

(*r*) The demand for payment is notice of decision (*R.* v. *Local Government Board* (1882), 10 Q. B. D. 309, C. A.); see also title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 223, note (*n*), and cases there cited. The memorial must reach the Local Government Board on or before the twenty-first day after demand is made.

(*s*) The memorial should be accompanied by all the original notices, each indorsed with the date of receipt. The procedure referred to in the text, *supra*, is the only appeal from an order of the local authority under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 36 (*Robinson* v. *Sunderland Corporation*, [1899] 1 Q. B. 751; *Nicholl* v. *Epping Urban Council*, [1899] 1 Ch. 844; and see p. 596, *post*), or under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 62 (*West Lancashire Rural Council* v. *Ogilvy*, [1899] 1 Q. B. 377; and see title WATER SUPPLY). Where an order under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150, is made by a local authority upon a frontager for paving expenses, and the order has been lawfully made, but the amount is in dispute, the remedy of the frontager is by such appeal; see cases cited in title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 223, note (*s*), and see *West Hartlepool Corporation* v. *Robinson* (1897), 77 L. T. 387, C. A. (local Act case). The assumption in *Bournemouth Commissioners* v. *Watts* (1884), 14 Q. B. D. 87, as to another remedy being available does not seem, in view of these cases, to have been well founded. In dealing with an appeal, the Local Government Board should give an appellant full opportunity of presenting his case, and inform him of the answer of the local authority to the memorial; the Board is not bound to go beyond the complaints in the memorial, but its discretion is not fettered in making inquiries into all the circumstances of the case so as to determine whether the sum demanded was equitable; see *R.* v. *Local Government Board*, *supra*, *per* BAGGALLAY, L.J., at p. 317,

SECT. 5. **Appeal against Expenses Charged by Local Authority.**

expenses by the local authority are stayed (*t*) on delivery to it of such copy.

Order of Local Government Board.

758. The Local Government Board may make such order in the matter as to it seems equitable (*a*), and may, if it thinks fit, by its order direct (*b*) the local authority to pay to the person proceeded against such sum as the Board considers to be a just compensation for the loss, damage, or grievance thereby sustained by him (*c*).

Part III.—Finance.

SECT. 1.—*Expenses.*

General expenses of urban authorities.

759. As a rule, the expenses of an urban authority under the Public Health Acts (*d*) are payable out of the district fund (*e*) and the general district rate (*f*), but certain exceptions which existed in 1875 as to expenses in boroughs and Improvement Act districts are preserved (*g*), the Local Government Board having power in

and *per* BRETT, L.J., at pp. 321, 322. The latter (*R.* v. *Local Government Board* (1882), 10 Q. B. D. 309, C. A., at p. 321) expressed a very strong opinion that "the decision of the Local Government Board is to be considered as judicial"; but in referring to the observations of BRETT, L.J. (*ibid.*, at pp. 321, 322), MATHEW, J., in *Eccles* v. *Wirral Rural Sanitary Authority* (1886), 17 Q. B. D. 107, at p. 112, said, "It may be that if a party choose to resort to that tribunal, he should be bound by what it does. But that it should otherwise be conclusive is opposed to all principle. It is not a court. No procedure is pointed out, and the idea is that the Board are to pronounce what judgment they choose though opposed to law and principles of equity, so long as they think it equity. That question is well deserving of very careful consideration." For the application of a local Act provision conferring an appeal to the Local Government Board or to quarter sessions, see *Local Government Board* v. *Street* (1908), 98 L. T. 599, H. L. As to appeals to the Local Government Board, see, further, title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 221, 223, 226, 235.

(*t*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 268.

(*a*) See note (*s*), p. 379, *ante*. The order is to be binding and conclusive on all parties (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 268); but it is only conclusive in respect of the grounds of complaint mentioned in the memorial (*Seabrooke* v. *Grays Thurrock Local Board* (1891), 8 T. L. R. 19). It is final, so as to include up to its date any claim for interest (*Wallington* v. *Willes* (1864), 16 C. B. (N. S.) 797).

(*b*) The direction might possibly be enforced by mandamus, or perhaps by indictment (*R.* v. *Walker* (1875), L. R. 10 Q. B. 355).

(*c*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 268.

(*d*) For a list of the Public Health Acts, see note (*a*), p. 361, *ante*.

(*e*) See title LOCAL GOVERNMENT, Vol. XIX., p. 281.

(*f*) As to general district rates and incidental matters, see titles LOCAL GOVERNMENT, Vol. XIX., p. 281; RATES AND RATING. An urban authority may divide its district or any street therein into parts for any purposes of the Public Health Acts, including rating (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 211 (4)). As to special district rates, see *ibid.*, s. 319; title RATES AND RATING. As to the payment of highway expenses, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 125; and as to the highway rate, see title RATES AND RATING. As to the payment of the expenses of the sanitary authorities in London, see title METROPOLIS, Vol. XX., pp. 410, 438—452.

(*g*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 207; and see title LOCAL GOVERNMENT, Vol. XIX., p. 280, note (*e*).

certain circumstances to make such expenses payable out of the district fund and the general district rate (*h*).

Private improvement expenses.

Whenever an urban authority has incurred or becomes liable for any private improvement expenses (*i*), it may levy on the occupier of the premises in respect of which the expenses have been incurred, in addition to all other rates, a private improvement rate for a period not exceeding thirty years, to discharge such expenses with interest (*k*).

Rentcharges.

On being satisfied by the report of its surveyor or otherwise that money advanced by any person for private improvement expenses has been duly expended, the local authority may grant a yearly rentcharge (*l*), issuable out of the premises (*m*) in respect of which the advance was made, and payable by equal half-yearly payments during a term not exceeding thirty years (*a*), so as to secure the repayment of the advance, with interest not exceeding 6 per cent. per annum (*b*).

Expenses of rural authorities.

760. The expenses incurred by a rural district council in the execution of the Public Health Acts (*c*) are divided into general expenses and special expenses (*d*); the former are payable out of a common fund raised out of the poor rate of the parishes in the district, while the latter are a separate charge on each contributory place (*e*). Precepts are addressed to the overseers of each

(*h*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 208.

(*i*) See title LOCAL GOVERNMENT, Vol. XIX., p. 281. For forms relating to private improvement expenses, see Encyclopædia of Forms and Precedents, Vol. XI., pp. 51—59.

(*k*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 213. A proportion of the rate may in certain circumstances be deducted from the rent (*ibid.*, ss. 214, 226). The rate may be redeemed (*ibid.*, s. 215). See also *ibid.*, ss. 218—225; and, generally, as to private improvement rates, see title RATES AND RATING.

(*l*) Such a rentcharge is personal estate (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 240; and see title RENTCHARGES AND ANNUITIES). Rentcharges and transfers must be registered as in the case of mortgages (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 241; and see p. 385, *post*).

(*m*) In the case of severance, the rent remains a charge upon every portion of the premises. A right of action for the rent, although not given by the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 240, would probably lie (see *Thomas* v. *Sylvester* (1873), L. R. 8 Q. B. 368). As to rentcharges and their recovery, see title RENTCHARGES AND ANNUITIES.

(*a*) It is doubtful whether, after the expiration of the term, arrears could be recovered (see *R.* v. *All Saints, Wigan* (*Churchwardens*) (1876), 1 App. Cas. 611).

(*b*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 240. The provisions of the Act as to deducting from rent a proportion of private improvement rates and as to redemption of such rates (see *ibid.*, ss. 214, 215) apply to such rentcharges (*ibid.*, s. 240).

(*c*) For a list of the Public Health Acts, see note (*a*), p. 361, *ante*.

(*d*) As to what constitute general and special expenses, see title LOCAL GOVERNMENT, Vol. XIX., pp. 335, 336. On the application of a rural district council, the Local Government Board may by order declare any expenses to be special expenses (Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 49); and see p. 363, *ante*.

(*e*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 229; and see title LOCAL GOVERNMENT, Vol. XIX., p. 335, where "contributory place" is defined. As to the effect of this provision as regards the supply of water to each contributory place, and the liability of each contributory place to pay income tax on profits, see *Wakefield Rural District Council* v. *Hall* (1912), 28 T. L. R. 589, C. A.; and see title WATER SUPPLY.

SECT. 1. Expenses.

contributory place, specifying the sums due in respect of contributions for general expenses and for special expenses, and they are required to pay (*f*) the former out of the poor rate and the latter out of a separate rate (*g*), except where the amount required in respect of special expenses is less than £10, or is so small that a rate of less than 1*d*. in the £ would suffice to raise it, when it is paid out of the poor rate (*h*).

Private improvement expenses.

Whenever a rural district council has incurred or becomes liable to any private improvement expenses (*i*), it may levy a private improvement rate in the same manner as an urban authority (*k*).

SECT. 2.—*Borrowing Powers.*

SUB-SECT. 1.—*Urban and Rural Authorities.*

(i.) *General Powers.*

Sanction of Local Government Board.

761. Any local authority (*l*) may, with the sanction of the Local Government Board (*m*), borrow (*n*), or reborrow (*o*), for the purpose of defraying any expenses incurred or to be incurred by it in the execution of the Public Health Acts (*p*), or for the purpose of discharging any loan under those Acts or the Sanitary Acts (*q*).

(*f*) The overseers are made personally liable for default (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 231). As to the duties of overseers, see, further, titles POOR LAW, Vol. XXII., pp. 529, 530; RATES AND RATING.

(*g*) As to its assessment and levy, see title RATES AND RATING.

(*h*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 230.

(*i*) See title LOCAL GOVERNMENT, Vol. XIX., p. 336.

(*k*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 232; and see p. 381, *ante*. The provisions as to rentcharges (see p. 381, *ante*) also apply.

(*l*) See p. 372, *ante*.

(*m*) Where, under any local Act, the sanction of the Secretary of State to any borrowing for sanitary purposes is required, the sanction of the Local Government Board is required instead (Public Health Act, 1872 (35 & 36 Vict. c. 79), s. 34; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 343, Sched. V., Part. III.). A loan (including banker's overdraft) without sanction is invalid (*Re Companies Acts, Ex parte Watson* (1888), 21 Q. B. D. 301; *Fell* v. *Charity Lands* (*Official Trustee*), [1898] 2 Ch. 44, C. A.; *A.-G.* v. *De Winton*, [1906] 2 Ch. 106; *A.-G.* v. *West Ham Corporation* (1910), 103 L. T. 394). Loans for a specific purpose cannot be used for other purposes (*A.-G.* v. *West Ham Corporation, supra*). The Local Government Board regards payment by instalments as in the nature of a loan for which its sanction is necessary. Sanction for a loan should be obtained before any expenditure is incurred, as the failure to obtain it would necessitate payment out of current expenditure. In the case of land, a provisional agreement for purchase should be contingent on subsequent sanction. Fresh sanction is not required where a reborrowing takes place within the period for which a loan was originally sanctioned and no alteration in the terms of the loan is made, and, if there is a new lender, the mortgage is transferred to him. For forms relating to loans, see Encyclopædia of Forms and Precedents, Vol. VIII., pp. 192—206; Vol. XVI., p. 373. As to borrowing by local authorities, generally, see titles LOCAL GOVERNMENT, Vol. XIX., p. 282; MONEY AND MONEY-LENDING, Vol. XXI., pp. 58, 63; MORTGAGE, Vol. XXI., p. 112.

(*n*) A commission for procuring a loan may be charged in the loan account.

(*o*) The old loan should not be paid off before sanction for reborrowing, if necessary, is obtained.

(*p*) For a list of the Public Health Acts, see note (*a*), p. 361, *ante*.

(*q*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 233. The term "sanitary Acts" is defined (see *ibid.*, s. 4) in terms to include the Baths and Washhouses Acts (see note (*k*), p. 487, *post*), and numerous Acts repealed and re-enacted by the Public Health Act, 1875 (38 & 39 Vict.

SECT. 2. Borrowing Powers.

Regulations as to loans.

762. Money must not be borrowed except for permanent works (*r*), and the sum borrowed, with the balances of outstanding loans (*s*), must not at any time exceed in the whole the assessable value for two years (*t*) of the premises assessable within the district in respect of which the money is borrowed. The loan may be for such time, not exceeding sixty years (*a*), as the local authority, with the sanction of the Local Government Board, determines in each case, and the authority must either pay it off by equal annual instalments of principal or of principal and interest, or in every year set apart as a sinking fund a sum which, invested in authorised securities (*b*), with accumulations at compound interest, will be

c. 55), s. 4, Sched. V., Part I.). The provision in the text, p. 382, *ante*, does not authorise loans to defray expenses incurred under local Acts for sanitary purposes.

(*r*) These include any works of which the cost ought in the opinion of the Local Government Board to be spread over a term of years (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 234 (1)). Loans for repairs are not entertained by the Board.

(*s*) Under the Sanitary Acts (see note (*q*), p. 382, *ante*) and the Public Health Act, 1875 (38 & 39 Vict. c. 55), and Acts construed therewith (see note (*q*), p. 365, *ante*). There is no mention of loans under local Acts.

(*t*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 234 (2). This is construed to mean twice the assessable value at any given time, and the Local Government Board considers that "assessable value," in the case of an urban district, means that value for the purposes of a general district rate, that is, reckoning certain properties at the reduced estimate of one-fourth (see *ibid.*, s. 211 (1) (b)), and, in the case of a rural district, similarly for the purpose of a special expenses rate (see Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 230); and see title RATES AND RATING. But where the expenses would be, in a rural district, general expenses, it is not clear that the limit is not extended to twice the assessable value for the purpose of general expenses. Where a proposed loan and balances would exceed the assessable value for one year, the Local Government Board must not sanction the borrowing until an inspector has held a local inquiry (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 234 (3)). As to local inquiries, see p. 375, *ante*. In some instances the limitations have been abrogated (see Small Dwellings Acquisition Act, 1899 (62 & 63 Vict. c. 44), s. 9 (6); title SMALL HOLDINGS AND SMALL DWELLINGS; Housing of the Working Classes Act, 1903 (3 Edw. 7, c. 39), s. 1 (2); Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 65 (3); and see pp. 523, 527, *post*).

(*a*) The Local Government Board sanctions periods ranging, according to the permanency of various works, from five years to sixty years. The maximum period for loans under the Housing Acts (see note (*q*), p. 516, *post*) is eighty years; see note (*f*), p. 523, *post*. If a loan is raised for a period less than the maximum, the only way to increase the period for repayment is to pay off the old loan by reborrowing. A loan for the purpose of discharging a previous loan must not extend beyond the unexpired period of the original loan, unless with the sanction of the Local Government Board, and then not beyond sixty years from the date of the original loan (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 234 (6)). After the expiration of the period sanctioned for a loan there is no power to levy a rate for the purpose of any repayment; see *R.* v. *All Saints, Wigan (Churchwardens)* (1876), 1 App. Cas. 611.

(*b*) For the authorised investments, see Trust Investment Act, 1889 (52 & 53 Vict. c. 32), s. 7; Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 1, 2; Metropolis Water Act, 1902 (2 Edw. 7, c. 41), s. 17 (4); Colonial Stock Act, 1900 (63 & 64 Vict. c. 62), s. 2; title TRUSTS AND TRUSTEES. At any time the local authority may apply part or the whole of the sinking fund in discharge of the loan, provided it pays into the fund each year the interest on the money so applied (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 234 (5)).

SECT. 2. Borrowing Powers.

sufficient, after payment of all expenses, to pay off the loan within the period sanctioned (*c*).

Loans to defray private improvement expenses.

763. An urban authority which borrows to defray private improvement expenses, or expenses in respect of which a part only of the district is liable, must make good, as far as it can, the money borrowed, either out of private improvement rates or a rate levied in such part (*d*).

Loans from Public Works Loans Commissioners.

764. The Public Works Loans Commissioners (*e*) may make loans to a local authority for the purposes of the Public Health Acts (*f*), on the security of any fund or rate applicable to any such purposes (*g*), and may, on the recommendation of the Local Government Board, grant any such loan to be repaid within a period not exceeding fifty years (*h*).

(ii.) *Mortgages.*

Of rates.

765. For the purpose of securing the repayment of loans and interest, an urban authority may mortgage to the lender any fund or all or any rates out of which its expenses in executing the

(*c*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 234 (4). In respect of loans under some local Acts, power to supervise the sinking fund is conferred by the local Act upon the Local Government Board. Apparently the requirements as to the sinking fund, referred to in p. 383, *ante*, might be enforced by mandamus (see *R.* v. *St. Michael's, Pembroke* (*Churchwardens*) (1836), 5 Ad. & El. 603; *R.* v. *St. Michael's, Southampton* (*Churchwardens*) (1856), 6 E. & B. 807). Where an urban authority has adopted the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), Part V., it may, with the consent of the Local Government Board, exercise any power to borrow by the creation of stock (see *ibid.*, s. 52; and title LOCAL GOVERNMENT, Vol. XIX., p. 385). As to further facilities given to local authorities for dealing with borrowed money and its repayment, see Local Loans Act, 1875 (38 & 39 Vict. c. 83); Local Loans Sinking Funds Act, 1885 (48 & 49 Vict. c. 30); title MONEY AND MONEY-LENDING, Vol. XXI., pp. 58—63.

(*d*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 234. But see the power of the local authority to mortgage rates; see *ibid.*, s. 233, and the text, *infra*.

(*e*) The procedure of the Commissioners in granting loans is governed by the Public Works Loans Act, 1875 (38 & 39 Vict. c. 89), and amending Acts; see title MONEY AND MONEY-LENDING, Vol. XXI., pp. 58—63. As to the application of balances of loans, see Public Works Loans Acts, 1878 (41 & 42 Vict. c. 18), s. 4; 1881 (44 & 45 Vict. c. 38), s. 9.

(*f*) Loans under the Public Works Loans Act, 1875 (38 & 39 Vict. c. 85), may be made for works under local and other Acts (Public Works Loans Act, 1896 (59 & 60 Vict. c. 42), s. 2).

(*g*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 242. The maximum period for repayment of the loan is thirty years (Public Works Loans Acts, 1875 (38 & 39 Vict. c. 89), s. 11; 1898 (61 & 62 Vict. c. 54), s. 5), unless a recommendation is made by the Local Government Board, which in determining the period must have regard to the probable duration and continuing utility of the proposed works (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 243).

(*h*) *Ibid.* This provision does not apply to a loan for the expenses of the Local Government Board in performing the duty of a defaulting local authority (*ibid.*); see p. 379, *ante*. Power is given to the Public Works Loans Commissioners to reduce the rate of interest on loans made before 1872 (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 243; Public Works Loans (Money) Act, 1876 (39 & 40 Vict. c. 31), s. 6). The rate of interest is now fixed by the Treasury (Public Works Loans Act, 1897 (60 & 61 Vict. c. 51), s. 1).

Public Health Acts (*i*) are payable, and a rural authority may, where the sums borrowed are applied to general expenses, mortgage the common fund, and, where they are applied to special expenses, the rate or rates out of which these are payable (*j*).

Receiver of rates on default in repayment.

766. If any principal or interest in respect of any mortgage of rates, at the expiration of six calendar months from the due date, and after demand in writing, is not paid, the mortgagee may apply (*k*) to a court of summary jurisdiction (*l*) for the appointment of a receiver (*m*), to whom all rates, or a competent part thereof (*n*), liable to the payment are payable for rateable apportionment between the mortgagees, until the principal and interest and the costs of the application and of collection are fully paid (*o*).

Form and registration of mortgages.

767. Mortgages must be made by deed, truly stating the date, consideration, and the time and place of payment, and must be under the common seal of the local authority (*p*). A register of the mortgages on each rate must be kept at the office of the local authority, and must be open to public inspection without fee (*q*).

Transfer of mortgages and registration.

768. A mortgage may be transferred by deed duly stamped (*r*),

(*i*) For a list of the Public Health Acts, see note (*a*), p. 361, *ante*.

(*j*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 233. The giving of security appears to be optional; see *R.* v. *Locke*, [1911] 1 K. B. 680, C. A., *per* KENNEDY, L.J., at p. 698. A mortgage of the rates is personalty; see *Re Pickard, Emsley* v. *Mitchell*, [1894] 3 Ch. 704, C. A.; and, as to personal property in general, see title PERSONAL PROPERTY, Vol. XXII., pp. 385 *et seq.* For forms of mortgage by local authorities, see Encyclopædia of Forms and Precedents, Vol. VI., p. 310; Vol. VIII., pp. 196—206.

(*k*) No application may be entertained unless the sums due to the applicant, or to two or more joint applicants, amount to £1,000 (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 239). For a less sum an action for a mandamus to make a rate would lie (*Ward* v. *Lowndes* (1859), 1 E. & E. 940; *Drewry* v. *Barnes* (1826), 3 Russ. 94).

(*l*) The court is required to hear the parties, and, therefore, proceedings must be by summons; and see title MAGISTRATES, Vol. XIX., pp. 593 *et seq.*

(*m*) Where a local Act contained no such provision, the Court of Chancery declined to make an appointment (*Preston* v. *Great Yarmouth Corporation* (1872), 7 Ch. App. 655). As to the duties of receivers generally, see title RECEIVERS.

(*n*) The receiver cannot make the rate, but the duty of the local authority to make it may be enforced by mandamus.

(*o*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 239.

(*p*) *Ibid.*, s. 236. A mortgage of rates may be according to the form prescribed or to the like effect (*ibid.*; Sched. IV., Form H; see also the forms in the Encyclopædia of Forms and Precedents, Vol. VIII., pp. 200—203). As to the stamp duty on mortgages, see title MORTGAGE, Vol. XXI., p. 134; and, as to stamp duty generally, see title REVENUE. As to the non-liability of a local authority where its officer fraudulently affixed its seal to a mortgage, see *Crapp* v. *East Stonehouse Local Board* (1889), 5 T. L. R. 501, C. A.

(*q*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 237. The number and date of each mortgage, and the names and descriptions of the mortgagees, must be entered within fourteen days after execution: the penalty for refusing to allow inspection of the register is a sum not exceeding £5 (*ibid.*).

(*r*) As to stamp duties on transfers of mortgages, see title MORTGAGE, Vol. XXI., p. 174.

SECT. 2. Borrowing Powers.

truly stating its date and the consideration for its transfer (*s*). A register of transfers of mortgages on each rate must be kept at the office of the local authority, and within thirty days after the date of a deed of transfer, or of its arrival in the United Kingdom if executed abroad, it must be produced to the clerk of the local authority for entry, in the register, of its date and the names and descriptions of the parties (*t*).

Of sewage works.

769. Any land, works, or other property possessed by a local authority for sewage disposal purposes may be mortgaged by it as if the authority were the absolute owner, and the moneys so borrowed may be applied for any purposes for which loans may be made under the Public Health Acts (*a*), but the mortgagees are not responsible for any misapplication (*b*).

SUB-SECT. 2.—*Joint Authorities.*

Loans to joint boards, port sanitary authorities etc.

770. Joint boards (*c*) and port sanitary authorities (*c*), and the local board of health of any main sewerage district, and any joint sewerage board existing on the 11th August, 1875 (*d*), have the like powers as a local authority of borrowing on the credit of their funds or rates or sewage land and plant, and the Public Works Loans Commissioners may make loans to them (*e*).

SUB-SECT. 3.—*Metropolitan Authorities.*

Power to borrow subject to sanction.

771. Metropolitan borough councils (*f*) may, with the sanction of

(*s*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 238. For form of transfer, see *ibid.*, Sched. IV., Form I.

(*t*) *Ibid.*, s. 238. The clerk is liable to a penalty not exceeding £20 for default (*ibid.*). On registration the transferee is entitled to the full benefit of the original mortgage, but until entry in the register the local authority is not responsible to him (*ibid.*). If the loan has been duly sanctioned, a local authority is estopped from challenging the legality of any debentures or other securities issued by it (*Webb* v. *Herne Bay Commissioners* (1870), L. R. 5 Q. B. 642; *Re Romford Canal Co., Pocock's Claim, Trickett's Claim, Carew's Claim* (1883), 24 Ch. D. 85). As to the protection of purchasers from loss by forged transfers, see the Forged Transfers Acts, 1891 (54 & 55 Vict. c. 43), and 1892 (55 & 56 Vict. c. 36); title COMPANIES, Vol. V., p. 195.

(*a*) For a list of the Public Health Acts, see note (*a*), p. 361, *ante*.

(*b*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 235. Interest may be paid out of the rates (*ibid.*), and, in the opinion of the Local Government Board, so may the principal. No sanction of the Board is required for borrowing under *ibid.*. Where the sums borrowed do not exceed three-fourths of the purchase-money of the lands, the power of borrowing is to be deemed distinct from and in addition to the general powers of borrowing of the local authority (*ibid.*); but, if they do exceed such three-fourths, the sums borrowed must be taken into account in considering the limitations imposed by *ibid.*, s. 234; see p. 383, *ante*.

(*c*) See p. 373, *ante*.

(*d*) *I.e.*, the date of the passing of the Public Health Act, 1875 (38 & 39 Vict. c. 55). As to such local boards and joint sewerage boards, see title SEWERS AND DRAINS.

(*e*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 244.

(*f*) For the borrowing powers of the London County Council, see title METROPOLIS, Vol. XX., pp. 444—446, and of the City Corporation, see *ibid.*, p. 447. The exercise of the borrowing powers for sanitary purposes of the metropolitan borough councils is subject to the general provisions

the London County Council (*g*), borrow for the provision of hospitals (*h*), mortuaries (*i*), premises and plant for the collection and disposal of house and street refuse (*k*), and for the purposes of any epidemic regulations (*l*); and, with the consent of the Local Government Board (*m*), may borrow for the purpose of providing sanitary conveniences, lavatories, and ashpits (*n*), premises and carriages for disinfection, removal of infected articles (*o*), buildings for post-mortems and inquests (*p*), and shelter for persons removed from their houses in case of infectious disease (*q*).

SECT. 3.—*Accounts and Audit.*

Form of accounts and Government audit.

772. The accounts of local authorities and of their committees and officers are made up in a form prescribed by the Local Government Board (*r*), and such accounts, other than those of municipal corporations, are audited by district auditors (*s*). The accounts of municipal corporations, with a few exceptions (*t*), are audited by the borough auditors (*u*).

applicable to borrowing by such authorities; see the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 183, 185—191; and see title METROPOLIS, Vol. XX., pp. 447—449.

(*g*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 183; Local Government Act, 1888 (51 & 52 Vict. c. 42), s. 40 (8).

(*h*) See pp. 432 *et seq.*, *post*.

(*i*) See title BURIAL AND CREMATION, Vol. III., p. 566.

(*k*) Public Health (London) Act, 1891, Amendment Act, 1893 (56 & 57 Vict. c. 47), s. 3. As to the collection of such refuse, see pp. 606, 609, *post*.

(*l*) Public Health (London) Act, 1891 (55 & 56 Vict. c. 76), s. 105 (1). As to such regulations, see p. 464, *post*.

(*m*) No other consent is necessary (Public Health (London) Act, 1891 (55 & 56 Vict. c. 76), s. 105 (3)).

(*n*) See p. 602, *post*.

(*o*) See, further, p. 456, *post*.

(*p*) Public Health (London) Act, 1891 (55 & 56 Vict. c. 76), s. 105 (2). As to such buildings, see title BURIAL AND CREMATION, Vol. III., p. 566.

(*q*) London County Council (General Powers) Act, 1896 (59 & 60 Vict. c. clxxxviii.), s. 32. As to such shelter, see pp. 454, 459, *post*.

(*r*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 245; Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 58 (1); London Government Act, 1899 (62 & 63 Vict. c. 14), s. 14; and see titles LOCAL GOVERNMENT, Vol. XIX., pp. 244, 260, 283, 323, 337, 362; METROPOLIS, Vol. XX., p. 451.

(*s*) Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 247, 250; Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 71 (3); Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 58 (2), (3); London Government Act, 1899 (62 & 63 Vict. c. 14), s. 14; see title LOCAL GOVERNMENT, Vol. XIX., pp. 244, 260, 284, 327, 363. The accounts of a joint committee of a municipal council and another council not a municipal council are also audited by the district auditor (Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 58 (2)).

(*t*) See title LOCAL GOVERNMENT, Vol. XIX., p. 325, note (*t*).

(*u*) Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 246, 250; and see title LOCAL GOVERNMENT, Vol. XIX., p. 324.

Part IV.—Bye-laws.

SECT. 1.

In General.

SECT. 1.—*In General.*

Bye-laws.

773. In addition to the direct enactments of the various statutes governing matters of public health and local administration, very large powers of providing for other incidental or minor matters are conferred upon sanitary and other local authorities, they being empowered by numerous Acts to make bye-laws, either dealing with specific matters or generally for the promotion of good order, government, and sanitary and other amenities in the areas under their control (*a*).

Definition of bye-law.

774. A bye-law has been said to be an ordinance affecting the public, or some portion of the public, imposed by some authority clothed with statutory powers, ordering something to be done or not to be done, and accompanied by some sanction or penalty for its non-observance. Further, it involves this consequence—that, if validly made, it has the force of law within the sphere of its legitimate operation (*b*).

When power may be exercised.

775. Where by any Act passed after 1889 a power to make rules, regulations, or bye-laws is given, the power may, unless the contrary intention appears, be exercised at any time after the passing of the Act, provided that the bye-laws do not come into operation until the Act does (*c*).

SECT. 2.—*How Made.*

Bye-laws under Public Health Acts.

776. All bye-laws (*d*) made by a local authority (*e*) under and for

(*a*) The numerous subjects with respect to which bye-laws may be made under the Public Health Acts and incorporated enactments (as to these Acts, see note (*a*), p. 361, *ante*) are referred to in this title, *passim*, where each such matter is dealt with. For metropolitan bye-laws, see title METROPOLIS, Vol. XX., pp. 460—462, and for bye-laws relating to other matters, not especially dealt with in this title, see the titles referred to at pp. 360, 361, *ante*. For forms of bye-laws, see Encyclopædia of Forms and Precedents, Vols. IX., pp. 99—111; XI., pp. 28—33; XVI., p. 8.

(*b*) *Kruse* v. *Johnson*, [1898] 2 Q. B. 91, *per* Lord RUSSELL OF KILLOWEN, C.J., at p. 96. The definition is, however, too wide, as it would include Orders in Council and other orders, rules, and regulations made by Government Departments under statutory authority. What may be postulated is that bye-laws are a particular class of such subordinate legislation, distinguished from ordinances made by central authorities, and usually requiring to be confirmed, or allowed, or not disallowed, by some central authority before having the force of law. Their function is to supplement the general law; they should not merely repeat statutory enactments; see note (*r*), p. 394, *post*.

(*c*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 37.

(*d*) The provisions of the Public Health Act, 1875 (38 & 39 Vict. c. 55) as to bye-laws do not apply to regulations authorised by the Public Health Acts, but a local authority may publish any such regulations in such manner as it sees fit (*ibid.*, s. 188). The provisions apply to bye-laws made under the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 9; the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53),

(*e*) For note (*e*), see next page.

SECT. 2. How Made.

the purposes of the Public Health Act, 1875 (*f*), must be under the common seal of the authority (*g*), and the authority may by such bye-laws impose upon offenders reasonable penalties (*h*), not

c. 53), s. 9; and other Acts incorporated with (see note (*s*), p. 391, *post*), or to be construed with, the Public Health Act, 1875 (38 & 39 Vict. c. 55) (see note (*g*), p. 365, *ante*), to bye-laws under the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 114 (see title METROPOLIS, Vol. XX., p. 460); the Housing of the Working Classes Act, 1885 (48 & 49 Vict. c. 72), s. 10 (see p. 516, *post*); the Housing of the Working Classes Acts, 1890 to 1909 (see pp. 516 *et seq.*, *post*); the Museums and Gymnasiums Act, 1891 (54 & 55 Vict. c. 22), s. 7 (see p. 592, *post*); the Public Libraries Act, 1901 (1 Edw. 7, c. 19), s. 3 (see p. 591, *post*); the Small Holdings and Allotments Act, 1908 (8 Edw. 7, c. 36), s. 28 (rules as to allotments) (see title ALLOTMENTS, Vol. I., p. 352); the Brine Pumping (Compensation for Subsidence) Act, 1891 (54 & 55 Vict. c. 40), s. 48 (see title MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 580, 581); the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 15 (see title FACTORIES AND SHOPS, Vol. XIV., p. 470); the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 8 (1) (d); the Commons Act, 1899 (62 & 63 Vict. c. 30), s. 10, and the Open Spaces Act, 1906 (6 Edw. 7, c. 25), s. 15 (2) (e) (see titles COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 611 *et seq.*; OPEN SPACES AND RECREATION GROUNDS, Vol. XXI., p. 584); the Locomotives Act, 1898 (61 & 62 Vict. c. 29), s. 6 (see title STREET AND AERIAL TRAFFIC); the Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 48 (rules and regulations) (see title TRAMWAYS AND LIGHT RAILWAYS); and they are often applied to bye-laws made under provisional orders and local Acts. Under the provisions as applied, the Secretary of State is sometimes the confirming authority, as, for instance, in the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 82 (seashore), and *ibid.*, s. 83 (promenades); see *ibid.*, s. 9; titles STREET AND AERIAL TRAFFIC; WATERS AND WATERCOURSES; and see Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 85 (servants' registries); title WORK AND LABOUR. There are special provisions under other Acts with respect to bye-laws, as, for instance, the Advertisements Regulation Act, 1907 (7 Edw. 7, c. 27), s. 3 (see p. 399, *post*); the Petroleum Act, 1871 (34 & 35 Vict. c. 105), s. 4 (see p. 572, *post*); and the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 13 (telegraph wires) (see titles HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 260; TELEGRAPHS AND TELEPHONES).

(*e*) See p. 372, *ante*.

(*f*) 38 & 39 Vict. c. 55, and the subsequent Acts to be construed therewith (see note (*g*), p. 365, *ante*); and see note (*s*), p. 391, *post*. Bye-laws under repealed enactments and not inconsistent with the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 315, 326, are deemed bye-laws under the Act (*ibid.*, s. 326); but upon an urban district becoming a borough (see title LOCAL GOVERNMENT, Vol. XIX., p. 311), bye-laws are not continued in force (see Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 310), unless expressly saved by a scheme under the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 213—218. Any bye-law may be altered or repealed by a subsequent bye-law (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 182). As to bye-laws made under Acts passed after 1889, see the similar provision in the Interpretation Act, 1889 (52 & 53 Vict. c 63), s. 32 (3).

(*g*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 182. As to sealing by parish councils and parish meetings which have no common seals, see Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 3 (9), 19 (11); title LOCAL GOVERNMENT, Vol. XIX., pp. 241, 256. It follows from the requirement referred to in the text, *supra*, that the formal making of bye-laws cannot be delegated to a committee.

(*h*) The bye-laws must be so framed as to allow of the recovery of any sum less than the full amount of the penalty (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 183). The penalty should be fixed by the bye-law, with a proviso allowing its reduction; see also the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49) s. 4; title MAGISTRATES, Vol. XIX., p. 603.

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exceeding £5 for each offence and, in the case of a continuing offence (*i*), a further penalty not exceeding £2 for each day after written notice of the offence has been given by the authority (*k*).

Bye-laws for good rule and government.

777. A council (*l*) of a borough (*m*) or county (*n*) may make bye-laws (*o*), enforceable by penalties not exceeding £5 (*p*), for the good rule and government (*q*) of the borough or county (*r*).

No greater penalties than those specified may be imposed by bye-laws made under any incorporated enactment (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 183); and see *Calder and Hebble Navigation Co.* v. *Pilling* (1845), 14 M. & W. 76. As to the recovery of penalties, see pp. 367 *et seq.*, *ante*.

(*i*) As to continuing offences, see the provision in respect of bye-laws as to new buildings, referred to at p. 425, *post*, and the cases cited in note (*d*), *ibid.*; and, as to what is a continuing offence, see, further, titles LIMITATION OF ACTIONS, Vol. XIX., p. 178; NUISANCE Vol. XXI., p. 560; PUBLIC AUTHORITIES AND PUBLIC OFFICERS, p. 346, *ante*.

(*k*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 183. Apparently notice may be given, and a person convicted, for a continuing offence although there has been no conviction for the original offence; see *London County Council* v. *Worley*, [1894] 2 Q. B. 826.

(*l*) At least two-thirds of the whole number of the council being present (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 23 (2)).

(*m*) Including a metropolitan borough (London Government Act, 1899 (62 & 63 Vict. c. 14), s. 5 (2), Sched. II., Part II.; and see title METROPOLIS, Vol. XX., pp. 402 *et seq.*

(*n*) Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 16 (1), 75. Bye-laws made by a county council have no force or effect within any municipal borough (*ibid.*, s. 16 (2)).

(*o*) The power to make bye-laws implies a power to repeal and alter them by others duly made (*R.* v. *Ashwell* (1810), 12 East, 22; *R.* v. *Westwood* (1825), 4 B. & C. 781, 806).

(*p*) Recoverable summarily (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 23 (5)). As to summary proceedings, see title MAGISTRATES, Vol. XIX., pp. 571 *et seq.*

(*q*) The bye-laws may not regulate the use of bicycles and similar machines (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 85). As to such machines, see title STREET AND AERIAL TRAFFIC.

(*r*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 23 (1), (2), (5). Under the same enactment bye-laws as to certain nuisances may also be made, but they are subject to the provisions of the Public Health Act, 1875 (38 & 39 Vict. c. 55), and are confirmed by the Local Government Board (Municipal Corporations) Act, 1882 (45 & 46 Vict. c. 50), s. 23 (6), and the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 187). Bye-laws made under Acts repealed by the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), were kept in force (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 260 (3)). Bye-laws dealing specifically with nuisances within the meaning of the enactment have seldom been made, and the distinction between them and bye-laws for good rule and government is sometimes confused; see *Mantle* v. *Jordan*, [1897] 1 Q. B. 248. Many bye-laws for good rule and government dealing with offences in streets have been before the courts. In *Thomas* v. *Sutters*, [1900] 1 Ch. 10, C. A., JEUNE, P., at p. 16, said, "I should hesitate long before saying that a municipality had not a perfect right, and indeed a duty, to deal with matters which affect the respectability and moral conduct of the persons in their streets—that is, in so far as they are matters of public interest and affect the persons who use the streets." In the following citation of cases relating to matters in or near streets or public places, it is stated where the bye-law was held to be invalid:—annoying passengers (*Nash* v. *Finlay* (1901), 66 J. P. 183 (invalid)); betting news (*Scott* v. *Pilliner*, [1904] 2 K. B. 855 (invalid)); football (*Pearson* v. *Whitfield*, 1888), 52 J. P. 708); juvenile vendors (*Macdonald* v. *Lochrane* (1887), 51

SECT. 2. How Made.

Confirmation etc. of bye-laws under the Public Health Acts.

778. Bye-laws under the Public Health Acts (*s*) have no effect until confirmed by the Local Government Board (*t*); and before

J. P. 629 (invalid) (see note (*t*), p. 395, *post*)); lights on vehicles (*Walker* v. *Stretton* (1896), 60 J. P. 313; *William* v. *Groves* (1896), 12 T. L. R. 450; *Adamson* v. *Miller* (1900), 16 T. L. R. 185; see now Lights on Vehicles Act, 1907 (7 Edw. 7, c. 45), and title STREET AND AERIAL TRAFFIC); litter (*Batchelor* v. *Sturley* (1905), 93 L. T. 539); music (*R.* v. *Powell* (1884), 48 J. P. 740; *Johnson* v. *Croydon Corporation* (1886), 16 Q. B. D. 708 (invalid); *Munro* v. *Watson* (1887), 57 L. T. 366 (invalid); *Booth* v. *Howell* (1889), 53 J. P. 678; *Brownscombe* v. *Johnson* (1898), 78 L. T. 265; reheard *sub nom. Kruse* v. *Johnson*, [1898] 2 Q. B. 91); music generally in borough (*Southend-on-Sea Corporation* v. *Davis* (1900), 16 T. L. R. 167); offensive language (*Strickland* v. *Hayes*, [1896] 1 Q. B. 290 (invalid); *Mantle* v. *Jordan*, [1897] 1 Q. B. 248; and see *Gentel* v. *Rapps*, [1902] 1 K. B. 160); roundabouts, swings etc. (*Teale* v. *Harris* (1896), 60 J. P. 744; see also Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 38; title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 117, 118, 151 *et seq.*, 208, 227 *et seq.*, 256 *et seq.*); shouting and hawking (*Innes* v. *Newman*, [1894] 2 Q. B. 292). A bye-law prohibiting the sale of unwholesome food and providing for its seizure has been upheld (*Shillito* v. *Thompson* (1875), 1 Q. B. D. 12); and see title FOOD AND DRUGS, Vol. XV., pp. 35, 40.

(*s*) For a list of the Public Health Acts, see note (*a*), p. 361, *ante*. Such bye-laws include bye-laws under the "incorporated enactments," namely, the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 128 (slaughter-houses), see note (*f*), p. 556, *post*; the Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 68 (hackney carriages), see title STREET AND AERIAL TRAFFIC; the Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 69 (public bathing), see p. 500, *post*; the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), s. 42 (markets), see title MARKETS AND FAIRS, Vol. XX., p. 23; Public Health (Confirmation of Byelaws) Act, 1884 (47 & 48 Vict. c. 12); and see note (*d*), p. 388, note (*f*), p. 389, *ante*. The Public Health (Confirmation of Byelaws) Act, 1884 (47 & 48 Vict. c. 12), made unnecessary any confirmation, allowance, or approval of any bye-law made under the incorporated enactments by reason of their incorporation with the Public Health Act, 1875 (38 & 39 Vict. c. 55), or the repealed Sanitary Acts (see note (*q*), p. 382, *ante*), or any local Act or provisional order, other than the confirmation of the confirming authority (Public Health (Confirmation of Byelaws) Act, 1884 (47 & 48 Vict. c. 12), s. 3), namely, the Secretary of State before, and the Local Government Board after, the 19th August, 1871 (*ibid.*, s. 2). There is a saving for bye-laws previously confirmed in pursuance of the special provisions applicable to the incorporated Acts, and for bye-laws under local Acts with special provisions (*ibid.*, s. 4). Those special provisions, although not expressly incorporated with the Public Health Act, 1875 (38 & 39 Vict. c. 55), or the Sanitary Acts, had been held to apply (*Wallasey Tramway Co.* v. *Wallasey Local Board* (1883), 47 J. P. 821); see also note (*t*), *infra*, and note (*d*), p. 388, *ante*.

(*t*) Confirmation, allowance or approval by any other authority is not required (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 184). Where, in any local Act, confirmation by the Secretary of State of any bye-laws for sanitary purposes is required, confirmation by the Local Government Board is required instead (Public Health Act, 1872 (35 & 36 Vict. c. 79), s. 34; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 343, Sched. V., Part III.). For instances where the Secretary of State is substituted for the Local Government Board as confirming authority, see note (*d*), p. 388, *ante*. Although, where so enacted, such confirmation, allowance, or approval, or non-disallowance (see p. 392, *post*) is essential to a bye-law having effect, it does not render a bye-law valid which is in other respects invalid (*Elwood* v. *Bullock* (1844), 6 Q. B. 383; *R.* v. *Wood* (1855), 5 E. & B. 49; *Kruse* v. *Johnson*, *supra*). The Local Government Board has issued instructions for submitting bye-laws or regulations, and requests that proposals of local authorities should in

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confirmation at least one calendar (*u*) month's notice of intention to apply for confirmation must be given in one or more local newspapers circulating in the district to which the bye-laws relate, and for one calendar (*u*) month at least before the application a copy of the proposed bye-laws must be kept at the office of the local authority, and be open during office hours to the inspection of the ratepayers of the district without fee or reward (*a*).

Submission to Secretary of State of bye-laws for good rule and government.

779. Bye-laws as to good rule and government do not come into force until the expiration of forty days (*b*) after a copy has been fixed at the town hall (*c*), and until the same time (*d*) after a copy, sealed with the corporate seal, has been sent to the Secretary of State (*e*); if within that time (*d*) the bye-law or any part is disallowed by Order in Council, the bye-law or part so disallowed does not come into force (*f*).

Publication of bye-laws under the Public Health Acts.

780. Bye-laws made by a local authority under the Public Health Acts (*g*), or for the same or similar purposes under any local Act (*h*), must be printed and hung up in the office of the authority (*i*),

the first instance be submitted in draft (duplicate) for preliminary approval before any formal steps are taken in compliance with the statutory requirements. The Board has also issued numerous series of model clauses for the assistance of local authorities proposing to make bye-laws (to which reference is hereafter made in connection with the particular subject-matters dealt with at pp. 417, 455, 499, 501, 507, 511, 516, 591, 601, 608—610, *post*), and supplies draft forms of the series for use by local authorities. When the terms of a proposed series have been settled, the requirements noted in the text, *supra*, have to be complied with, and any objections which may be made by interested ratepayers are considered by the Local Government Board before appending the certificate of confirmation.

(*u*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 3.

(*a*) On the application of a ratepayer, the clerk to the authority must furnish him with a copy of the proposed bye-laws, or any part thereof, on payment of 6*d.* for every 100 words (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 184). A ratepayer may make any representation to the Local Government Board before confirmation; see note (*t*), p. 391, *ante*.

(*b*) The forty days commence on the day succeeding that on which the notice is first fixed (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 230); see titles LOCAL GOVERNMENT, Vol. XIX., p. 314, note (*g*); TIME; STATUTES.

(*c*) In some conspicuous place on or near the outer door of the town hall, or, if there is no town hall, in some conspicuous place in the borough (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 232) or county (Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 16, 75).

(*d*) If this time is enlarged, the bye-laws do not come into force until after the expiration of that enlarged time (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 23 (4)).

(*e*) The Home Secretary has issued a series of model clauses. A draft of any proposed bye-laws should in the first instance be submitted to him, so as to settle their terms before the formal statutory steps are taken. Bye-laws made by a county council as to good rule and government are to be sent to him, and do not require confirmation by the Local Government Board (*Strickland* v. *Hayes*, [1896] 1 Q. B. 290).

(*f*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 23 (3), (4).

(*g*) For a list of the Public Health Acts, see note (*a*), p. 361, *ante*. These bye-laws include bye-laws under the repealed Sanitary Acts which were kept in force (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 286); and see note (*f*), p. 389, *ante*.

(*h*) See *Fielding* v. *Rhyl Improvement Commissioners* (1878), 3 C. P. D. 272.

(*i*) Destruction or injury of any board on which any bye-law is inscribed,

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and a copy must be delivered to any ratepayer on his application; and, where made by a rural authority, a copy must also be sent to the overseers of every parish to which the bye-laws relate, to be deposited with the public documents of the parish (*k*), and to be open to the inspection of any ratepayer at all reasonable hours (*l*).

Evidence of bye-laws.

781. A copy of any bye-laws made by a local authority other than a town council, signed and certified by the clerk to be a true copy and to have been duly confirmed, is, until the contrary is proved, conclusive evidence in all legal proceedings, of the due making, confirmation, and existence of the bye-laws (*m*). A copy (*n*) of any bye-law made by a town council, if authenticated by the corporate seal (*o*), is, until the contrary is proved, sufficient evidence of the due making and existence of the bye-law, and, if so stated in the copy, of its having been duly approved and confirmed (*p*).

SECT. 3.—*Validity.*

Essentials.

782. A bye-law must be—

(1) *intra vires* of the authority who makes it (*q*);

if set up by the local authority, is punishable by a penalty not exceeding £5 (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 306). As to publication of bye-laws with respect to baths and washhouses, see p. 500, *post*; and see note (*m*), p. 499, *post*. Printed copies of market bye-laws must be conspicuously exhibited in the market (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 167); and see title MARKETS AND FAIRS, Vol. XX., p. 25, note (*m*)).

(*k*) As to the custody of these documents, see title LOCAL GOVERNMENT, Vol. XIX., p. 253.

(*l*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 185. Non-compliance with this provision would not, apparently, invalidate bye-laws (*Duncan* v. *Knill* (1907), 96 L. T. 911).

(*m*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 186.

(*n*) Written or printed (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 7, 24).

(*o*) See *ibid.*, s. 7. As to the use of the seal and tendering in evidence a forged copy of bye-laws, see title LOCAL GOVERNMENT, Vol. XIX., p. 328, note (*p*).

(*p*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 24; *Robinson* v. *Gregory*, [1905] 1 K. B. 534.

(*q*) "The Local Board had no right to make a bye-law investing themselves with power beyond that conferred on them by the Act" (*Brown* v. *Holyhead Local Board of Health* (1862), 1 H. & C. 601, *per* POLLOCK, C.B., at p. 606). Bye-laws embodying the following matters have been held to be *ultra vires*, namely: prohibiton of Sunday navigation where a company was empowered to make bye-laws "for the good and orderly use of the navigation" (*Calder and Hebble Navigation Co.* v. *Pilling* (1845), 14 M. & W. 76); removal of snow from footpaths, where the enactment referred only to "dust, ashes, rubbish, filth, manure, dung and soil" (*R.* v. *Wood* (1855), 5 E. & B. 49) (this is now met by the terms of the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 44; see pp. 608, 609, *post*); prohibition of building, before kerb of footpath put in, considered *ultra vires* of Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 157 (see p. 416, *post*; *Rudland* v. *Sunderland Corporation* (1884), 52 L. T. 617, *per* HAWKINS, J., at p. 620); prohibition of building before roadway made for access to privy and ashpit (*Waite* v. *Garston Local Board* (1867), L. R. 3 Q. B. 5); prohibition of fishing without regard to statutory qualifications (*Wood* v. *Venton* (1890), 54 J. P. 662); compulsory licensing of proprietors (not acting as boatmen) of pleasure boats (*Byrne* v. *Brown* (1893), 57 J. P. 741); prohibition in effect where enactment authorised regulation (*Parker* v.

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(2) not repugnant to the law of England (*r*);
(3) certain in its terms and positive (*s*); and
(4) reasonable (*t*).

Bournemouth Corporation (1902), 86 L. T. 449; *Moorman* v. *Tordoff* (1908), 98 L. T. 416).

(*r*) "All bye-laws which are contrary to the laws or statutes of the realm are void and of no effect" (*London's (Chamberlain) Case* (1590), 5 Co. Rep. 62 b, 63 a); and bye-laws under the Public Health Acts (see note (*a*), p. 361, *ante*) are to be of no "effect if repugnant to the laws of England or to the provisions of this Act" (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 182). As to bye-laws under repealed enactments, see note (*f*), p. 389, *ante;* and see note (*s*), p. 391, *ante.* But "a bye-law must necessarily superadd something to the common law, otherwise it would be idle" (*R.* v. *Saddlers' Co.* (1860), 3 E. & E. 42, Ex. Ch., *per* MARTIN, J., at p. 80; see *Edmonds* v. *Watermen and Lightermen's Co.* (*Master, etc.*) (1855), 1 Jur. (N. S.) 727. "A bye-law is not repugnant to the general law merely because it creates a new offence, and says that something shall be unlawful which the law does not say is unlawful. It is repugnant if it makes unlawful that which the general law says is lawful, if it expressly or by necessary implication professes to alter the general law of the land if it adds something inconsistent with the provisions of a statute creating the same offence; but if it adds something not inconsistent, that is not sufficient to make the bye-law bad as repugnant" (*Gentel* v. *Rapps*, [1902] 1 K. B. 160, *per* CHANNELL, J., at p. 166). These considerations seem equally applicable to the provisions of local Acts. As to such inconsistent additions, see *Dearden* v. *Townsend* (1865), L. R. 1 Q. B. 10; *Bentham* v. *Hoyle* (1878), 3 Q. B. D. 289; *London and Brighton Rail. Co.* v. *Watson* (1878), 3 C. P. D. 429; *Purvis* v. *Wimbledon and Putney Commons Conservators* (1890), 62 L. T. 529. As to additions which, although more stringent than, were held not inconsistent with, the statutes, see *Thomas* v. *Sutters*, [1900] 1 Ch. 10, C. A.; *Batchelor* v. *Sturley* (1905), 93 L. T. 539; *Da Prato* v. *Partick* (*Provost*), [1907] A. C. 153; *Tuffley* v. *Tate* (1906), 96 L. T. 24. A bye-law specifying a mode of construction of street channelling was held not to be repugnant to the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150, or the Private Street Works Act, 1892 (55 & 56 Vict. c. 57), ss. 6, 7 (*Leyton Urban Council* v. *Chew*, [1907] 2 K. B. 283); and see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 237. In *Strickland* v. *Hayes*, [1896] 1 Q. B. 290, a bye-law prohibiting obscene songs and language in or near streets or public places or adjacent lands was held invalid, as it did not make the offence contingent upon there being annoyance to the residents or passengers, as in the Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 28; see also *Russon* v. *Dutton* (No. 2) (1911), 104 L. T. 601. *Strickland* v. *Hayes, supra,* was distinguished in *Thomas* v. *Sutters, supra,* where a bye-law that no person should frequent and use any street or other public place for betting was held not repugnant to the Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134), s. 23, and was doubted in *Gentel* v. *Rapps, supra,* where a bye-law absolutely prohibiting obscene or offensive language in tramcars was held not repugnant to the Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 28, above referred to; see also *Kruse* v. *Johnson,* [1898] 2 Q. B. 91; and see note (*t*), p. 395, *post; White* v. *Morley,* [1899] 2 Q. B. 34. As to betting in streets, see Street Betting Act, 1906 (6 Edw. 7, c. 43); title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 551. A penalty imposed by statute for an offence cannot be increased by bye-law (*Calder and Hebble Navigation Co.* v. *Pilling* (1845), 14 M. & W. 76).

(*s*) A bye-law should clearly indicate what is required to be done or not done by the persons concerned, and be expressed as a command, and not as a mere counsel of perfection. "From many decisions on the subject

(*t*) For note (*t*) see next page.

it would seem clear that a bye-law to be valid must, among other conditions, . . . be certain; that is, it must contain adequate information as to the duties of those who are to obey" (*Kruse* v. *Johnson*, [1898] 2 Q. B. 91, *per* MATHEW, J., at p. 108, quoted with approval in *Nash* v. *Finlay* (1902), 85 L. T. 682, by Lord ALVERSTONE, C.J., at p. 683), where a bye-law that "no person shall wilfully annoy passengers in the streets" was held void for uncertainty, as other bye-laws in the series dealt with specific nuisances, and there was nothing to show what the bye-law was intended to prohibit; see also *Scott* v. *Pilliner*, [1904] 2 K. B. 855; *Treasure & Co.* v. *Bermondsey Borough Council* (1904), 68 J. P. 206. But a bye-law prescribing that "the several places in the district where painted boards shall from time to time be placed . . . shall be the stands for such number of carriages, etc. as shall be mentioned on such boards" (*Blackpool Local Board of Health* v. *Bennett* (1859), 4 H. & N. 127) and a bye-law requiring the channels of new streets to be constructed either of granite cubes laid in a bed of concrete at least six inches in thickness or otherwise in a suitable manner and with suitable materials (*Leyton Urban Council* v. *Chew*, [1907] 2K. B. 283) were upheld as of sufficient certainty; and see *Dunning* v. *Maher* (1912), 106 L. T. 846 (bye-law requiring lamp solely for illuminating dial of taximeter). The penalty must be certain, but the fixing of a maximum with a power of mitigation does not infringe this canon (*Piper* v. *Chappell* (1845), 14 M. & W. 624). The persons upon whom the duty of compliance with bye-laws is imposed should be clearly indicated in the bye-laws. This is specially necessary where the duty is to do, rather than to forbear from doing. The Local Government Board, in its Circular Letter of the 25th July, 1877, to urban authorities, refers to the necessity for the use of certain and definite language in bye-laws, and states that it has been called to criticize bye-laws which, while purporting to lay down rules enforceable by penalties, ignore the necessary details, and substitute vague conditions, which render compliance with the bye-laws dependent upon the approval, by the sanitary authority or their officers, of the mode of proceeding in each case; that such bye-laws also are open to objection on the ground of uncertainty, and they do not fulfil the purpose for which the power of making bye-laws was conferred upon sanitary authorities; and that the Board thinks that every person who, by neglect of the rules which a bye-law is intended to prescribe, may be rendered liable to a penalty, is entitled to demand from those who impose such rules a clear statement of the course of action which must be followed or avoided.

(*t*) *Slattery* v. *Naylor* (1888), 13 App. Cas. 446, P. C.; *Brownscombe* v. *Johnson* (1898), 78 L. T. 265 (see note (*r*), p. 390, *ante*). Until 1898, the test of reasonableness was applied sometimes with uncertainty and often with stringency. Bye-laws prohibiting, in streets or public places, without a licence from the mayor, entertainment booths (*Elwood* v. *Bullock* (1844), 6 Q. B. 383), and music or preaching (*Munro* v. *Watson* (1887), 51 J. P. 660), have been held unreasonable, as have bye-laws which prohibited in boroughs the keeping of swine from May to October (*Everett* v. *Grapes* (1861), 3 L. T. 669); street music on Sundays (*Johnson* v. *Croydon Corporation* (1886), 16 Q. B. D. 708), and street trading by children at night (*Macdonald* v. *Lochrane* (1887), 51 J. P. 629; see title INFANTS AND CHILDREN, Vol. XVII., p. 152), where the bye-laws did not make it a condition precedent that nuisance or annoyance should be caused. But in *Kruse* v. *Johnson*, *supra*, a bye-law which prohibited any person from playing music or singing within fifty yards of any dwelling-house after being requested by a constable or inmate to desist was held not unreasonable although it was not confined to acts causing an annoyance or nuisance. A distinction was drawn in that case between bye-laws made by trading companies and bye-laws made, under ample statutory safeguards, by local authorities elected by a popular vote. Bye-laws of public representative bodies "ought to be supported if possible. They ought to be, as has been said, 'benevolently' interpreted, and credit ought to be given to those who have to administer them, that they will be reasonably administered. This involves the introduction of no new canon of construction. . . . If, for instance, they were found to be partial and unequal in their operation as between different classes; if

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they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say 'Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*.' But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded. A bye-law is not unreasonable because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there" (*Kruse* v. *Johnson*, [1898] 2 Q. B. 91, *per* Lord RUSSELL OF KILLOWEN, C.J., at pp. 99, 100). The principle thus laid down was explained as being "that, where a thing is of such a character as that it can be a nuisance, it is to rest with the local authority to say whether it shall be considered to be a nuisance in the particular locality for which they have power to make bye-laws. The court can say whether it is reasonably possible for the prohibited act or thing to be a nuisance; but they cannot say whether it should or should not be forbidden in the particular locality" (*White* v. *Morley*, [1899] 2 Q. B. 34, *per* CHANNELL, J., at p. 39; see also *Walker* v. *Stretton* (1896), 60 J. P. 313; *Clayton* v. *Peirse*, [1904] 1 K. B. 424). A bye-law under a local Act prohibiting the use of steam and other mechanical musical instruments in a borough was upheld, although it did not exempt small mechanical instruments in private houses (*Southend-on-Sea Corporation* v. *Davis* (1900), 16 T. L. R. 167). Bye-laws which imposed duties of cleansing and maintenance on the owners of houses let in lodgings were held unreasonable for not providing for notifying the owner of non-compliance (*Nokes* v. *Islington Corporation* (No. 1), [1904] 1 K. B. 610; *Stiles* v. *Galinski*, *Nokes* v. *Islington Corporation* (No. 2), [1904] 1 K. B. 615) and, where they did so provide, because they applied to owners who might have reserved no right of entry (*Arlidge* v. *Islington Corporation*, [1909] 2 K. B. 127); as to this, see the Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 16; and see p. 508, *post*. A bye-law prohibiting, in streets or public places, the sale of papers wholly or mainly devoted to racing news was held unreasonable, as it might include papers in general which give information perfectly legal (*Scott* v. *Pilliner*, [1904] 2 K. B. 855). The requirement of reasonableness involves the general rule that bye-laws should in their application be general and not particular. They should not improperly discriminate between different classes; see the observations in *Kruse* v. *Johnson*, *supra*. "Lawful preferential treatment is the exception, and is a question of degree" (*Mitcham Common Conservators* v. *Cox*, *Same* v. *Cole*, [1911] 2 K. B. 854, *per* PHILLIMORE and HAMILTON, JJ., at p. 875); but in special circumstances some preferential treatment may be given, as, for instance, in favour of clubs who make and keep up recreation grounds (*Mitcham Common Conservators* v. *Cox*, *Same* v. *Cole*, *supra*; and see *Dunning* v. *Maher* (1912), 106 L. T. 846).

A bye-law in restraint of trade is bad unless there be a custom to support it (*Hesketh* v. *Braddock* (1766), 3 Burr. 1847; see also *Fazakerly* v. *Wiltshire* (1721), 1 Stra. 462; *Clark* v. *Le Cren* (1829), 9 B. & C. 52; *Clark* v. *Denton* (1830), 1 B. & Ad. 92; *Shaw* v. *Pope* (1831), 2 B. & Ad. 465; *Shaw* v. *Poynter* (1834), 2 Ad. & El. 312; *Elwood* v. *Bullock* (1844), 6 Q. B. 383); and see title TRADE AND TRADE UNIONS. But, notwithstanding any custom or bye-law, every person in any borough may keep any wholesale or retail shop, and use every lawful trade for hire and gain (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 247). This enactment does not prevent the making of lawful bye-laws regulating trade. A bye-law which in effect prohibited the bringing into a market, without permission, of articles for which it had been established was held invalid as a general restraint of trade (*Wortley* v. *Nottingham Local Board* (1870), 21 L. T. 582); and, without express power to prohibit, a bye-law could not make it unlawful to carry on a lawful trade in a lawful manner in a substantial and important portion of a city (*Toronto (City) Municipal Corporation* v. *Virgo*, [1896] A. C. 88, P. C.). Bye-laws for regulating trade, although they involve a partial restraint, may not be unreasonable (*Freemantle* v. *Silk-Throwsters' Co.* (1668), 1 Lev. 229; *Bodwic* v.

If a bye-law can be divided into separate and distinct parts, although bad in part it may be upheld as to the rest (*a*). Severance where partly valid.

SECT. 4.—*Enforcement.*

783. Bye-laws made by a local authority under statutory powers are to be benevolently interpreted (*b*). Expressions used in them Construction.

Fennel (1742), 1 Wils. 233; *Pierce* v. *Bartrum* (1775), 1 Cowp. 269; *Savage* v. *Brook* (1863), 15 C. B. (N. S.) 264; *Collins* v. *Wells Corporation* (1885), 1 T. L. R. 328; *Strike* v. *Collins* (1886), 55 L. T. 182; *Gray* v. *Sylvester* (1897), 46 W. R. 63; *Scott* v. *Glasgow Corporation*, [1899] A. C. 470; *Rossi* v. *Edinburgh Corporation*, [1905] A. C. 21; *Da Prato* v. *Partick (Provost)*, [1907] A. C. 153). Where there is express power to prohibit, *e.g.*, the erection of booths etc. on the seashore, the reservation by bye-law of an arbitrary power to permit such erection may be upheld (*Williams* v. *Weston-super-Mare Urban District Council* (1909), 74 J. P. 52; followed in *Williams* v. *Weston-super-Mare Urban District Council* (No. 2) (1910), 103 L. T. 9, C. A.).

A stringent bye-law is not necessarily unreasonable because no discretion is reserved to the authority in exceptional cases, as the justices have a discretion under the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 16 (see also the Probation of Offenders Act, 1907 (7 Edw. 7, c. 17), s. 1), to dismiss a summons in such cases; see *Salt* v. *Scott Hall*, [1903] 2 K. B. 245, where an opinion was expressed by CHANNELL, J., at p. 248, that all bye-laws as to buildings should confer a power on someone to dispense with their hard and fast rules in particular cases. The reservation of such a power would not, however, render valid a bye-law otherwise invalid (*Waite* v. *Garston Local Board* (1867), L. R. 3 Q. B. 5). Apart from the reservation of a discretionary power by bye-law, a local authority cannot waive the requirements of its bye-laws (*Baxter* v. *Bedford* (1885), 1 T. L. R. 424; *R.* v. *Newcastle-on-Tyne Corporation* (1889), 60 L. T. 963; *Re McIntosh and Pontypridd Improvements Co.* (1891), 61 L. J. (Q. B.) 164; affirmed (1892), 8 T. L. R. 203, C. A., on another point), and its approval of building plans which contravene bye-laws is illegal and inoperative (*Yabbicom* v. *King*, [1899] 1 Q. B. 444). The Local Government Board does not confirm bye-laws reserving to local authorities or their officers any discretionary power.

(*a*) *Dodwell* v. *Oxford University* (1680), 2 Vent. 33; *Lee* v. *Wallis* (1756), 1 Keny. 292; *R.* v. *Faversham Fishermen's Co.* (1799), 8 Term Rep. 352; *R.* v. *Lundie* (1862), 8 Jur. (N. S.) 640; *Reay* v. *Gateshead Corporation* (1886), 55 L. T. 92; *Strickland* v. *Hayes*, [1896] 1 Q. B. 290.

(*b*) *Kruse* v. *Johnson*, [1898] 2 Q. B. 91, *per* Lord RUSSELL OF KILLOWEN, C.J., at p. 99; and see note (*t*), p. 395, *ante*. If on one construction a bye-law is good, but on another bad, the rule is that it ought to be construed so as to make it valid (*R.* v. *Saddlers' Co.* (1863), 10 H. L. Cas. 404, *per* Lord WENSLEYDALE, at p. 463; see *Vintners' Co.* v. *Passey* (1757), 1 Burr. 235, 239; *Edmonds* v. *Watermen and Lightermen's Co. (Master etc.)* (1855), 1 Jur. (N. S.) 727; and *Dearden* v. *Townsend* (1865), L. R. 1 Q. B. 10). If a bye-law in terms conflicts with the Act under which it is made, the bye-law should, if it can, be reconciled with the Act, but, if it cannot, it must give way to the Act; see *Irving* v. *Askew* (1870), L. R. 5 Q. B. 208; *Re Davis, Ex parte Davis* (1872), 7 Ch. App. 526. Where noises in streets to the annoyance of inhabitants were prohibited, proof that one inhabitant was annoyed was held sufficient (*Innes* v. *Newman*, [1894] 2 Q. B. 292); and a prohibition of bad language to the annoyance of the inhabitants or passengers was held to apply to such language inside a house heard by constables outside (*Brabham* v. *Wookey* (1901), 18 T. L. R. 99). A bye-law against betting in any place of public resort was held to apply to a private ground to which the public resorted for betting (*Kitson* v. *Ashe*, [1899] 1 Q. B. 425).

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have, unless the contrary intention appears, the same respective meanings as in the empowering statute (*c*).

Remedies.

784. Bye-laws may be enforced not only by the recovery of penalties (*d*) from offenders (*e*), but also, in some instances, by the pulling down of offending work (*f*), the removal of offenders from the place to which the bye-laws relate (*g*), the suspension or cancellation of registration or licences (*h*), and by injunction (*i*).

Part. V.—Provisions in Respect of Particular Matters.

SECT. 1.—*Advertising Stations and Advertisements.*

SUB-SECT. 1.—*Hoardings and Advertisements.*

Bye-laws for regulation of advertisements.

785. Any local authority (*j*) may make bye-laws, applying to either the whole or a specified part of its area (*k*): (1) for the regulation and control of hoardings and similar structures used

(*c*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 31, which applies to bye-laws made after 1889; but the same rule applies to bye-laws previously made (*Blashill* v. *Chambers* (1884), 14 Q. B. D. 479); and see title STATUTES.

(*d*) For limits of penalties, see pp. 389, 390, *ante*.

(*e*) As to the recovery of penalties, see pp. 367 *et seq.*, *ante*. With respect to the liability of a master for breach of a bye-law by his servant, see *Collman* v. *Mills*, [1897] 1 Q. B. 396; titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 235; MASTER AND SERVANT, Vol. XX., pp. 257 *et seq.*; and see *Watkins* v. *Royal Naval Colliery Co., Ltd.* (1912), 28 T. L. R. 569, H. L. A local authority may not usurp the functions of a judicial authority by setting up a committee to investigate complaints and impose fines on offenders (*Re Wiseman, Re Manchester Corporation Cab Committee* (1886), 3 T. L. R. 12, C. A.). Where a bye-law provided that street music could be objected to for a "reasonable cause," it was for the justices to decide whether a given cause was in fact reasonable (*R.* v. *Powell* (1884), 51 L. T. 92). As to evidence of bye-laws, see p. 393, *ante*.

(*f*) See pp. 422, 424, 425, *post*; and see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 239.

(*g*) For such removal from public baths and washhouses, see p. 497, *post*; from museums and gymnasiums, see p. 592, *post*; and from recreation and pleasure grounds, see title OPEN SPACES AND RECREATION GROUNDS, Vol. XXI., p. 588; and compare as to public libraries, p. 591, *post*.

(*h*) For instances in respect of common lodging-houses, see note (*q*), p. 519; note (*c*), p. 514, *post*; of hackney carriages, omnibuses, porters etc., see title STREET AND AERIAL TRAFFIC; of slaughter-houses, see p. 557, *post*.

(*i*) See note (*t*), p. 422, *post*.

(*j*) The local authority for the purposes referred to in the text, *supra*, is, in the City of London, the mayor, aldermen, and commons in common council assembled; in any municipal borough, the town council; in any urban district with a population according to the last census of over ten thousand, the council of that district; and elsewhere the county council (Advertisements Regulation Act, 1907 (7 Edw. 7, c. 27), s. 7). As to census returns, see *Re Druitt, Druitt* v. *Dehler*, [1903] 1 Ch. 446, C. A. (where information as to the population of an altered area, published in

(*k*) For note (*k*), see next page.

for the purpose of advertising, when they exceed twelve feet in height (*l*); (2) for regulating, restricting, or preventing the exhibition of advertisements in such places and in such manner, or by such means, as to affect injuriously the amenities of a public park or pleasure promenade, or to disfigure the natural beauty of a landscape. In making such bye-laws the authority must provide for the exemption from the operation thereof for a period of not less than five years of any hoardings and similar structures in use for advertising purposes at the time of the making of the bye-laws, and of any advertisements exhibited at that time (*m*).

Confirmation of bye-laws by Secretary of State.

786. A bye-law has no effect until confirmed by the Secretary of State (*n*), and must not be so confirmed until at least thirty days after its publication in such manner as he, by general or special order, directs (*o*). Before confirming a bye-law the Secretary of State

the census returns for 1901, was held to affect the numerical standard of a borough, although the alteration took place after the census day); and as to the census (the last of which was taken in 1911; see Census (Great Britain) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 27) generally, see title CONSTITUTIONAL LAW, Vol. VI., pp. 343—345. A bye-law made by a county council is of no force in any borough or urban district the council of which is a local authority (Advertisements Regulation Act, 1907 (7 Edw. 7, c. 27), s. 3 (5)). Some local authorities have obtained powers under local Acts to spend money in advertising the attractions of their districts, *e.g.*, Margate Corporation Act, 1908 (8 Edw. 7, c. lxxxvii.), and in Ireland a general provision to that effect is in operation; see Health Resorts and Watering-Places (Ireland) Act, 1909 (9 Edw. 7, c. 32). The powers and provisions of the Advertisements Regulation Act, 1907 (7 Edw. 7, c. 27), are in addition to, and not in derogation of, any powers and provisions of any local Act, and any powers of making bye-laws under any general Act (*ibid.*, s. 5). By some local Acts the erection of hoardings etc. in or abutting on or adjoining any street, without the consent of the local authority, is prohibited; see *Rockleys, Ltd.* v. *Pritchard* (1909), 101 L. T. 575; *Stockport Corporation* v. *Rollinson* (1910), 102 L. T. 567; compare *Barnett* v. *Covell* (1903), 68 J. P. 93. The series of model bye-laws issued by the Home Secretary (see note (*e*), p. 392, *ante*) for use under the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 23, and the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 16, contains clauses dealing with advertising vehicles, flags, bills etc. in streets. For other powers of a local authority as to advertisements, see pp. 400—404, *post*. As to indecent advertisements, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 539, note (*j*). For advertisements in hackney carriages, see titles STREET AND AERIAL TRAFFIC; TRAMWAYS AND LIGHT RAILWAYS.

(*k*) Advertisements Regulation Act, 1907 (7 Edw. 7, c. 27), s. 3 (4). For forms of bye-laws, see Encyclopædia of Forms and Precedents, Vol. XVI., p. 8.

(*l*) Bye-laws under heading (1) (see p. 398, *ante*), made by the London County Council are required to be enforced by every metropolitan borough council within its own area (Advertisements Regulation Act, 1907 (7 Edw. 7, c. 27), s. 8); and see title METROPOLIS, Vol. XX., p. 406.

(*m*) Advertisements Regulation Act, 1907 (7 Edw. 7, c. 27), s. 2. Model bye-laws under this provision have been drafted by the Home Secretary. Bye-laws under this Act are not subject to the provisions of the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 182—188; see pp. 388 *et seq.*, *ante*.

(*n*) *I.e.*, the Home Secretary. As to the Home Secretary, see title CONSTITUTIONAL LAW, Vol. VII., pp. 82 *et seq.*

(*o*) No general order has been made by the Home Secretary. It is his practice to issue in each case a special direction, which, however, is in a common form.

SECT. 1. Advertising Stations and Advertisements.

must consider any objections by persons whom it may affect, and he may order a local inquiry to be held with respect to the bye-law or any such objections. The remuneration of the person holding the local inquiry is determined by the Secretary of State, and the expenses of the inquiry are paid by the authority making the bye-law (*p*).

Evidence of bye-laws.

787. A copy of any bye-law certified by a person purporting to be the clerk of the local authority to be a true copy is, until the contrary is proved, evidence of the bye-law and of its due making, and, if so stated in the certificate, of the bye-law having been duly confirmed (*q*).

Penalties.

788. An offence against a bye-law is punishable summarily by a penalty not exceeding £5, and a daily penalty after conviction not exceeding 20*s.* (*r*).

Expenses.

789. Any expenses incurred by a local authority in respect of the above-mentioned matters (*s*) are defrayed, as the case may be, out of the general rate of the City of London (*t*), the borough fund or borough rate (*u*), or the county fund (*v*), and, in the case of an urban district as part of the general expenses incurred in the execution of the Public Health Acts (*a*); but a county council may not raise any sum on account of its expenses within any borough or urban district the council of which is a local authority (*b*).

Licensing of advertisement hoardings etc.

790. Any corporation, metropolitan borough council, urban sanitary (*c*) or other authority granting, in pursuance of any local or general Act, a licence for the temporary erection of any hoard, gantry, scaffold, or other structure, upon or over any public highway (*d*) or any lands or hereditaments belonging to it, may

(*p*) Advertisements Regulation Act, 1907 (7 Edw. 7, c. 27), s. 3 (1), (2), (3).

(*q*) *Ibid.*, s. 3 (6). As to proof of bye-laws generally, see p. 393, *ante*.

(*r*) Advertisements Regulation Act, 1907 (7 Edw. 7, c. 27), s. 10. As to summary proceedings, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*; and compare pp. 367 *et seq.*, *ante*.

(*s*) See p. 399, *ante*, and the text, *supra*.

(*t*) See title METROPOLIS, Vol. XX., p. 439.

(*u*) See title LOCAL GOVERNMENT, Vol. XIX., pp. 319, 320.

(*v*) See *ibid.*, p. 358.

(*a*) The expenses are usually payable out of the general district rate; see p. 380, *ante*. For a list of the Public Health Acts, see note (*a*), p. 361, *ante*.

(*b*) Advertisements Regulation Act, 1907 (7 Edw. 7, c. 27), s. 4. For the meaning of local authority, see note (*j*), p. 398, *ante*. Where there is any such borough or urban district in a county, the contributions levied by the county council on the rest of the county are for "special county purposes" under the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 68; and see title LOCAL GOVERNMENT, Vol. XIX., p. 358. For the rating of advertising stations and hoardings, see title RATES AND RATING.

(*c*) "Metropolitan borough council" was in effect substituted for "board or vestry" in this provision by the London Government Act, 1899 (62 & 63 Vict. c. 14), s. 4. Town and other urban district councils are urban sanitary authorities; see p. 372, *ante*.

(*d*) The erection of hoards, scaffolding and similar structures in streets for building operations and other purposes is governed in the provinces by the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 80, the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 34, and

include in the licence conditions prohibiting the affixing of any advertisement to the structure, or sanctioning such affixing upon payment of such sum, and on such conditions, as the licensing authority determines. The use of any such structure except as permitted by such licence is punishable summarily by a penalty not exceeding £5, and a daily penalty, after notice from the authority to discontinue, not exceeding 40*s*. Any payments received or penalties recovered are applied by the authority in aid of the highway rate (*e*).

Hoardings to be securely fixed.

791. A hoarding or similar structure which is in, or abuts on, or adjoins a street, must not be used for any purpose unless it is securely fixed to the satisfaction of the local authority (*f*).

SUB-SECT. 2.—*Sky-signs.*

Definition of "sky-sign."

What the term includes.

792. The term "sky-sign" means any word, letter, model, sign, device, or representation in the nature of an advertisement, announcement, or direction, supported on or attached to any post, pole, standard, framework, or other support, wholly or in part upon, over, or above any house (*g*), building, or structure, which, or

the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 32; and in London by the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 121—123, and the Metropolitan Paving Act, 1817 (57 Geo. 3, c. xxix.), s. 75, as extended by the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 73; and see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 251, 252. The City of London Sewers Act, 1848 (11 & 12 Vict. c. clxiii.), contains similar provisions (see *ibid.*, ss. 161—164). There is no enactment generally requiring a licence for the erection of such structures; but, in London, under the general and local enactments mentioned, a licence is necessary. For forms relating to hoardings, see Encyclopædia of Forms and Precedents, Vols. I., p. 242; XI., pp. 101—103; XVI., p. 8.

(*e*) Advertising Stations (Rating) Act, 1889 (52 & 53 Vict. c. 27), s. 5. "Person" in the Act includes any body of persons, whether corporate or unincorporate (*ibid.*, s. 2). For the rating provisions of the Act, see title RATES AND RATING; and see *Lewisham Corporation* v. *Avey* (1912), 76 J. P. 343.

(*f*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 32. Penalty not exceeding £5, and a daily penalty not exceeding 20*s*. (*ibid.*); and see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 252.

(*g*) "House" includes schools, also factories and other buildings in which persons are employed (Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 13; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 4); see also Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 91 (5); title NUISANCE, Vol. XXI., pp. 538, 539. There is a similar definition in the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 141, which extends the meaning of the term "house." That meaning differs according to the subject-matter. It may be a question of fact for the justices (*Wootten* v. *Bishop* (1907), 71 J. P. 334). A turnpike toll-house was held to be a house under the Public Health Act, 1848 (11 & 12 Vict. c. 63) (*Tunstall, etc. Turnpike Road (Trustees)* v. *Lowndes* (1856), 20 J. P. 374). A steam laundry, which included a dwelling-house, was held not to come within the term "house" for the purposes of the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 42 (see p. 606, *post* (*London and Provincial Laundry Co.* v. *Willesden Local Board*, [1892] 2 Q. B. 271)). For building line purposes under a local Act a church was held to be a house (*Folkestone Corporation* v. *Woodward* (1872), L. R. 15 Eq. 159). For paving expenses in the Metropolis a church was held not to be a house (*Angell* v. *Paddington Vestry* (1868), L. R. 3 Q. B. 714); but a dissenting chapel was held to be

SECT. 1. Advertising Stations and Advertisements.

any part of which sky-sign is visible against the sky from some point in any street (*h*) or public way, and includes all and every part of any such post, pole, standard, framework, or other support (*i*). The term also includes any balloon, parachute, or other similar device, employed wholly or in part for the purposes of any advertisement or announcement on, over, or above any house (*k*), building, structure, or erection of any kind, or on or over any street (*h*) or public way (*l*).

a house (*Caiger* v. *St. Mary, Islington, Vestry* (1881), 50 L. J. (M. C.) 59; followed in *Wright* v. *Ingle* (1885), 16 Q. B. D. 379, C. A.), on the ground that, as it was not consecrated, it was capable of being used for human habitation. A house primarily means a dwelling (*Surman* v. *Darley* (1845), 14 M. & W. 181), or a building which may be so used (*Nunn* v. *Denton* (1844), 8 Scott (N. R.), 794; *Daniel* v. *Coulsting* (1845), 8 Scott (N. R.), 949); see title ELECTIONS, Vol. XII., pp. 184, 185, note (*h*). Under local Acts, for rating purposes, business premises which had formerly been dwellings have been held to be houses (*Lewin* v. *End*, [1906] A. C. 299; *Lewin* v. *Newnes, Ltd.*, *Same* v. *Warne & Co.* (1904), 90 L. T. 160); buildings and yards within the curtilage and gardens and orchards occupied with a house were held to come within the term "house" (*Hole* v. *Milton Commissioners*, *Watson* v. *Same* (1867), 31 J. P. 804). As to the inclusion of buildings etc. within the curtilage for the purposes of the Lands Clauses Acts (as to which see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 1 *et seq.*), see *Marson* v. *London, Chatham, and Dover Rail. Co.* (1868), L. R. 6 Eq. 101); title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 71, 72. As to the inclusion of outhouses with a house for paving expenses under a local Act, see *R.* v. *Warwickshire Justices* (1851), 17 L. T. (O. S.) 183, and for the purposes of the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 23, see *Meyrick* v. *Pembroke Corporation* (1912), 76 J. P. 365; title SEWERS AND DRAINS. In the Cemeteries Clauses Act, 1877 (10 & 11 Vict. c. 65), s. 10, "house" does not include the curtilage (see *Wright* v. *Wallasey Local Board* (1887), 18 Q. B. D. 783; title BURIAL AND CREMATION, Vol. III., p. 467). Whether a building is a "dwelling house" turns upon the terms of the particular enactment and the use of the premises (see *Riley* v. *Read* (1879), 4 Ex. D. 100; *Chester Waterworks Co.* v. *Chester Union* (1907), 71 J. P. 133; and see *Bristol Guardians* v. *Bristol Waterworks Co.*, [1912] 1 Ch. 846, C. A.; titles POOR LAW, Vol. XXII., p. 558; RATES AND RATING; WATER SUPPLY).

(*h*) "Street" includes any highway, and any public bridge (not being a county bridge), and any road, lane, footway, square, court, alley or passage, whether a thoroughfare or not (Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 13; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 4.); see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 16 *et seq.*

(*i*) In connection with the similar definition of "sky-sign" in the London Acts (see note (*d*), p. 403, *post*), the following were held to be sky-signs: a structure visible against the sky mainly used for other trade purposes, but also for advertisements (*London County Council* v. *Carwardine* (1892), 62 L. J. (M. C.) 40); open letters, with a board separate therefrom and placed behind them, the whole arrangement and not the letters showing against the sky (*R.* v. *Vaughan, Ex parte London County Council* (1896), 12 T. L. R. 193; *London County Council* v. *Savoy Hotel Co., Ltd.* (1896), 60 J. P. 457); but, on the other hand, an arrangement of letters on a trellis which was placed between the top of the wall and the dome of a building, and did not appreciably show against the sky, was held not to be a sky-sign (*Tussaud* v. *London County Council* (1892), 57 J. P. 184).

(*k*) See note (*g*), p. 401, *ante*.

(*l*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 91 (3); see p. 364, *ante*.

The term does not include (1) any flagstaff, pole, vane, or weather-cock, unless adapted or used wholly or in part for the purpose of any advertisement or announcement; (2) any sign, or any board, frame, or other contrivance, securely fixed to or on the top of the wall or parapet of any building, or on the cornice or blocking course of any wall, or to the ridge of a roof, if such board, frame, or other contrivance is of one continuous face and not open work, and does not extend in height more than three feet above any part of the wall or parapet or ridge to, against, or on which it is fixed or supported; or (3) any word, letter, model, sign, device, or representation as above mentioned, relating exclusively to the business of a railway or canal company, and placed wholly upon or over any railway, canal, railway station, wharf, quay, yard, platform, or station or wharf or quay approach belonging to a railway or canal company, and so placed that it cannot fall into any street (*a*) or public place (*b*).

What the term does not include.

793. In an area in which the provisions as to sky-signs are in operation a sky-sign may not be erected, or fixed to, upon, or in connection with, any building or erection; and no sky-sign, so erected and fixed, and existing when such operation commences, may be retained for a longer period than three years thereafter (*c*), nor during that period except with the licence of the local authority, and, in the event of such licence being granted, for the period not exceeding such three years, and under and subject to the terms and conditions prescribed in the licence (*d*).

Sky-signs prohibited subject to licences for limited period.

794. A licence becomes void if (1) any addition to any sky-sign is made except for the purpose of making it secure under the direction of the surveyor of the local authority; (2) any change is made in the sky-sign or any part thereof; (3) the sky-sign or any part thereof fall through accident, decay, or any other cause; (4) any addition or alteration, involving the disturbance of the sky-sign or any part thereof, is made to or in the house, building, or structure over, on, or to which it is placed or attached, or (5) such house, building, or structure becomes unoccupied or is demolished or destroyed (*e*).

When licence becomes void.

(*a*) See note (*h*), p. 402, *ante*.

(*b*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 91 (3); see p. 364, *ante*.

(*c*) That is, the date at which by an order of the Secretary of State, and subject to any conditions or adaptations specified in that order, the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 91, is declared to be in force (*ibid.*, ss. 3 (4), 13); see p. 364, *ante*.

(*d*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, s. 53), s. 91 (1) (a); an appeal lies to quarter sessions against the withholding of a licence (*ibid.*, s. 7 (1); see title LOCAL GOVERNMENT, Vol. XIX., p. 387). Provisions of a similar character contained in the London Sky Signs Act, 1891 (54 & 55 Vict. c. lxxviii.), were repealed by the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), and re-enacted by *ibid.*, ss. 125—135. The licensing provisions are now spent, and it is unlawful to erect or retain in London any sky-sign as defined by *ibid.*, s. 125 (*ibid.*, ss. 127, 128); see also title METROPOLIS, Vol. XX., p. 494; and the cases cited in note (*i*), p. 402, *ante*.

(*e*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 91 (1) (b).

SECT. 1. Advertising Stations and Advertisements.

Removal of offending sky-signs. Penalties.

795. If any sky-sign is erected or retained contrary to the statutory provisions, or after the licence for its erection, maintenance, or retention has expired or become void, the local authority may take proceedings for its taking down or removal (*f*).

796. Any contravention of the foregoing provisions (*g*), or of any terms and conditions of any approval, licence, or consent, is punishable summarily by a penalty not exceeding £5, and a daily penalty after conviction not exceeding 20*s.* (*h*).

SECT. 2.—*Alkali, Acid, and Other Works.*

SUB-SECT. 1.—*In General.*

Alkali etc. Works Regulation Act, 1906.

797. Alkali and other specified chemical works, and cement and smelting works in which noxious or offensive gases (*i*) are produced, are the subject of regulation by the Alkali, etc. Works Regulation Act, 1906 (frequently referred to in this section as "the Act") (*j*).

Statutory definitions.

798. In the Act (*j*) the following definitions apply, unless the context otherwise requires:—

"Alkali work." "Alkali work" means every work for (1) the manufacture of sulphate of soda or sulphate of potash, or (2) the treatment of copper ores by common salt or other chlorides whereby any sulphate is formed, in which muriatic acid gas is evolved (*k*).

"Scheduled work." "Scheduled work" means any work specified in the First Schedule to the Act (*l*).

(*f*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 91 (1) (c). The proceedings are the same in manner, and bear the same consequences as to recovery of expenses and otherwise, in all respects as if the offending sky-sign were an obstruction within the meaning of the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 69, as to which see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 248.

(*g*) See pp. 401—403, *ante*.

(*h*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), ss. 13, 91 (2). As to summary proceedings, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*; and compare pp. 367 *et seq.*, *ante*.

(*i*) For the definition of noxious or offensive gas, see p. 406, *post*.

(*j*) 6 Edw. 7, c. 14. The Act came into operation on the 1st January, 1907 (*ibid.*, s. 31), re-enacting, with amendments, the previous legislation which it repealed (*ibid.*, s. 30). The Act contains a saving for the general law with respect to nuisances (*ibid.*, s. 29; and, as to such general law, see title NUISANCE, Vol. XXI., pp. 503 *et seq*), and also a saving for existing inspectors, certificates, special rules, notices etc. As to the general effect of a repealing enactment, see title STATUTES.

(*k*) Alkali, etc. Works Regulation Act, 1906 (6 Edw. 7, c. 14), s. 27 (1).

(*l*) *Ibid.*, s. 7 (1). The following is the list of works so specified:—

(1) Sulphuric acid works, *i.e.*, works in which the manufacture of sulphuric acid is carried on by the lead chamber process, namely, the process by which sulphurous acid is converted into sulphuric acid by the agency of oxides of nitrogen and by the use of a lead chamber.

(2) Sulphuric acid (Class II.) works, *i.e.*, works in which the manufacture of sulphuric acid is carried on by any process other than the lead chamber process, and works for the concentration or distillation of sulphuric acid.

(3) Chemical manure works, *i.e.*, works in which the manufacture of

"Cement works" means works in which aluminous deposits are treated for the purpose of making cement (*m*).

"Cement works."

chemical manure is carried on, and works in which any mineral phosphate is subjected to treatment involving chemical change through the application or use of any acid.

(4) Gas liquor works, *i.e.*, works (not being sulphate of ammonia works or muriate of ammonia works) in which sulphuretted hydrogen or any other noxious or offensive gas is evolved by the use of ammoniacal liquor in any manufacturing process, and works in which any such liquor is desulphurised by the application of heat in any process connected with the purification of gas.

(5) Nitric acid works, *i.e.*, works in which the manufacture of nitric acid is carried on and works in which nitric acid is recovered from oxides of nitrogen.

(6) Sulphate of ammonia works and muriate of ammonia works, *i.e.*, works in which the manufacture of sulphate of ammonia or of muriate of ammonia is carried on.

(7) Chlorine works, *i.e.*, works in which chlorine is made or used in any manufacturing process.

(8) Muriatic acid works, *i.e.* (1) muriatic acid works, or works (not being alkali works as defined; see the text, *supra*) where muriatic acid gas is evolved either during the preparation of liquid muriatic acid or for use in any manufacturing process; (2) tin plate flux works, *i.e.*, works in which any residue or flux from tin plate works is calcined for the utilization of such residue or flux, and in which muriatic acid gas is evolved; and (3) salt works, *i.e.*, works (not being works in which salt is produced by refining rock salt, otherwise than by the dissolution of rock salt at the place of deposit) in which the extraction of salt from brine is carried on, and in which muriatic acid gas is evolved.

(9) Sulphide works, *i.e.*, works in which sulphuretted hydrogen is evolved by the decomposition of metallic sulphides, or in which sulphuretted hydrogen is used in the production of such sulphides.

(10) Alkali waste works, *i.e.*, works in which alkali waste or the drainage therefrom is subjected to any chemical process for the recovery of sulphur or for the utilization of any constituent of such waste or drainage.

(11) Venetian red works, *i.e.*, works for the manufacture of Venetian red, crocus, or polishing powder, by heating sulphate or some other salt of iron.

(12) Lead deposit works, *i.e.*, works in which the sulphate of lead deposit from sulphuric acid chambers is dried or smelted.

(13) Arsenic works, *i.e.*, works for the preparation of arsenious acid, or where nitric acid or a nitrate is used in the manufacture of arsenic acid or an arseniate.

(14) Nitrate and chloride of iron works, *i.e.*, works in which nitric acid or a nitrate is used in the manufacture of nitrate or chloride of iron.

(15) Bisulphide of carbon works, *i.e.*, works for the manufacture of bisulphide of carbon.

(16) Sulphocyanide works, *i.e.*, works in which the manufacture of any sulphocyanide is carried on by the reaction of bisulphide of carbon upon ammonia or any of its compounds.

(17) Picric acid works, *i.e.*, works in which nitric acid or a nitrate is used in the manufacture of picric acid.

(18) Paraffin oil works, *i.e.*, works in which crude shale oil is refined.

(19) Bisulphite works, *i.e.*, works in which sulphurous acid is used in the manufacture of acid sulphites of the alkalis or alkaline earths.

(20) Tar works, *i.e.*, works where gas tar or coal tar is distilled or is heated in any manufacturing process.

(21) Zinc works, *i.e.*, works in which, by the application of heat, zinc is extracted from the ore, or from any residue containing that metal (Alkali, etc. Works Regulation Act, 1906 (6 Edw. 7, c. 14), Sched. I.).

(*m*) *Ibid.*, s. 8 (1).

SECT. 2. Alkali, Acid, and Other Works.

"Smelting works."

"Noxious or offensive gas."

Best practicable means."

"Owner."

"Sanitary authority."

"Smelting works" means works in which sulphide ores, including regulus, are calcined or smelted (*n*).

"Noxious or offensive gas" includes the following gases and fumes: muriatic acid; sulphuric acid; sulphurous acid, except that arising solely from the combustion of coal; nitric acid and acid-forming oxides of nitrogen; sulphuretted hydrogen; chlorine and its acid compounds; fluorine compounds; cyanogen compounds; bisulphide of carbon; chloride of sulphur; fumes from cement works; fumes containing copper, lead, antimony, arsenic, zinc, or their compounds; fumes from tar works (*o*).

"Best practicable means," where used with respect to the prevention of the escape of noxious and offensive gases, has reference not only to the provision and the efficient maintenance of appliances adequate for preventing such escape, but also to the manner in which such appliances are used and to the proper supervision, by the owner, of any operation in which such gases are evolved (*o*).

"Owner" includes any lessee, occupier, or any other person carrying on any work to which the Act applies (*o*).

"Sanitary authority" means any local authority entrusted with the execution (*p*) of the Public Health Act, 1875 (*q*), or the Public Health (London) Act, 1891 (*a*), in the case of London (*b*).

Central authority and officers.

Sanitary authority and expenses.

799. The provisions of the Act (*c*) are generally enforced by a chief inspector and inspectors (*d*) appointed by the Local Government Board, and acting under that Board as the central authority for England (*e*); but some powers are conferred upon the sanitary authority (*f*). Any expenses incurred by a sanitary authority are defrayed as general expenses incurred by it under the Public Health Act, 1875 (*g*).

(*n*) Alkali, etc. Works Regulation Act, 1906 (6 Edw. 7, c. 14), s. 8 (1).
(*o*) *Ibid.*, s. 27 (1).
(*p*) The local authorities executing the Acts respectively referred to in the text, *supra*, are now, in boroughs, the mayor, aldermen and burgesses, acting by the council (see Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 4—6 (but part of the borough of Folkestone is under the jurisdiction of the urban district council of Sandgate); see note (*q*), p. 372, *ante*); elsewhere, urban and rural district councils (see Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 4—6; Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 21, 24, 25); in the City of London, the Common Council (*i.e.*, the Lord Mayor and commonalty and citizens of the City of London acting by the Common Council); see Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 99; City of London Sewers Act, 1897 (60 & 61 Vict. c. cxxxiii.), ss. 5, 7; and, in the metropolitan boroughs, the councils for those boroughs (see Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 99; London Government Act, 1899 (62 & 63 Vict. c. 14), s. 4 (1)).
(*q*) 38 & 39 Vict. c. 55.
(*a*) 54 & 55 Vict. c. 76.
(*b*) Alkali, etc. Works Regulation Act, 1906 (6 Edw. 7, c. 14), s. 27 (1).
(*c*) *Ibid.*, ss. 24, 27 (1).
(*d*) See p. 412, *post*.
(*e*) Alkali, etc. Works Regulation Act, 1906 (6 Edw. 7, c. 14), s. 27 (1).
(*f*) As to such powers, see pp. 408, 412, 414, *post*. For definition of "sanitary authority," see the text, *supra*.
(*g*) 38 & 39 Vict. c. 55; see Alkali, etc. Works Regulation Act, 1906 (6 Edw. 7, c. 14), ss. 24, 27 (1). The expenses are payable, in the case of a town council or other urban district council, out of the general district

Application of provisions to works.

800. Nothing in the Act (*h*) is to be construed as exempting any work from any of the statutory provisions applicable to it as being a work of a certain class or description by reason only that it is subject to other provisions of the Act (*h*) as being a work of some other class or description (*i*).

Condensation of muriatic acid gas.

801. Every alkali work (*k*) must be carried on in such manner as to secure the condensation, to the satisfaction of the chief inspector (*l*), of the muriatic acid gas evolved in such work, to the extent of 95 per cent., and to such an extent that in each cubic foot of air, smoke, or chimney gases, escaping into the atmosphere, there is not contained more than one-fifth part of a grain of muriatic acid (*m*); and the owner (*n*) of a work not so carried on is liable to a fine, not exceeding, for a first offence, £50, and, in the case of every subsequent offence, £100 (*o*).

Prevention of discharge of noxious or offensive gas.

The owner (*n*) must also, under penalty of fines (*p*), use the best practicable means (*q*) for preventing the escape of noxious or offensive gases (*r*) by the exit flue of any apparatus used in any process carried on in the work, and for preventing the discharge, whether directly or indirectly, of such gases into the atmosphere, and for rendering such gases where discharged harmless and inoffensive, subject to the qualification that, on the basis of the amount of acid gas per cubic foot, no objection is to be taken by an inspector to any muriatic acid gas in the air, smoke, or gases discharged by a chimney or other final outlet, where the amount of such acid gas in each cubic foot of air, smoke, or gases so discharged does not exceed the amount above limited (*s*).

fund or rate (see p. 380, *ante*); of a rural district council, as general expenses (see p. 381, *ante*); of the Common Council of the City of London, out of the general rate (see Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 103; title METROPOLIS, Vol. XX., p. 439); and of a metropolitan borough council, out of the general rate (see London Government Act, 1899 (62 & 63 Vict. c. 14), s. 10; title METROPOLIS, Vol. XX., p. 440).

(*h*) Alkali, etc. Works Regulation Act, 1906 (6 Edw. 7, c. 14).

(*i*) *Ibid.*, s. 27 (2).

(*k*) For definition of "alkali work," see p. 404, *ante*.

(*l*) The chief inspector (see p. 412, *post*) may found his opinion on facts disclosed by an examination by any other inspector; see Alkali, etc. Works Regulation Act, 1906 (6 Edw. 7, c. 14), s. 25.

(*m*) *Ibid.*, s. 1 (1). In calculating the proportion of acid to a cubic foot of air, smoke, or gases, such air, smoke, or gases must be calculated at the temperature of 60° Fahrenheit, and at a barometric pressure of 30 inches; see *ibid.*, s. 16.

(*n*) For definition of "owner," see p. 406, *ante*.

(*o*) Alkali, etc. Works Regulation Act, 1906 (6 Edw. 7, c. 14), s. 1 (2). As to the recovery of fines, see p. 413, *post*.

(*p*) Not exceeding, in the case of a first offence, £20, and in the case of every subsequent offence, £50, with a further sum not exceeding £5 for every day during which such subsequent offence has continued (*ibid.*, s. 2 (2)). As to the recovery of fines, see p. 413, *post*.

(*q*) For definition of "best practicable means," see p. 406, *ante*.

(*r*) For definition of "noxious or offensive gas," see p. 406, *ante*.

(*s*) Alkali, etc. Works Regulation Act, 1906 (6 Edw. 7, c. 14), s. 2.

SECT. 2.

Alkali, Acid, and Other Works.

Separation of acids and other substances from alkali waste and drainage therefrom.

Provision of drains.

802. Every work of whatever description, in which any liquid containing either acid or any other substance capable of liberating sulphuretted hydrogen from alkali waste or drainage therefrom is produced or used, must be carried on in such manner that the liquid shall not come in contact with alkali waste, or with drainage therefrom, so as to cause a nuisance (*t*); and the owner (*u*) of any work not so carried on is liable to fines (*v*).

On the request and at the expense of the owner (*u*) of any such work, the sanitary authority (*a*) must provide and maintain a drain or channel for carrying off such liquid produced in such work into the sea, or into any river or watercourse into which the liquid can be carried without contravention of the Rivers Pollution Prevention Act, 1876 (*b*), as amended by any subsequent enactment; and the sanitary authority, for the purpose of providing any such drain or channel, has the like powers as it has for providing sewers, whether within or without its district, under the Public Health Act, 1875 (*c*). Compensation (*d*) must be made, at the expense of such owner, to any person for any damage sustained by him by reason of the exercise by a sanitary authority of such powers (*e*).

Deposit or discharge of alkali waste.

Prevention of nuisance.

803. Alkali waste must not, under penalty of fines (*f*), be deposited or discharged without the best practicable means (*g*) being used for effectually preventing any nuisance arising therefrom (*h*).

Where alkali waste has been deposited or discharged, and complaint is made to the chief inspector that a nuisance is occasioned thereby, the chief inspector, if satisfied of the existence of the

(*t*) Alkali, etc. Works Regulation Act, 1906 (6 Edw. 7, c. 14), s. 3 (1); see title NUISANCE, Vol. XXI., p. 534.

(*u*) For definition of "owner," see p. 406, *ante*. For form of request to local authority to provide drain, compare Encyclopædia of Forms and Precedents, Vol. X., pp. 301, 303.

(*v*) Not exceeding, in the case of a first offence, £50, and in the case of every subsequent offence, £100, with a further sum not exceeding £5 for every day such subsequent offence has continued (Alkali, etc. Works Regulation Act, 1906 (6 Edw. 7, c. 14), s. 3 (2)). As to the recovery of fines, see p. 413, *post*.

(*a*) For definition of "sanitary authority," see p. 406, *ante*.

(*b*) 39 & 40 Vict. c. 75. The Act has been amended by the Rivers Pollution Prevention Act, 1893 (56 & 57 Vict. c. 31), and the Rivers Pollution Prevention (Border Councils) Act, 1898 (61 & 62 Vict. c. 34); see title WATERS AND WATERCOURSES.

(*c*) 38 & 39 Vict. c. 55; see Alkali, etc. Works Regulation Act, 1906, (6 Edw. 7, c. 14), ss. 3 (3), 27 (1). For the powers of a sanitary authority outside London to provide sewers under the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 16, 32, see title SEWERS AND DRAINS. A sanitary authority in London has no such powers under the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76).

(*d*) This is determinable under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 308; see *Lingke* v. *Christchurch Corporation* (1912), 76 J. P. 265; title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 163; and, as to arbitration proceedings, see note (*e*), p. 367, *ante*.

(*e*) Alkali, etc. Works Regulation Act, 1906 (6 Edw. 7, c. 14), s. 3 (3), (4).

(*f*) *Ibid.*, s. 4 (2). The fines are of the same amounts as those imposed by *ibid.*, s. 2 (2); see note (*p*), p. 407, *ante*. As to the recovery of fines, see p. 413, *post*.

(*g*) For definition of "best practicable means," see p. 406, *ante*.

(*h*) Alkali, etc. Works Regulation Act, 1906 (6 Edw. 7, c. 14), s. 4.

nuisance (*i*), and that it is within the power of the owner or occupier of the land to abate it, must serve a notice (*k*) requiring him to abate the nuisance; and, if he fails to use the best practicable and reasonably available means for its abatement, he is liable to a fine not exceeding £20, and if he does not proceed to use such means within the time limited by the court inflicting such fine, he is liable to a further penalty not exceeding £5 for every day, after the expiration of the time so limited, during which the failure continues (*l*).

Penalties.

804. Every sulphuric acid work (*m*) must be carried on in such manner as to secure the condensation, to the satisfaction of the chief inspector (*n*), of the acid gases of sulphur or of sulphur and nitrogen which are evolved in the process of the manufacture of sulphuric acid, to such an extent that the total acidity of those gases in each cubic foot of residual gases after completion of the process, and before admixture with air, smoke, or other gases, does not exceed what is equivalent to four grains of sulphuric anhydride (*o*).

Condensation of acid gases in sulphuric acid and muriatic acid works.

Similarly every muriatic acid work (*p*) must be so carried on that in each cubic foot of air, smoke, or chimney gases escaping into the atmosphere there is not contained more than one-fifth part of a grain of muriatic acid (*q*).

The owner (*r*) of any work not so carried on is liable to a fine (*s*), not exceeding, in the case of a first offence, £50, and, in the case of every subsequent offence, £100.

Penalties.

805. The owner (*r*) of any scheduled work (*t*) must under penalty of fines (*a*) use the best practicable means (*b*) for preventing the escape of noxious or offensive gases (*c*) by the exit flue of any apparatus and the discharge of such gases into the atmosphere, and for rendering such gases where discharged harmless and inoffensive, subject to the qualification that, on the basis of the

Prevention of discharge of noxious or offensive gas in scheduled works.

(*i*) See note (*l*), p. 407, *ante*. For form of complaint, see Encyclopædia of Forms and Precedents, Vol. X., p. 301; Vol. XVI., p. 508.

(*k*) As to the mode of service, see p. 413, *post*.

(*l*) Alkali, etc. Works Regulation Act, 1906 (6 Edw. 7, c. 14), s. 5.

(*m*) "As defined in paragraph (1) of the First Schedule" (*ibid*, s. 6 (1)). For definition, see note (*l*), p. 404, *ante*.

(*n*) See note (*l*), p. 407, *ante*.

(*o*) Alkali, etc. Works Regulation Act, 1906 (6 Edw. 7, c. 14), s. 6 (1). For the mode of calculating the proportion of acid, see note (*m*), p. 407, *ante*.

(*p*) "As defined in paragragh (8) of the First Schedule" (*ibid*., s. 6 (2)). For definition, see note (*l*), p. 404, *ante*.

(*q*) Alkali, etc. Works Regulation Act, 1906 (6 Edw. 7, c. 14), s. 6 (2).

(*r*) For definition of "owner," see p. 406, *ante*.

(*s*) Alkali, etc. Works Regulation Act, 1906 (6 Edw. 7, c. 14), s. 6 (3)). As to the recovery of fines, see p. 413, *post*.

(*t*) For definition of "scheduled work," see p. 404, *ante*.

(*a*) Not exceeding, in the case of a first offence, £20, and, in the case of every subsequent offence, £50, with a further sum not exceeding £5 for every day such subsequent offence has continued (Alkali, etc. Works Regulation Act, 1906 (6 Edw. 7, c. 14), s. 7 (2)). As to the recovery of fines, see p. 413, *post*.

(*b*) For definition of "best practicable means," see p. 406, *ante*.

(*c*) For definition of "noxious or offensive gases," see p. 406, *ante*.

SECT. 2. Alkali, Acid, and Other Works.

amount of acid gas per cubic foot (*d*), no objection is to be taken under this provision by an inspector where (1) the muriatic gas in the air, smoke, or gases discharged into the atmosphere does not exceed the amount limited by the last preceding provision (*e*); or (2) where the total acidity of any acid gases (including those from the combustion of coal) in each cubic foot of air, smoke, or gases, so discharged by a chimney or other final outlet receiving the residual gases from any process for the concentration or distillation of sulphuric acid, does not exceed what is equivalent to one grain and a half of sulphuric anhydride (*f*).

Provisional order preventing discharge of noxious or offensive gas in cement and smelting works.

806. An inspector may inquire whether, in any cement works (*g*) or smelting works (*h*), means can be adopted at a reasonable expense for preventing the discharge from the furnaces or chimneys of such works into the atmosphere of any noxious or offensive gas (*i*) evolved in such works, or for rendering such gas where discharged harmless or inoffensive; and, where it appears to the Local Government Board that such means can be so adopted, the Board may by provisional order, to be confirmed by Parliament, require the owners (*k*) of such works to adopt the best practicable means (*l*) for the purpose, and may by the order limit the amount or proportion of any noxious or offensive gas which is to be permitted to escape from such works into the chimney or into the atmosphere, and extend to such works such of the statutory provisions (*m*) relating to scheduled works (*n*) as it thinks fit, and impose fines for a breach of the provisions of the order (*o*).

Power of owners of works to make special rules.

807. The owner (*k*) of an alkali work (*p*) or of a scheduled work (*n*) may, with the sanction of the central authority (*q*), make special rules for the guidance of his workmen who are employed in or in connexion with any process causing the evolution of any noxious or offensive gas (*i*), or in or in connexion with the condensation or other treatment of that gas, and may annex a fine not exceeding £2 to any violation of such rules, such fine being recoverable in accordance with the Summary Jurisdiction Acts (*r*).

(*d*) As to the mode of calculating the proportion of acid, see note (*m*), p. 407, *ante*.

(*e*) *I.e.*, the Alkali, etc. Works Regulation Act, 1906 (6 Edw. 7, c. 14), s. 6; see p. 409, *ante*.

(*f*) Alkali, etc. Works Regulation Act, 1906 (6 Edw. 7, c. 14), s. 7. *Ibid.*, s. 26, which for a period of three years after the 1st January, 1907 (the commencement of the Act), substituted, in the case of "the over-heat pan process," two grains for one grain and a half of sulphuric anhydride, is now spent.

(*g*) For definition of "cement works," see p. 405, *ante*.

(*h*) For definition of "smelting works," see p. 406, *ante*.

(*i*) For definition of "noxious or offensive gas," see p. 406, *ante*.

(*k*) For definition of "owner," see p. 406, *ante*.

(*l*) For definition of "best practicable means," see p. 406, *ante*.

(*m*) Alkali, etc. Works Regulation Act, 1906 (6 Edw. 7, c. 14).

(*n*) For definition of "scheduled work," see p. 404, *ante*.

(*o*) Alkali, etc. Works Regulation Act, 1906 (6 Edw. 7, c. 14), s. 8. As to recovery of fines, see p. 413, *post*.

(*p*) For definition of "alkali work," see p. 404, *ante*.

(*q*) As to the central authority, see p. 406, *ante*.

(*r*) See title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*; and compare pp. 367 *et seq.*, *ante*.

A printed copy of such special rules must be given by the owner to every workman affected thereby (*s*).

SUB-SECT. 3.—*Registration.*

Registration and stamp duty.

808. An alkali work (*t*), a scheduled work (*a*), a cement work (*b*), or a smelting work (*c*) must not be carried on, under liability of the owner (*d*) to a fine not exceeding £50, unless it is certified to be registered (*e*). Certificates which are issued by the Local Government Board (*f*) are chargeable with an Inland Revenue stamp duty of £5 for an alkali work and £3 for any other work, and they expire on the 1st April in each year (*g*).

Application for certificates.

809. An application for a certificate may, for the first registration of a work, be made at any time, and subsequent applications are made in January or February (*h*). The certificate will be issued on application by the owner (*d*), if the conditions of registration are complied with. One of the conditions in the case of the first registration of an alkali or scheduled work, or the registration of such a work if the work has been closed for a period of twelve months, is that the work is at the time of registration furnished with such appliances as appear to the chief inspector or, on appeal, to the Local Government Board to be necessary in order to enable the work to be carried on in accordance with the statutory requirements; but the Local Government Board may dispense with this condition in the case of works erected before the 1st January, 1907, which were not before that date required to be registered (*i*).

Change of ownership.

810. Written notice of any change which occurs in the ownership of a work or in the other registered particulars must, within one calendar month after such change, be sent by the owner to the Local Government Board, and the register and the certificate are altered accordingly without charge (*k*). If such

(*s*) Alkali, etc. Works Regulation Act, 1906 (6 Edw. 7, c. 14), s. 15.
(*t*) For definition of "alkali work," see p. 404, *ante*.
(*a*) For definition of "scheduled work," see p. 404, *ante*.
(*b*) For definition of "cement works," see p. 405, *ante*.
(*c*) For definition of "smelting works," see p. 406, *ante*.
(*d*) For definition of "owner," see p. 406, *ante*.
(*e*) Alkali, etc. Works Regulation Act, 1906 (6 Edw. 7, c. 14), s. 9 (1), (8). As to the recovery of fines, see p. 413, *post*. The three months' limitation for bringing proceedings (see *ibid.*) does not apply.
(*f*) Under the Alkali, etc. Works Regulation Act, 1907 (6 Edw. 7, c. 14), ss. 9, 27, the Local Government Board is empowered to prescribe particulars to be contained in the register, and the manner of conducting it, and of issuing certificates etc. Such matters were prescribed on the 27th November, 1906 (Stat. R. & O., 1906, p. 21).
(*g*) Alkali, etc. Works Regulation Act, 1906 (6 Edw. 7, c. 14), s. 9 (3), (6). As to stamp duties generally, see title REVENUE.
(*h*) Alkali, etc. Works Regulation Act, 1906 (6 Edw. 7, c. 14), s. 9 (4).
(*i*) *Ibid.*, ss. 9 (5), 31.
(*k*) *Ibid.*, s. 9 (7). The Local Government Board has prescribed that an alteration of ownership shall be indorsed on the certificate; see note (*f*), *supra*.

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notice is not so sent the work is not deemed to be certified to be registered (*l*).

SUB-SECT. 4.—*Inspection.*

Appointment of chief inspector and inspectors.

811. The Local Government Board appoints inspectors and constitutes a chief inspector (*m*), and these officers must not be employed in any other work without that Board's sanction (*n*). A copy of the *London Gazette* in which notice of an appointment is published is evidence of the appointment (*o*). Land agents and certain other persons employed or interested in works to which the Act (*p*) applies, or in patents and apparatus carried on or used in any such work or connected with matters dealt with by the Act (*p*), are disqualified to act as inspectors (*q*).

Deputy of chief inspector.

In the case of the illness or other unavoidable absence of the chief inspector, the Local Government Board may appoint any other inspector to act as his deputy, and the inspector so appointed has, whilst so acting, all the powers by or under the Act (*p*) conferred on the chief inspector (*r*).

Additional inspector on application of sanitary authorities.

If any sanitary authority (*s*) applies to the Local Government Board (*t*) for an additional inspector, and undertakes to pay not less than one-half of his salary or remuneration, the Local Government Board may, with the sanction of the Treasury, appoint an additional inspector to reside within a convenient distance of the works he is required to inspect (*u*).

Inspection of works.

812. An inspector may at all reasonable times, by day and night, without previous notice, but so as not to interrupt the process of the manufacture, enter and inspect any work to which, in the opinion of the Local Government Board, any of the provisions of the Act (*p*) apply, and any place where alkali waste is treated or deposited, or is likely to come into contact with liquid containing either acid or any other substance capable of liberating sulphuretted hydrogen from alkali waste or drainage therefrom (*v*). He is given extensive powers to examine processes, apply tests, make experiments, and generally make such inquiries as seem to him necessary or proper for the execution of his duties (*v*). The owner (*w*) of a work must, on demand of the chief inspector, furnish him with a sketch plan, to be kept secret, of parts of the work where noxious or offensive gases are evolved or dealt with (*v*). Where facilities are not afforded

(*l*) Alkali, etc. Works Regulation Act, 1906 (6 Edw. 7, c. 14), s. 9 (7).
(*m*) Such appointments are made with the approval of the Treasury as to numbers and salaries (*ibid.*, s. 10 (1), (3)). The chief inspector must make an annual report to the Local Government Board, which must be laid before both Houses of Parliament; see *ibid.*, s. 13.
(*n*) *Ibid.*, s. 10 (4).
(*o*) *Ibid.*, s. 10 (2).
(*p*) Alkali, etc. Works Regulation Act, 1906 (6 Edw. 7, c. 14).
(*q*) *Ibid.*, s. 11.
(*r*) *Ibid.*, s. 10 (5).
(*s*) For definition of "sanitary authority," see p. 406, *ante*.
(*t*) The "central authority"; see p. 406, *ante*.
(*u*) Alkali, etc. Works Regulation Act, 1906 (6 Edw. 7, c. 14), s. 14.
(*v*) *Ibid.*, s. 12.
(*w*) For definition of "owner," see p. 406, *ante*.

to an inspector, or where he is obstructed, the owner of the work and every wilful obstructor is liable on summary conviction (*a*) to a fine not exceeding £10 (*b*).

SUB-SECT. 5.—*Proceedings.*

Recovery of fines.

813. Fines, other than those recoverable summarily (*c*), are recovered by action of debt in the county court, and are paid into the Exchequer (*d*). The action cannot be brought without the sanction of the Local Government Board (*e*), nor, except as respects a fine in contravention of the provisions as to registration (*f*), after three calendar months from the offence, and an appeal lies to the High Court (*g*).

Notice before proceedings.

814. Not less than twenty-one days before the hearing of any proceeding against an owner (*h*) for failing to secure the condensation of any gas to the satisfaction of the chief inspector (*i*), or for failing to use the best practicable means (*k*), an inspector must serve (*l*) on the owner a notice in writing stating, as the case requires, either the facts on which such chief inspector founds his opinion (*m*), or the means (*k*) which such owner has failed to use, and the means (*k*) which, in the chief inspector's opinion (*m*), would suffice, and must produce a copy of such notice before the court having cognizance of the matter (*n*).

Limitation of fines.

815. A person is not liable to a fine for more than one offence in respect of the same work or place in respect of any one day, or to an increased fine for a second offence or a third or any subsequent offence, unless a fine has been recovered within the preceding twelve calendar months against such person for the first offence, or for the second or other offence, as the case may be (*o*).

Discharge of owner on conviction of actual offender.

816. Generally, the owner of a work is made responsible for an offence committed therein, unless he can prove that he has used due diligence and that it was committed without his knowledge, consent,

(*a*) See title MAGISTRATES, Vol. XIX., p. 589.
(*b*) Alkali, etc. Works Regulation Act, 1906 (6 Edw. 7, c. 14), s. 12.
(*c*) As to fines for violation of special rules, see p. 410, *ante*, and, as to fines for obstructing an inspector, see the text, *supra*.
(*d*) Alkali, etc. Works Regulation Act, 1906 (6 Edw. 7, c. 14), s. 19. As to such actions, and by whom they are brought, see title COUNTY COURTS, Vol. VIII., pp. 631—633. As to the service of notices and other documents, see *ibid.*, p. 632.
(*e*) See note (*t*), p. 412, *ante*.
(*f*) See p. 411, *ante*.
(*g*) Alkali, etc. Works Regulation Act, 1906 (6 Edw. 7, c. 14), s. 17.
(*h*) For definition of "owner," see p. 406, *ante*.
(*i*) See p. 412, *ante*.
(*k*) For definition of "best practicable means," see p. 406, *ante*.
(*l*) For the mode of service, see title COUNTY COURTS, Vol. VIII. p. 632.
(*m*) See note (*l*), p. 407, *ante*.
(*n*) Alkali, etc. Works Regulation Act, 1906 (6 Edw. 7, c. 14), s. 18 (3). It is sufficient in proceedings to allege the work to be one to which the Act applies, and to state the name of the registered or ostensible owner, or the usual title of the firm; see *ibid.*, s. 18 (1).
(*o*) *Ibid.*, ss. 18 (2), (4).

SECT. 2. Alkali, Acid, and Other Works.

or connivance by some agent, servant, or workman, whom he charges by name as the actual offender, in which case such offender is liable to pay the fine and the costs of proceedings (*p*).

Complaint by sanitary authority in cases of nuisance.

817. Where complaint is made to the Local Government Board (*q*) by any sanitary authority (*r*), on information given by any of its officers, or any ten inhabitants of its district, that, either within or without the district, in contravention of the Act (*s*), any work is carried on, or that any alkali waste is deposited or discharged, and that a nuisance is occasioned thereby to any of the inhabitants of the district, the Local Government Board must make such inquiry into the matters complained of, and after the inquiry may direct such proceedings to be taken by an inspector as it thinks fit and just. The complaining sanitary authority (*r*) must, if so required by the Local Government Board, pay the expense of any such inquiry (*t*).

Actions in case of contributory nuisance.

818. Where a nuisance, arising from the discharge of any noxious or offensive gas or gases (*u*), is wholly or partially caused by the acts or defaults of the owners (*v*) of several works to which the Act (*s*) applies, any person injured by such nuisance may proceed against any one or more of such owners, and may recover damages from each defendant owner in proportion to the extent of the contribution of that defendant to the nuisance, notwithstanding that the act or default of that defendant would not separately have caused a nuisance; but this provision does not authorise the recovery of damages from any defendant who can produce a certificate from the chief inspector (*a*) that in the works of that defendant the requirements of the Act (*b*) have been complied with, and were complied with when the nuisance arose (*c*).

SECT. 3.—*Building Regulations.*

SUB-SECT. 1.—*In General.*

Adoptive powers.

819. The powers of a local authority to regulate (*d*) buildings and building operations within its area depends largely upon whether the Public Health Acts Amendment Act, 1890 (*e*), Part III., and

(*p*) Alkali, etc. Works Regulation Act, 1906 (6 Edw. 7, c. 14), s. 20.
(*q*) The "central authority"; see pp. 406, 412, note (*t*), *ante*.
(*r*) For definition of "sanitary authority," see p. 406, *ante*. As to the defraying of its expenses, see note (*g*), p. 406, *ante*.
(*s*) Alkali, etc. Works Regulation Act, 1906 (6 Edw. 7, c. 14).
(*t*) *Ibid.*, s. 22.
(*u*) For definition of "noxious or offensive gas," see p. 406, *ante*.
(*v*) For definition of "owner," see p. 406, *ante*.
(*a*) See note (*l*), p. 407, *ante*.
(*b*) Alkali, etc. Works Regulation Act, 1906 (6 Edw. 7, c. 14).
(*c*) *Ibid.*, s. 23.
(*d*) As to the effect on building contracts of non-compliance with bye-laws, see title BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., pp. 195, 196. As to the duty of architects in respect of compliance with bye-laws, see *ibid.*, pp. 295, 296.
(*e*) 53 & 54 Vict. c. 59. As to the adoption of this Act by urban authorities, see title LOCAL GOVERNMENT, Vol. XIX., p. 385, and by rural authorities, see *ibid.*, p. 386; and see pp. 363, 364, *ante*.

certain provisions of the Public Health Acts Amendment Act, 1907 (*f*), are in force in the particular area, and, wherever in the following pages either of those Acts is given as authority for a statement, it must be understood that the law so stated only applies to places in which the specified provision is in operation (*g*).

SUB-SECT. 2.—*Alteration of Buildings.*

Power to make bye-laws as to alterations.

820. A local authority may make bye-laws (*h*) to prevent buildings which have been erected in accordance with bye-laws (*i*) from being altered in such a way that if at first so constructed they would have contravened the bye-laws (*j*).

SUB-SECT. 3.—*New Buildings.*

"Erection of a new building."

821. The "erection of a new building" is not for the purposes of the Public Health Acts (*k*) limited to the erection of buildings for the first time, but is extended to cover the following specified building operations, each of which operations is deemed to be the erection of a new building:—

(1) The re-erection of any building (*l*) pulled down to or below

(*f*) 7 Edw. 7, c. 53. As to the application of this Act to local areas, see title LOCAL GOVERNMENT, Vol. XIX., p. 387; and see p. 364, *ante*.

(*g*) As to building in streets, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 236 *et seq.*; in metropolitan streets, see *ibid.*, pp. 198 *et seq.*; title METROPOLIS, Vol. XX., pp. 470 *et seq.* For various forms relating to buildings, see Encyclopædia of Forms and Precedents, Vols. X., pp. 639—643; XI., pp. 20—25; XVI., pp. 527—529.

(*h*) As to the making, publication, confirmation etc. of bye-laws, see pp. 388 *et seq.*, *ante*.

(*i*) The words are "bye-laws made under the Public Health Acts" (see note (*a*), p. 361, *ante*), but bye-laws made under repealed Acts, and not inconsistent with the Public Health Act, 1875 (38 & 39 Vict. c. 55), are deemed to be made under the Public Health Act, 1875 (38 & 39 Vict. c. 55) (*ibid.*, s. 326); and see note (*f*), p. 389, *ante*. As to what is a "building," see note (*l*), *infra*.

(*j*) Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 23 (4). The Local Government Board allows bye-laws as to notices, deposit of plans, and inspection of alterations, but not bye-laws as to pulling down offending works. But where notice or plan or description has been delivered, the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 158 (see pp. 422 *et seq.*, *post*), applies to any such work.

(*k*) For a list of the Public Health Acts, see note (*a*), p. 361, *ante*.

(*l*) "Building" is a term of wide significance. The structure need not be fastened to the ground (*Watson* v. *Cottar* (1847), 5 C. B. 51; *Poplar Board of Works* v. *Knight* (1858), E. B. & E. 408; *Richardson* v. *Brown* (1885), 49 J. P. 661), or be above the surface of a street (*Thompson* v. *Sunderland Gas Co.* (1877), 2 Ex. D. 429, C. A.; *Schweder* v. *Worthing Gas Light and Coke Co.*, [1912] 1 Ch. 83); see also the cases as to what is a "building, structure, or work" under the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 145, cited in title METROPOLIS, Vol. XX., p. 477, note (*u*), and the cases as to "other building" under the Representation of the People Act, 1832 (2 & 3 Will. 4, c. 45), s. 27, referred to in title ELECTIONS, Vol. XII., p. 185, note (*i*); and, for the definition of "building" in the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), see note (*d*), p. 567, *post*. It is very doubtful whether mere walls, hoardings, or fences are buildings within the meaning of the term as used in the text (see *Child* v. *Douglas* (1854), Kay, 560; *Weston* v. *Arnold* (1873), 8 Ch. App. 1084; *Slaughter* v. *Sunderland Corporation* (1891), 60 L. J. (M. C.) 91; *Ellis* v. *Plumstead Board of Works* (1893), 68 L. T. 291; *Lavy* v. *London County*

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the ground floor, or of any frame building of which only the framework is left down to the ground floor (*m*).

(2) The re-erection, wholly or partially, of any building of which an outer wall is pulled down (*n*) or burnt down to or within ten feet of the surface of the ground adjoining the lowest storey of the building, and of any frame building so far pulled down or burnt down as to leave only the framework of the lowest storey (*o*).

(3) The conversion into a dwelling-house of any building not originally constructed for human habitation (*p*), or the conversion into more than one dwelling-house of a building originally constructed as one dwelling-house only (*q*).

(4) The reconversion into a dwelling-house of any building which has been discontinued as or appropriated for any purpose other than that of a dwelling-house (*o*).

(5) The making of any addition (*r*) to an existing building by raising any part of the roof, by altering a wall, or making any projection from the building, but so far as regards the addition only (*o*).

(6) The roofing or covering over of an open space between walls or buildings (*o*).

Bye-laws for securing stability, fire-prevention, sanitation etc.

822. Local authorities (*s*) may make bye-laws (*t*) with respect to

Council, [1895] 2 Q. B. 577, C. A.; title BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., p. 176).

(*m*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 159. Neither this nor the next provision referred to in the text, *supra*, exhausts the definition of a new building, nor do they provide for the conversion of a dwelling-house into a public building, business premises etc. Whether a building is a "new building" is "a question of fact, ... it is a question of degree" (*James* v. *Wyvill* (1884), 51 L. T. 237, *per* Lord COLERIDGE, C.J., at p. 240; see *Redruth Brewery Co.* v. *Redruth District Council* (1904), 69 J. P. 78). As to re-erections, see *Hobbs* v. *Dance* (1873), L. R. 9 C. P. 30; *Lee* v. *Barton* (1909), 101 L. T. 600; conversions, *West Hartlepool Commissioners* v. *Levy* (1886), 50 J. P. 196; *Hall* v. *Eastbourne Corporation* (1905), 69 J. P. 369; addition to old building, *Shiel* v. *Sunderland Corporation* (1861), 6 H. & N. 796 (cases under local Acts).

(*n*) See *Yabbicom* v. *Bristol Brewery, Ltd.* (1903), 67 J. P. 261, where the inadvertent pulling down by a workman of part of a wall was held not to be a pulling down within a local Act.

(*o*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 23, which does not apply to buildings, other than dwelling-houses, used for duly authorised railways, harbours, docks, canals etc. (*ibid.*, s. 33).

(*p*) See *Hanrahan* v. *Leigh-on-Sea Urban Council*, [1909] 2 K. B. 257, C. A. (converted railway carriage).

(*q*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 159; Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 23; and see notes (*m*), (*o*), *supra*.

(*r*) An erection may be such an addition, although it merely occupies the same space as the structure it replaces (*Meadows* v. *Taylor* (1890), 24 Q. B. D. 717).

(*s*) As to the several matters referred to in the text, *infra*, every urban authority may make bye-laws with respect to those grouped under the numbers (1), (2), (3); see Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 157. For those under numbers (4), (5), (6), an urban authority must acquire the necessary power under the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 23 (1), by adopting *ibid.*, Part III.; see

(*t*) For note (*t*), see next page.

title LOCAL GOVERNMENT, Vol. XIX., p. 385. A rural authority may acquire the power under the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 23 (3), to make bye-laws with respect to "the structure of walls and foundations of new buildings for purposes of health." As to the matters under numbers (2), (3), (4), and the structure of floors and the height of rooms to be used for human habitation, the rural authority may acquire powers by the adoption of *ibid.*, Part III., or it may be invested with such a power as to matters under numbers (1)—(6) by an order of the Local Government Board, under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 276, or the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 5. Bye-laws as to matters under numbers (7) and (8) may be made by a local authority where the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 24, has been declared to be in force in its district by the Local Government Board; see p. 364, *ante*.

(*t*) As to the making and publication of bye-laws, see pp. 388 *et seq.*, *ante*. The Local Government Board has issued the following model bye-laws—Series IV., with respect to new streets and buildings, comprising the matters grouped under numbers (1), (2), (3), and the observance of bye-laws (see p. 421, *post*), for urban authorities and rural authorities with the necessary powers (see note (*s*), p. 416, *ante*); Series IVA, with respect to new buildings and certain matters in connection with buildings, for rural authorities with the powers obtained by adopting the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), Part III., or by an order of the Local Government Board; Series IVB, with respect to drainage of existing buildings (*ibid.*, s. 23 (2)); and the Local Government Board also supplies an intermediate Series IVC (based upon Series IVA, with additional clauses as to new streets etc., taken from Series IV.), which is framed for areas of a semi-urban character; see, further, a circular letter of the Board dated the 29th August, 1912 (76 J. P. (Journal), 425).

Bye-laws invariably contain clauses defining expressions, and exempting certain buildings, and matters of this kind have been the subject of judicial decisions. As to a barn being a domestic building, see *R.* v. *Preston Rural District Council, Ex parte Longworth* (1911), 76 J. P. 65. A stable has been held not to be a "domestic building" for the purpose of open space at the rear (*Collins* v. *Greenwood* (1910), 103 L. T. 36). For the meaning of "incombustible materials," see *Payne* v. *Wright*, [1892] 1 Q. B. 104; *Badley* v. *Cuckfield Union Rural District Council* (1895), 64 L. J. (Q. B.) 571; *Hendon Urban District Council* v. *Martin* (1900), *Times*, 13th January; *Stevens* v. *Gourley* (1859), 7 C. B. (N. S.) 99; "party wall," *Watson* v. *Gray* (1880), 14 Ch. D. 192; title BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., p. 134; "topmost storey," *Foot* v. *Hodgson* (1890), 25 Q. B. D. 160; and for other cases in connection with definitions in the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), see title METROPOLIS, Vol. XX., pp. 470 *et seq.* For exemption of a brick-kiln used with a fire-clay mine, see *Tylecote* v. *Morton* (1901), 85 L. T. 692; and for exemption of a stable as not being used for habitation or habitual employment, see *Linzell* v. *Felixstowe and Walton Urban District Council* (1904), 90 L. T. 388. The completion of buildings, begun before bye-laws for the first time came into force, has been held not to be subject to such bye-laws (*Hubbard* v. *Bromley Rural District Council* (1905), 69 J. P. 437). A water tower under a local Act was held not exempt (*Uckfield Rural Council* v. *Crowborough District Water Co.*, [1899] 2 Q. B. 664).

Bye-laws under numbers (1)—(6) do not apply to buildings of a railway company used for the purposes of the railway under any Act of Parliament (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 157). But cottages built by a railway company for its servants must comply with the bye-laws (*Manchester, Sheffield, and Lincolnshire Rail. Co.* v. *Barnsley Union Guardians* (1892), 67 L. T. 119; see also the cases referred to in title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 246, note (*p*)). Bye-laws under numbers (7) and (8) do not apply to any buildings (other than a dwelling-house) belonging to a railway company, or to any company or public body maintaining a harbour, pier, or dock, or to the owners of any canal or inland navigation and used for the purposes of their

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(1) the structure of walls, foundations, roofs, and chimneys (*a*) of new buildings (*b*), for securing stability and the prevention of

undertaking (Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 33). No bye-law, except as mentioned below, is to affect any building erected in any place, included on the 11th August, 1875, in an urban district, before the Local Government Acts (defined and repealed, Public Health Act, 1875 (38 & 39 Vict. c. 55), Sched. V., Part I.) came into force in such place, or any building erected in any other place before it becomes constituted or included in an urban district, or, by virtue of any order of the Local Government Board, subject to the Public Health Act, 1875 (38 & 39 Vict. c. 55) (*ibid.*, s. 157), in the manner referred to in note (*s*), p. 416, *ante* But where the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 23 (1) or s. 23 (3), is in force, bye-laws as to drainage, water-closets (including water for flushing), earth-closets, privies, ashpits and cesspools may be made to affect buildings erected before the times mentioned (*ibid.*, s. 23 (2)).

In the Metropolis, the London County Council has power to make bye-laws as to certain matters in connexion with buildings (see title METROPOLIS, Vol. XX., p. 460), but generally building operations in that area are regulated by the London Building Acts (see title METROPOLIS, Vol. XX., pp. 470 *et seq.*). The City of London (Various Powers) Act, 1911 (1 & 2 Geo. 5, c. lxxxiv.), ss. 29, 30, confer on the Corporation power to make and enforce bye-laws controlling projections etc. in the street. In the provinces new buildings are also frequently dealt with by local Acts.

Bye-laws with respect to new buildings, including provisions as to the giving of notices and deposit of plans and sections, and provisions in local Acts dealing with the construction of new buildings, and bye-laws made with respect to new buildings under any local Act, do not apply in the case of school premises erected according to plans which have been approved by the Board of Education (Education (Administrative Provisions) Act, 1911 (1 & 2 Geo. 5, c. 32), s. 3).

(*a*) The Chimney Sweepers and Chimneys Regulation Act, 1840 (3 & 4 Vict. c. 85), s. 6, provides that all withs and partitions between any chimney or flue must be of brick or stone, and at least equal to half a brick in thickness, and every chimney or flue to be built or rebuilt in any wall, or longer than 4 feet out of the wall, not being a circular one 12 inches in diameter, must be in every section not less than 14 inches by 9 inches. Angles of chimneys and flues are also regulated. The provisions are enforceable by penalties, not less than £10 nor more than £50. As to the bearing on this provision of a local Act upon the same matter, see *Hill* v. *Hall* (1876), 1 Ex. D. 411. As to the height of chimneys, see p. 421, *post.*

(*b*) An erection to be a "new building" within the meaning of bye-laws must be a building to which their requirements would be applicable. Thus the following have been held not to be new buildings: hoardings enclosing land used for preparing wood for hoardings (*Slaughter* v. *Sunderland Corporation* (1891), 65 L. T. 250); a boiler cased in brickwork, partly underground (*Gery* v. *Black Lion Brewery Co.* (1891), 55 J. P. 711); a conservatory of wood and glass (*Hibbert* v. *Acton Local Board* (1889), 5 T. L. R. 274, C. A.); a temporary storehouse for building purposes (*Fielding* v. *Rhyl Improvement Commissioners* (1878), 3 C. P. D. 272); wooden erections to shelter a weighing machine and refreshment stall (*Southend-on-Sea Corporation* v. *Archer*, *Same* v. *Romanis* (1901), 70 L. J. (K. B.) 328); a wooden portable theatre (*Newell* v. *Ormskirk Urban District Council* (1907), 71 J. P. 119; see *Collins* v. *Greenwood* (1910), 103 L. T. 36). As to temporary buildings, see p. 427, *post.* A bye-law prohibiting the erection of any building by the side of a new street until the street had been constructed, has been held valid (*Baker* v. *Portsmouth Corporation* (1878), 3 Ex. D. 157, C. A.; and see *Robinson* v. *Barton-Eccles Local Board* (1883), 8 App. Cas. 798, *per* Lord SELBORNE, L.C., at p. 801). As to when the erection of buildings may constitute the construction of a new street so as to necessitate compliance with bye-laws as to new streets, see *Hendon Local Board* v. *Pounce*

fires (*c*), and for purposes of health; (2) the sufficiency of the space about buildings to secure a free circulation of air (*d*), and the ventilation of buildings (*e*); (3) the drainage of buildings (*f*),

(1889), 42 Ch. D. 602; *Devonport Corporation* v. *Tozer*, [1903] 1 Ch. 759, C. A.; *Fellowes* v. *Sedgley Urban District Council* (1906), 70 J. P. 412; title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 238. A building may not be newly erected over any sewer without the consent of the local authority (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 26); see title SEWERS AND DRAINS. See, as to structural materials, a circular letter of the Local Government Board dated the 29th August, 1912 (76 J. P. (Journal), 425).

(*c*) Where, by virtue of its incorporation with a local Act, the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 109, is in force, roofs and external and party walls are to be constructed of incombustible materials, and party walls are to be carried up through the roof. As to prevention of fire by provision of appliances, see pp. 548 *et seq.*, *post*. As to the means of escape from fire in factories and workshops, and the bye-laws which may be made as to such means, see title FACTORIES AND SHOPS, Vol. XIV., pp. 467—470.

(*d*) A bye-law requiring every new building to have an open space of at least 500 square feet free from any erection has been held valid (*Adams* v. *Bromley Local Board* (1872), 37 J. P. 662). As to the mode of measuring open space, see *Anderton* v. *Rigby* (1863), 13 C. B. (N. S.) 603; *Jones* v. *Parry* (1887), 52 J. P. 69; *A.-G.* v. *The Friary, Holroyd, and Healy's Breweries, Ltd.* (1907), 71 J. P. 348; and, as to what constitutes a separate building for the purpose of open space, see *A.-G.* v. *Melville and King* (1905), 93 L. T. 612; *Southend-on-Sea Corporation* v. *Ramuz* (1895), 99 L. T. Jo. 358; *R.* v. *Preston Rural District Council, Ex parte Longworth* (1911), 76 J. P. 65. A wooden fence, 3 feet 6 inches high, has been held to infringe a provision prohibiting an erection on the open space (*Adams* v. *Bromley Local Board, supra*); compare *Graham* v. *Newcastle-upon-Tyne Corporation* (1892), 67 L. T. 790, C. A., as to the application of a covenant requiring a garden or open space to be "kept open and unbuilt upon." A prohibition against building on any open space left belonging to any building was held invalid if it applied to old buildings (*Tucker* v. *Rees* (1861), 25 J. P. 789), and so was a similar prohibition applicable to new buildings without limitation of the extent of open space left (*Quinby* v. *Liverpool Corporation* (1888), 53 J. P. 213). An offending building may be pulled down by the local authority (*Jagger* v. *Doncaster Union Rural Sanitary Authority* (1890), 54 J. P. 438). For the purpose of a bye-law requiring every new domestic building to have an open space, a stable was held not to be such a domestic building (*Collins* v. *Greenwood* (1910), 103 L. T. 36). As to the retrospective application to existing buildings of local Act provisions with respect to open space, see *West Hartlepool Commissioners* v. *Levy* (1886), 50 J. P. 196. A provision in a local Act respecting open spaces for blocks of back-to-back houses was construed in *Robshaw* v. *Leeds Corporation* (1875), 39 J. P. 149. Generally bye-laws require open spaces to be so provided in the rear as in effect to prohibit the erection of back-to-back houses; and now, notwithstanding anything in any local Act or bye-law, such houses may not be erected as dwellings for the working classes except, in the case of tenement houses, where the ventilation is certified as satisfactory by the medical officer of health (Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 43); see note (*e*), p. 528, *post*.

(*e*) Where the provisions of the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), with respect to supplying buildings with fresh air, are in force, by virtue of their incorporation with a local Act, notice, accompanied by a plan showing means of ventilation, has to be given to the local authority, and the authority's approval of such means obtained, before any building intended as a place of public meeting can be commenced to be built (*ibid.*, s. 110); but if the authority fails to approve or disapprove within fourteen days, the building may be proceeded with (*ibid.*, s. 111); there is an appeal to quarter sessions (*ibid.*, s. 86) against any determination of the authority (*ibid.*, s. 112).

(*f*) Where there are suitable separate sewers, the Local Government

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water-closets, earth-closets, privies (*g*), ashpits (*h*), and cesspools (*i*) in connexion with buildings (*k*), and the closing of buildings or parts of buildings unfit for human habitation, and prohibition of their use for such habitation (*l*); (4) the keeping water-closets supplied with sufficient water for flushing (*m*); (5) the structure of floors (*n*), hearths, and staircases, and the height of

Board confirms bye-laws requiring new buildings to have separate drains for sewage and surface water; see *Matthews* v. *Strachan*, [1901] 2 K. B. 540, *per* RIDLEY, J., at p. 548. As to the enforcement of provisions for sufficient drains for both old and new houses, see the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 23—25; the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 73—75. The London County Council may make bye-laws as to drains (*ibid.*, s. 202; Metropolis Management Acts Amendment (Byelaws) Act, 1899 (62 & 63 Vict. c. 15); see titles METROPOLIS, Vol. XX., p. 461; SEWERS AND DRAINS.

(*g*) Tub-closets have been held to be privies (*Burton* v. *Acton* (1887), 51 J. P. 566).

(*h*) "Ashpit" includes any ashpit or other receptacle for the deposit of ashes, fæcal matter, or refuse (Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 11).

(*i*) A bye-law requiring a cesspool to be at least 50 feet from a dwelling-house has been held not to be unreasonable (*Simmons* v. *Malling Rural Council*, [1897] 2 Q. B. 433); compare *Meyrick* v. *Pembroke Corporation* (1912), 76 J. P. 365. A bye-law prohibiting cesspools being connected with sewers has been held not to be infringed by connecting a series of cesspools together (*Button* v. *Tottenham Urban District Council* (1898), 62 J. P. 423).

(*k*) For the application to old buildings of bye-laws as to drainage, water-closets etc., see note (*t*), pp. 417, 418, *ante*. The London County Council must make bye-laws as to closing and filling up cesspools and privies (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 16 (2) (b)), and as to water-closets, earth-closets, privies, ashpits (defined *ibid.*, s. 141), cesspools, and dung receptacles in connection with buildings whenever erected (*ibid.*, s. 39 (1)); but the bye-laws do not extend to the City (*ibid.*, s. 133). The sanitary authorities must enforce them (*ibid.*, ss. 16 (3), 39 (3)). As to the construction of bye-laws made under these enactments, see *Fulham Vestry* v. *Solomon*, [1896] 1 Q. B. 198; *Metropolitan Industrial Dwellings Co.* v. *Long* (1903), 68 J. P. 113); and see title METROPOLIS, Vol. XX., p. 461.

(*l*) The model bye-laws, Series IV., IVA, and IVC, referred to in note (*t*), p. 417, *ante*, require that, before a local authority makes an order to close a house, the owner should have an opportunity of showing cause against such an order being made. As an alternative to proceeding under a bye-law, proceedings for a closing order may be taken under the Housing of the Working Classes Acts; see p. 527, *post*. A bye-law prohibiting the occupation of new houses before the house drainage is completed and the surveyor certifies them to be fit for occupation has been upheld (*Horsell* v. *Swindon New Town Local Board* (1888), 58 L. T. 732). A similar prohibition against letting or occupation has been held not to apply to a caretaker (*Gowen* v. *Sedgwick* (1904), 68 J. P. 484).

(*m*) As to the application of this provision to old buildings, see note (*t*), pp. 417, 418, *ante*. The provision of a flushing apparatus may be enforced by a bye-law where a water-closet is being provided; see *ibid.* As to its enforcement in the case of there being no existing sufficient water-closet, see *Bogle* v. *Sherborne Local Board* (1880), 46 J. P. 675, referred to in note (*o*), p. 598, *post*. Every sanitary authority in London is required to make and enforce bye-laws for keeping water-closets supplied with sufficient water (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 39 (2)); and see title METROPOLIS, Vol. XX., p. 461.

(*n*) See *Towers* v. *Brown* (1903), 2 L. G. R. 942, where floors of steel and wood were held not to come within a bye-law referring to timbers only.

rooms intended to be used for human habitation (*o*); (6) the paving of yards and open spaces in connexion with dwelling-houses (*p*); (7) the structure of chimney-shafts for the furnaces of steam-engines, breweries, distilleries, or manufactories; and (8) the height (*q*) of chimneys of buildings and the height of buildings.

Notices plans etc.

823. A local authority may further provide for the observance of such bye-laws by enacting therein provisions as to the giving of notices (*r*), the deposit of plans and sections by persons intending to construct buildings (*s*), inspection by the authority, and its

(*o*) A scullery has been held not to be such a room (*Bain* v. *Compstall Co-operative Society* (1910), 103 L. T. 759).

(*p*) Where the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 25, is in force, yards not properly paved may be dealt with under that provision, and the order of the Local Government Board declaring the provision in force invariably provides that the power of making or enforcing bye-laws on the subject as in the text, *supra*, shall cease to be exercisable; see title SEWERS AND DRAINS. In London a sanitary authority must make and enforce bye-laws for the paving of yards etc. in connexion with dwelling-houses (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 16 (1) (d), (3)).

(*q*) In London there are special provisions as to the height of buildings; see *A.-G.* v. *Metcalf and Greig*, [1908] 1 Ch. 327, C. A.; title METROPOLIS, Vol. XX., pp. 482, 484.

(*r*) In *Hattersley* v. *Burr* (1886), 14 L. T. 565, a bye-law requiring that a written notice of at least a month should be given to the local authority before commencing to build was held unreasonable; but in *Hall* v. *Nixon* (1875), L. R. 10 Q. B. 152, a bye-law which required, under a penalty, fourteen days' notice, together with the deposit of plans and sections, was upheld. The imposition of a penalty is not inconsistent with the power to pull down, for notice must be given before commencing to build, but the pulling down afterwards of buildings not properly erected is quite a different thing (*Hall* v. *Nixon*, *supra*, *per* QUAIN, J., at p. 161). As to the sufficiency of a notice requiring a person to comply with a bye-law, see *Dickenson* v. *Forsyth* (1903), 68 J. P. 170.

(*s*) A bye-law may require a deposited plan to show adjoining buildings (*Slee* v. *Bradford Corporation* (1863), 8 L. T. 491). For a recent judicial construction of the word "adjoining," see *Cave* v. *Horsell* (1912), 106 L. T. 147; affirmed, 28 T. L. R. 543, C. A. The fact that several of the prescribed particulars may be applicable to houses only does not exonerate the builder of a wooden stable from depositing a plan (*South Shields Corporation* v. *Wilson* (1901), 84 L. T. 267). A specimen plan allowed to be deposited may be regarded as the plan applicable to each house of the same type built (*Balby-with-Hexthorpe District Council* v. *Millard* (1903), 68 J. P. 81). Where plans of several buildings were approved, and, after some had been erected, new bye-laws came into force containing a saving for anything duly done or suffered under the old bye-laws, it was held that the rest of the buildings might be erected under the old bye-laws (*Withington Urban District Council* v. *Moore* (1896), 60 J. P. 408); but where old bye-laws were repealed, except as regards any work commenced before the date of the confirmation of the new bye-laws, it was held that buildings not yet begun at that date, of which (with others then completed) the plans had been previously approved, must comply with the new bye-laws (*White* v. *Sunderland Corporation* (1903), 88 L. T. 592; and see *Harrogate Corporation* v. *Dickinson*, [1904] 1 K. B. 468, C. A.). Sometimes building without approval of plans is an offence under a local Act; see *Pearson* v. *Kingston-upon-Hull Local Board of Health* (1865), 3 H. & C. 921; *Cook* v. *Hainsworth*, [1896] 2 Q. B. 85 (where a bye-law to that effect under a local Act was upheld, there being an obligation on the authority to approve or disapprove within twenty-one days, and an appeal to quarter

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power to remove, alter, or pull down any work begun or done in contravention (*t*) of such bye-laws (*a*).

Approval of plans by local authority and pulling down of offending buildings.

824. A local authority (*b*) must, within one calendar (*c*) month (*d*) after any notice, plan or description of any work has been delivered or sent in pursuance of a bye-law (*e*) to its surveyor or clerk, signify in writing its approval or disapproval of the intended work to the person proposing to execute it (*f*); and, if it is com-

sessions from its decision). A deviation from deposited plans is an offence (*Burton* v. *Acton* (1887), 51 J. P. 566; *James* v. *Masters*, [1893] 1 Q. B. 355).

(*t*) The power to pull down (which should only be exercised after an opportunity of being heard has been afforded to the person concerned (see note (*h*), p. 424, *post*), may be applied by bye-law to cover work begun or done without compliance with bye-laws as to notices and deposit of plans (*Baker* v. *Portsmouth Corporation* (1878), 3 Ex. D. 157, C. A.). It may be exercised although no plan has been deposited, and an offending building may be pulled down more than six months after its completion (*Fairbrass* v. *Canterbury Corporation* (1902), 67 J. P. 181); but where action is taken under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 158 (see the text, *infra*), there must first be a delivery of a notice, plan or description. Offending work may be pulled down notwithstanding that it might be removed or altered so as to comply with the bye-laws (*Hanrahan* v. *Leigh-on-Sea Urban Council*, [1909] 2 K. B. 257, C. A.). The bye-laws may further impose penalties for contraventions, and they may be enforced by an injunction in an action by the Attorney-General at the relation of the local authority (*A.-G.* v. *Ashborne Recreation Ground Co.*, [1903] 1 Ch. 101; followed in *Devonport Corporation* v. *Tozer*, [1903] 1 Ch. 759, C. A.); although penalties have been imposed by the justices for a continuing offence (*A.-G.* v. *Wimbledon House Estate Co., Ltd.*, [1904] 2 Ch. 34; *A.-G.* v. *The Friary, Holroyd, and Healy's Breweries, Ltd.* (1907), 71 J. P. 348); and see title INJUNCTION, Vol. XVII., p. 204. It is sometimes a question who is the person liable for a contravention of the bye-laws: as to the liability of an assignor of a building contract, see *Brown* v. *Edmonton Local Board* (1881), 45 J. P. 553; a lessor, *Bennett* v. *Skegness Local Board* (1890), 54 J. P. 469; a plumber under metropolitan drainage bye-laws, *Kershaw* v. *Brooks*, [1909] 2 K. B. 265. As to penalties for contraventions, see p. 389, *ante*.

(*a*) Public Health Acts, 1875 (38 & 39 Vict. c. 55), s. 157; 1890 (53 & 54 Vict. c. 59), s. 23; 1907 (7 Edw. 7, c. 53), s. 24.

(*b*) This provision (*i.e.*, the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 158) is in force in every urban district, and also in every rural district where the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), Part III., has been adopted, or where the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 24 (which provides that, in every district in which *ibid.*, s. 24, is in force, the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 158, is to be in force), has been declared to be in force, or put in force by the Local Government Board under the Public Health Act, 1875 (38 & 39 Vict. c. 55); see p. 364, *ante*; and see title LOCAL GOVERNMENT, Vol. XIX., p. 387.

(*c*) See Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 3; and see titles STATUTES; TIME.

(*d*) The period cannot be extended by bye-law (*Clark* v. *Bloomfield* (1885), 1 T. L. R. 323).

(*e*) Made by the local authority (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 158) under any Act, local or general, or by it or its predecessors under repealed Acts (*ibid.*, s. 326).

(*f*) There is no authority under the general law for the imposition by bye-law or otherwise of any fee for the examination of plans, or for any certificate of the fitness of a new house for occupation (opinion of Local Government Board; see 1 Lumley, Public Health, 7th ed., p. 357); see note (*l*), p. 420, *ante*. A local authority has no general discretion to disapprove or withhold approval where there is no infringement of bye-laws or statutory requirements (*Robinson* v. *Barton-Eccles Local Board* (1883), 8 App. Cas.

menced after such notice of disapproval, or before the expiration of such month without such approval (*g*), and is in any respect not

798); nor can it refuse to pass plans of buildings because it does not approve of the site (*R.* v. *Preston Corporation* (1887), 3 T. L. R. 665), or of the style of building (*R.* v. *Newcastle-on-Tyne Corporation* (1889), 60 L. T. 963), or of the site of a cesspool if neither the bye-law nor statute is contravened (*R.* v. *Bexhill Corporation, Ex parte Cornell* (1911), 75 J. P. 385), nor may it attach to its approval such an extraneous condition as the provision of a sewerage system (*R.* v. *Tynemouth Rural District Council*, [1896] 2 Q. B. 451, C. A.). As to the enforcement of an agreement, subject to which, in pursuance of a local Act, plans were passed, see *Crane* v. *Wallasey Corporation* (1912), 19 L. G. R. 523. In *Ex parte Crosby* (1877), 41 J. P. 740, it was suggested, on the application for a rule *nisi*, that the title to land on which it was proposed to build according to a plan could not be inquired into; but in *Thompson* v. *Failsworth Local Board* (1881), 46 J. P. 21, it was held that the local board ought to have ascertained that the builder had sufficient land to provide a new street of the width shown on his plans. The latter case was followed in *R.* v. *Tynemouth Corporation*, [1911] 2 K. B. 361, where Lord ALVERSTONE, C.J., at p. 365, said that the local authority can "take into consideration any matters which tend to show that it is impossible for the applicant to carry out the works shown on the plans." The approval of plans contravening the bye-laws is inoperative, and a saving of plans under repealed bye-laws applies only to plans legally approved (*Yabbicom* v. *King*, [1899] 1 Q. B. 444; see note (*t*), pp. 395, 397, *ante*). As to powers to dispense with the requirements of bye-laws generally, see note (*t*), pp. 395, 397, *ante*.

(*g*) In *Masters* v. *Pontypool Local Government Board* (1878), 9 Ch. D. 677, it was held that where a plan has not been disapproved within the prescribed month, the local authority cannot afterwards object to a building according to the plan; see also *Slee* v. *Bradford Corporation* (1863), 8 L. T. 491; *Clark* v. *Bloomfield* (1885), 1 T. L. R. 323 (where it was held that penalties could not be recovered for breaches of the bye-laws where the plan had not been disapproved within the month); compare *Yabbicom* v. *King*, *supra*. Where bye-laws are infringed, the Attorney-General may intervene by an action for an injunction; see *A.-G.* v. *Ashborne Recreation Ground Co.*, [1903] 1 Ch. 101. A builder may, at his own risk, build without waiting for approval, or in spite of disapproval (*R.* v. *Tynemouth Rural District Council*, [1896] 2 Q. B. 219, *per* WILLS, J., at p. 230: "If . . . the applicant has contravened no bye-law, I see no reason why he should not proceed to build . . . nothing can be done to him"); see *Pearson* v. *Kingston-upon-Hull Local Board of Health* (1865), 13 L. T. 180; *Cook* v. *Hainsworth*, [1896] 2 Q. B. 85 (cases under local Acts). There may, perhaps, be an appeal to quarter sessions under the Public Health Act, 1907 (7 Edw. 7, c. 53), s. 7 (1), where plans are disapproved or approval withheld in the case of matters numbered (7) and (8); see p. 421, *ante*. Local Acts often give such an appeal; see *Cook* v. *Hainsworth*, *supra*. An action for damages does not lie for improper refusal to pass plans (see *Mullis* v. *Hubbard*, [1903] 2 Ch. 431); but a mandamus may be granted requiring the local authority to hear and determine the application (*Davis* v. *Bromley Corporation* (1907), 71 J. P. 513, C. A.; compare *R.* v. *West Hartlepool Corporation, Ex parte Richardson* (1901), 18 T. L. R. 1). If a person whose plans comply with the bye-laws does not care to proceed in the absence of approval, his remedy is to apply for a mandamus to approve (*R.* v. *Newcastle-on-Tyne Corporation*, *supra*; *R.* v. *St. George the Martyr, Southwark, Vestry* (1892), 61 L. J. (Q. B.) 398; *R.* v. *Tynemouth Rural District Council*, [1896] 2 Q. B. 451, C. A.; see *Smith* v. *Chorley Rural Council*, [1897] 1 Q. B. 678, C. A. (where it was held that the honest and *bonâ fide* exercise by a local authority of its discretion cannot be questioned by an action for a mandamus). In *R.* v. *Bexhill Corporation, Ex parte Cornell*, *supra*, a mandamus to approve was granted, although the building had been erected. Writs were refused in cases where the local authority in good faith thought the proposed buildings would obstruct a highway (*R.* v. *West Hartlepool Corporation, Ex parte Richardson*, *supra*), or would contravene the

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in conformity with any bye-law of the authority, the authority may cause so much of the work as has been executed to be pulled down or removed (*h*).

Recovery of expenses.

Where an authority incurs expenses in or about the removal of any work executed contrary to any bye-law, it may recover in a summary manner (*i*) the amount of such expenses either from the person executing the works removed, or from the person causing the works to be executed, at its discretion (*k*).

Deposit to be of no effect after certain intervals.

825. The deposit (*l*) of any plans or sections in pursuance of any bye-law (*m*) may, by notice in writing (*n*) to the depositor, be declared by the local authority to be of no effect if the work is not commenced (*o*) within three years of the deposit, or, where the deposit was before the commencement of the statutory provision (*p*), within three years from that date; and, where the deposit has been declared to be of no effect, a fresh deposit is necessary before the work is commenced (*q*).

Public Health (Buildings in Streets) Act, 1888 (51 & 52 Vict. c. 52) (*R.* v. *Eastbourne Corporation* (1900), 64 J. P. 724, C. A.; followed in *R.* v. *Chiswick Urban District Council, Ex parte Brickell* (1908), 72 J. P. 165); and see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 241.

(*h*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 158. Before pulling down, the local authority must give notice to the person concerned, and afford him an opportunity of being heard (*Cooper* v. *Wandsworth District Board of Works* (1863), 14 C. B. (N. S.) 180; *Masters* v. *Pontypool Local Government Board* (1878), 9 Ch. D. 677; approved and followed in *Hopkins* v. *Smethwick Local Board of Health* (1890), 24 Q. B. D. 712, C. A.; and see *A.-G.* v. *Hooper*, [1893] 3 Ch. 483). A building may be pulled down in any way, so long as there is no unnecessary damage (*Jagger* v. *Doncaster Union Rural Sanitary Authority* (1890), 54 J. P. 438). For form of notice, see Encyclopædia of Forms and Precedents, Vol. XI., p. 24. As to pulling down under bye-laws, see p. 422, *ante*.

(*i*) See the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 35; title MAGISTRATES, Vol. XIX., pp. 589 *et seq.* Costs may be granted on a *certiorari* to quash an order of justices as to such expenses (*R.* v. *Woodhouse*, [1906] 2 K. B. 501, C. A.; reversed *sub nom. Leeds Corporation* v. *Ryder*, [1907] A. C. 420; and see title CROWN PRACTICE, Vol. X., p. 171, note (*n*)).

(*k*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 158.

(*l*) See p. 421, *ante*.

(*m*) Including bye-laws made under local Acts.

(*n*) As to notices, see Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 266, 267; and see pp. 370, 371, *ante*. For form of notice, see Encyclopædia of Forms and Precedents, Vol. XVI., p. 527.

(*o*) Whether work has been commenced is a question of fact. Under a similar local Act, a plan showing several houses was held to be, as regards each house, a separate plan, so that it could be declared void as regards houses not commenced within the specified period (*Harrogate Corporation* v. *Dickinson*, [1904] 1 K. B. 468, C. A.; see *White* v. *Sunderland Corporation* (1903), 88 L. T. 592).

(*p*) Namely, the date at which the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c 53), s. 15, is declared to be in force; see *ibid.*, s. 13; and see pp. 364, 415, *ante*.

(*q*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 15. Notice of the provisions referred to in the text, *supra*, must be given by the local authority to every person intending to erect a new building of which plans and sections have been deposited before the commencement of the operation of *ibid.*, and of which the erection has not been commenced, and a similar notice must be attached by the authority to the approval of plans and sections deposited subsequent to such commencement of the section (*ibid.*). An appeal against any declaration of the local authority under *ibid.* lies to quarter sessions (*ibid.*, s. 7).

Retention of plans etc. deposited with local authority.

826. The local authority may retain any drawings, plans, elevations, sections, specifications, and written particulars, descriptions or details, deposited with and approved by it in pursuance of any enactment for the time being in force in the district or of any bye-law (*r*) thereunder (*s*).

Buildings not to be used as dwellings if otherwise described in deposited plans.

827. If a building (*t*) is described in any plan deposited (*u*) with a local authority otherwise than as a dwelling-house, any person who wilfully uses or knowingly permits it to be used for habitation by any person other than a caretaker and his family is liable to a penalty not exceeding £5, and to a daily penalty after conviction (*v*) not exceeding 40*s*. But the owner may use such building as a dwelling-house if it has in the rear and adjoining (*w*) and exclusively belonging thereto such an open space as is required by an Act or bye-law in force with respect to buildings intended to be used as dwelling-houses, and if such part of the building as is intended to be used as a dwelling-house has undergone such structural alterations, if any, as are necessary in the opinion of the local authority (*a*) to render it fit for that purpose (*b*).

Continuing offences.

828. Where an authority may under the statutory provision (*c*) pull down or remove any work begun or executed in contravention of any bye-law, or where the beginning or execution of the work is an offence punishable under a bye-law by penalty, the existence of the work during its continuance in such a form or state as to be in contravention of the bye-law is deemed to be a continuing offence (*d*),

(*r*) Including bye-laws made under local Acts.

(*s*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 16. In *Gooding* v. *Ealing Local Board of Health* (1884), 1 T. L. R. 62, it was held that plans drawn upon paper supplied by the local board, on which was a stipulation providing for their retention, might be retained although not approved.

(*t*) As to what is a "building," see note (*l*), p. 415, *ante*.

(*u*) Either before or after the enactment is in force, in pursuance of any Act or bye-law (Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 33).

(*v*) *Ibid.*, s. 11 (3).

(*w*) As to "adjoining," see note (*s*), p. 421, *ante*.

(*a*) An appeal against any determination of the local authority lies to quarter sessions (Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 7); see title LOCAL GOVERNMENT, Vol. XIX., p. 387. As to the appellate jurisdiction of quarter sessions, see title MAGISTRATES, Vol. XIX., pp. 638 *et seq.*

(*b*) Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 33. The section may be contravened although plans of alterations have been submitted, and the local authority had not signified approval or disapproval under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 158 (see p. 422, *ante*; *Fulford* v. *Blatchford* (1899), 80 L. T. 627).

(*c*) *I.e.*, under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 158; see note (*b*), p. 422, *ante*.

(*d*) As to penalties for continuing offences against bye-laws, see p. 390, *ante*; and as to continuing offences, generally, see titles LIMITATION OF ACTIONS, Vol. XIX., p. 178; NUISANCE, Vol. XXI., p. 560; PUBLIC AUTHORITIES AND PUBLIC OFFICERS, pp. 346, 347, *ante*. Continuing to build in contravention of bye-laws might be a continuing offence; but without the provision in the text, *supra*, mere omission to pull down would not; see *Marshall* v. *Smith* (1873), L. R. 8 C. P. 416; *Welsh & Son* v. *West Ham Corporation*, [1900] 1 Q. B. 324, *per* CHANNELL, J., at p. 328. A bye-law, which imposed a continuing penalty for every day that the work should continue, was held to be bad, as it did not refer to the offence

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but a penalty is not to be incurred in respect thereof after the expiration of one year (*e*) from the day when the offence was committed, or the bye-law was broken (*f*).

Revocation of unreasonable bye-laws.

829. The Local Government Board, if satisfied that the erection of working class dwellings is unreasonably impeded by any bye-laws with respect to new streets (*g*) or buildings in force in any borough or urban or rural district may require the local authority to revoke such bye-laws, or to make such new ones as the Board considers necessary to remove the impediment, and, if the authority does not within three months comply with the requisition, the Board may revoke such bye-laws or make such new ones (*h*).

Insanitary sites.

830. No new building may, under liability to a penalty not exceeding £5 and a daily penalty after conviction not exceeding 40*s*., be erected on any ground which has been filled up with any matter impregnated with fæcal, animal, or vegetable matter, or upon which any such matter has been deposited, unless and until such matter has been properly removed by excavation or otherwise, or has been rendered or become innocuous (*i*).

(see p. 390, *ante*), and that could only date from the notice to discontinue the work (*Reay* v. *Gateshead Corporation* (1886), 55 L. T. 92). Where the same person both builds and maintains in contravention of bye-laws, one summons and information is sufficient, and a notice of his liability for a continuing penalty is sufficient notice of intention to proceed for such a penalty (*Airey* v. *Smith*, [1907] 2 K. B. 273); and a continuing penalty may be imposed although the information was for the original offenee only (*James* v. *Wyvill* (1884), 51 L. T. 237). A conviction for an original offence is not in itself proof of a continuing offence, as there must be evidence of continued control (*Pomeroy* v. *Malvern Urban District Council* (1903), 89 L. T. 555), and a builder who had ceased to have possession of a building was held not liable for its continuance to contravene bye-laws (*Welsh & Son* v. *West Ham Corporation*, [1900] 1 Q. B. 324). Penalties cannot be imposed in advance (*R.* v. *Struve* (1895), 59 J. P. 584), or for every day during a period of more than six months previous to the laying of the information (*R.* v. *Slade, Ex parte Saunders*, [1895] 2 Q. B. 247); see Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 11; title MAGISTRATES, Vol. XIX., p. 591, note (*o*).

(*e*) As to this limitation, in *Reay* v. *Gateshead Corporation*, *supra*, HAWKINS, J., said, at p. 103: "It simply provides that in the case of a continuing offence no penalty shall be incurred for a greater period than twelve calendar months, but it does not limit the time for proceeding to twelve calendar months, or extend the six months given by Jervis's Act under s. 11. It merely provides a limitation to the extent of the amount of the penalty which may be incurred." As to the application of the limitation in the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 11, to continuing offences, see *Rumball* v. *Schmidt* (1882), 8 Q. B. D. 603; *Metropolitan Board of Works* v. *Anthony & Co.* (1884), 54 L. J. (M. C.) 39; and see title MAGISTRATES, Vol. XIX., p. 591, note (*o*).

(*f*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 158.

(*g*) See title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 237—243.

(*h*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 44. Bye-laws may also be suspended by a town planning scheme (*ibid.*, s. 55 (2)); see p. 526, *post*.

(*i*) Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 25. A bye-law to the same effect appears in the Model Series IV., IVA, IVC, referred to in note (*t*), p. 417, *ante*, but is rendered unnecessary where this section is in force; see pp. 363, 414, *ante*.

Approval of local authority.

831. Before any person erects a temporary building (*k*) he must apply to the local authority for permission, and deliver a plan and sections, including a block plan, to scale, showing the situation and surroundings of the buildings, together with a specification of the materials, and the purpose for which the building is intended; and within one calendar (*l*) month after such delivery the authority must approve or disapprove of the building. The authority may attach to its approval any condition with regard to the sanitary arrangements, the ingress and egress, protection against fire, and the period during which the building may stand.

Exceptions.

These requirements do not apply to (1) any building expressly exempt from the Public Health Acts (*m*), or the bye-laws made thereunder and in force within the district; (2) any building erected for protecting or preventing the acquisition of rights to light; or (3) any temporary building set up as part of the plant to be used in or about or in connection with the construction, alteration, or repair of any building or other work; but so far as regards only the requirements as to plans, sections, and specifications (*n*).

Penalties; pulling down offending buildings etc.

832. A person who begins or erects a temporary building (*k*) without an application accompanied by plans, sections or specifications, or after disapproval, or before one month without approval of the authority, or without complying with any condition attached to such approval, or, if the building is not removed within the period allowed by the local authority, the owner (*o*), is liable to a penalty

(*k*) As to what is a "building," see note (*l*), p. 415, *ante*. A portable skeleton structure of wood and canvas is a "temporary building" within this provision (*Whitehorn* v. *Smelt* (1910), 102 L. T. 35). The following were held not to be "wooden structures or erections of a movable or temporary character" within the meaning of the Metropolis Management and Building Acts (Amendment) Act, 1882 (45 & 46 Vict. c. 14), s. 13 (repealed):—A steam roundabout, shooting gallery and caravans (*Hall* v. *Smallpiece* (1890), 59 L. J. (M. C.) 97); a builder's office of wood, with zinc roof and on wheels (*London County Council* v. *Pearce*, [1892] 2 Q. B. 109); and a corrugated iron bungalow erected for exhibition and sale and not for occupation (*London County Council* v. *Humphreys*, [1894] 2 Q. B. 755). As to temporary buildings in London, see title METROPOLIS, Vol. XX., p. 488. Wooden structures in the city of London must be licensed by the corporation (City of London (Various Powers) Act, 1911 (1 & 2 Geo. 5, c. lxxxiv.), s. 35).

(*l*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 3. After the expiration of the month, approval or disapproval would apparently be futile.

(*m*) For a list of the Public Health Acts, see note (*a*), p. 361, *ante*. As to exemptions from bye-laws, see note (*t*), p. 417, *ante*; and it is to be observed that the exemption conferred upon buildings belonging to railway companies or owners of harbours, piers, docks, or canals, by the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 33, referred to in note (*t*), p. 417, *ante*, applies to the provisions of the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 27, also; and see the savings in the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 327; pp. 366, 367, *ante*.

(*n*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 27 (1)—(3), (6). An appeal against any withholding of approval or any condition attached to approval by the local authority lies to quarter sessions (*ibid.*, s. 7).

(*o*) "Owner" means, if not inconsistent with the context, the person for the time being receiving the rack-rent of the lands or premises in connection with which the word is used, whether on his own account or as

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agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack-rent (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 4, as applied by Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 13). "Rack-rent" means rent which is not less than two-thirds of the full net annual value of the property out of which the rent arises (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 4). "Full net annual value" is defined (*ibid.*) in terms similar to the definition of "net annual value" in the Parochial Assessments Act, 1836 (6 & 7 Will. 4, c. 96), s. 1, as to which see title RATES AND RATING. "Lands" and "premises" include messuages, buildings, lands, easements, and hereditaments of any tenure (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 4); and see the definition of "land" in the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 3; title STATUTES. "Owner" and the other subsidiary expressions are defined in similar terms for the purposes of the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76); see *ibid.*, s. 141.

The effect of such a definition of "owner" is that persons to come within it must be "the owners of land which could be let at a rack-rent within the meaning of the statute" (*Plumstead Board of Works* v. *British Land Co.* (1875), L. R. 10 Q. B. 203, Ex. Ch., *per* Lord COLERIDGE, C.J., at p. 207). On the other hand, "the section does not confine the term 'owner' to those persons who could receive a rack-rent from the particular premises, or who could let them at a rack-rent; it includes those persons who would receive the rack-rent if the premises were let at a rack-rent, and, I think, *Bowditch* v. *Wakefield Local Board* (1871), L. R. 6 Q. B. 567, is a conclusive authority, if authority were wanted, to show that a man is not the less the owner of premises because, by the provisions of the deed under which he holds them, they cannot, so long as he holds them, be let at a rack-rent. Whether in the case of premises which were prevented by an Act of Parliament from being let at a rack-rent, there ever could be an owner within the meaning of the section I very much doubt. I am inclined to think that if the incapacity to be let were stamped upon the premises, they never could have an owner within the meaning of the section" (*Wright* v. *Ingle* (1885), 16 Q. B. D. 379, C. A., *per* BOWEN, L.J., at p. 402). As to premises *extra commercium*, see also title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 218. The Crown is not bound by the Public Health Acts (see pp. 361, note (*a*), 366, *ante*), and there could be no "owner" of land occupied and used for Crown purposes; see *Hornsey Urban Council* v. *Hennell*, [1902] 2 K. B. 73. Generally, a lessor receiving a moderate ground rent is not "owner" within the definition. Where there are sub-lettings, a lessee who receives more than he pays may be the owner (*Field & Sons* v. *Southwark Borough Council* (1907), 96 L. T. 646); but a lessee who pays no more than he receives (that not being the rack-rent) is not (*Walford* v. *Hackney Board of Works* (1894), 43 W. R. 110; *Truman, Hanbury, Buxton & Co.* v. *Kerslake*, [1894] 2 Q. B. 774). As to a lease being admitted as evidence of rack-rent, see *Wareham and Dale, Ltd.* v. *Fyffe* (1910), 74 J. P. 249. As to the "owners" under building agreements, see *Poplar Board of Works* v. *Love* (1874), 29 L. T. 915; *Holland (Lady)* v. *Kensington Vestry* (1867), L. R. 2 C. P. 565, followed in *Driscoll* v. *Battersea Borough Council*, [1903] 1 K. B. 881; *St. Helen's Corporation* v. *Riley* (1883), 47 J. P. 471. Trustees of national schools (*Bowditch* v. *Wakefield Local Board, supra; Hornsey District Council* v. *Smith*, [1897] 1 Ch. 843, C. A.), and trustees in receipt of rents (*Re Barney, Harrison* v. *Barney*, [1894] 3 Ch. 562; *Re Lever, Cordwell* v. *Lever*, [1897] 1 Ch. 32), have been held to be owners. As to trustees of a long term to secure debts etc., see *Mansell* v. *Norton* (1883), 22 Ch. D. 769. Trustees of Nonconformist places of worship are generally "owners" (*Caiger* v. *St. Mary, Islington, Vestry* (1881), 50 L. J. (M. C.) 59; *Wright* v. *Ingle, supra; Hornsey Local Board* v. *Brewis* (1890), 60 L. J. (M. C.) 48); see titles CHARITIES, Vol. IV., p. 254; ECCLESIASTICAL LAW, Vol. XI., pp. 732, note (*r*), 788, 819; but, in the case of the Established Church, the position of the incumbent as "owner" may depend upon the subject-matter (*R.* v. *Lee* (1878), 4 Q. B. D. 75; *Folkestone Corporation* v. *Woodward* (1872), L. R. 15 Eq. 159; see title ECCLESIASTICAL LAW, Vol. XI., p. 732, note (*r*)). As to the position of the Ecclesiastical Commissioners in regard to church sites vested in them, see *Angell*

not exceeding 40*s.* and a similar daily penalty after conviction (*p*), and the local authority may cause the building to be pulled down or removed (*q*), and recover the expenses summarily as a civil debt (*r*) from the owner or the builder. The authority may also sell the materials, and, after recouping itself, pay the balance to the owner (*s*).

SUB-SECT. 5.—*Safety of Buildings.*

(i.) *Places of Public Resort.*

833. Every building (*t*) which is used as a place of public resort (*u*) Ingress and egress.

Paddington Vestry (1868), L. R. 3 Q. B. 714; *Plumstead District Board of Works* v. *Ecclesiastical Commissioners for England*, [1891] 2 Q. B. 361. Mortgagees in possession are "owners" (*Tottenham Local Board* v. *Williamson* (1893), 62 L. J. (Q. B.) 322; *Maguire* v. *Leigh-on-Sea Urban District Council* (1906), 70 J. P. 479; and see *Blackburn Corporation* v. *Micklethwait* (1886), 54 L. T. 539). As to "owners" of cemeteries, see *St. Giles, Camberwell, Vestry* v. *London Cemetery Co.*, [1894] 1 Q. B. 699; title BURIAL AND CREMATION, Vol. III., p. 465); churchyards (*Winstanley* v. *North Manchester Overseers*, [1910] A. C. 7; see title ECCLESIASTICAL LAW, Vol. XI., p. 730); private roads (*Pound* v. *Plumstead Board of Works* (1871), L. R. 7 Q. B. 183; see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 21 *et seq.*); roads which have been dedicated (*Plumstead Board of Works* v. *British Land Co.* (1875), L. R. 10 Q. B. 203, Ex. Ch.; followed in *Hampstead Vestry* v. *Cotton* (1885), 16 Q. B. D. 475, C. A.; see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 33 *et seq.*); banks of a river under a conservancy board (*Hackney Corporation* v. *Lee Conservancy Board*, [1904] 2 K. B. 541, C. A.; see *River Thames Conservators* v. *London Port Sanitary Authority*, [1894] 1 Q. B. 647); recreation and pleasure grounds (*London County Council* v. *Wandsworth Borough Council*, [1903] 1 K. B. 797, C. A.; *St. Mary, Islington, Vestry* v. *Cobbett*, [1895] 1 Q. B. 369; *Herne Bay Urban Council* v. *Payne and Wood*, [1907] 2 K. B. 130; see title OPEN SPACES AND RECREATION GROUNDS, Vol. XXI., p. 581); narrow strips of land used only to screen adjoining property (*Hampstead Corporation* v. *Midland Railway*, [1905] 1 K. B. 538, C. A.; *Williams* v. *Wandsworth Board of Works* (1884), 13 Q. B. D. 211; compare *Elsdon* v. *Hampstead Corporation*, [1905] 2 Ch. 633, and *Hampstead Borough Council* v. *Western* (1907), 71 J. P. 565). But in *Great Eastern Rail. Co.* v. *Hackney Board of Works* (1883), 8 App. Cas. 687, a railway company was held not to be the "owner" of parapet walls of a bridge over a cutting, as the bridge was vested in it for public purposes. A lord of a manor has been held liable for paving expenses as "owner" of an inclosed common (*Re Christchurch Inclosure Act, Meyrick* v. *A.-G.*, [1894] 3 Ch. 209). An agent to collect rents (*St. Helens Corporation* v. *Kirkham* (1885), 50 J. P. 647; *Broadbent* v. *Shepherd* (1900), 83 L. T. 504), even after his resignation (*Broadbent* v. *Shepherd*, [1901] 2 K. B. 274), and a person who collects rents *de facto*, whether rightly or wrongly (*Peek* v. *Waterloo and Seaforth Local Board of Health* (1863), 2 H. & C. 709), may be an "owner"; but the liability of such persons as "owners" does not prevent recourse to those who, as being entitled to receive the rack-rent, are also "owners" within the meaning of the enactment (*Lyon* v. *Greenhow* (1892), 8 T. L. R. 457). A receiver appointed by the court is not an "owner" (*Bacup Corporation* v. *Smith* (1890), 44 Ch. D. 395).

(*p*) See Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 13.

(*q*) After giving the owner an opportunity of being heard; see note (*h*), p. 424, *ante*, and cases therein cited.

(*r*) See the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 35; title MAGISTRATES, Vol. XIX., p. 609.

(*s*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 27 (4), (5). As to penalties, see also *Clark* v. *Bloomfield* (1885), 1 T. L. R. 323.

(*t*) As to what is a building, see note (*l*), p. 415, *ante*.

(*u*) "Place of public resort" means a building used, or constructed, or

SECT. 3. Building Regulations.

must, to the satisfaction of the local authority (*v*), be substantially constructed, and supplied with ample, safe, and convenient means of ingress and egress for its use, regard being had to the number of likely frequenters at any one time. The means of ingress and egress must be kept free and unobstructed, to such extent as the authority (*v*) may require.

Inspection.

An officer authorised in writing by the authority, and producing his authorisation if so required, may at all reasonable times enter any such building to see that these provisions are carried into effect (*a*).

Platforms and other structures on public occasions.

834. Whenever crowds are likely to assemble for any show, entertainment, public procession, open-air meeting or other like occasion, every roof, platform, balcony, or other structure let or used for affording sitting or standing accommodation for a number of persons must, under a penalty not exceeding £50, be safely constructed or secured to the satisfaction of the surveyor of the local authority (*b*).

(ii.) *Ruinous and Dangerous Buildings.*

Demolition and repair.

835. Where a building (*c*), or wall, or anything affixed thereon, is in a ruinous state, and dangerous to passengers (*d*), or to the occupiers of neighbouring buildings, the surveyor of the local authority must put up a fence, and give written notice to the owner (*e*), if known

adapted to be used, either ordinarily or occasionally, as a church, chapel, or other place of public worship (not being merely a dwelling-house so used), or as a theatre, public hall, public concert-room, public ball-room, public lecture-room, or public exhibition-room, or as a public place of assembly for persons admitted thereto by tickets or by payment, or used, or constructed, or adapted to be used, either ordinarily or occasionally, for any other public purpose. It does not, however, include a private dwelling-house used occasionally or exceptionally for any of those purposes, nor does it extend to places of worship in use before or at the time the enactment comes into force (Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 36 (6)). As to this time, see p. 364, *ante*.

(*v*) Namely, the urban or rural council, as the case may be; see p. 363, *ante*.

(*a*) Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 36 (1), (2), (3); see p. 414, *ante*. For non-compliance, the occupier or manager, or, in the case of a building let for less than one year, the owner (see note (*o*), p. 427, *ante*), is liable to a penalty not exceeding £20 (Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 36 (4)). Where an alteration is required to give proper means of ingress and egress, the court may refuse to inflict a penalty until a reasonable time has been allowed for making such alteration, but in the meantime may make an order for the closing or otherwise of the building (*ibid.*, s. 36 (5)). An appeal lies to quarter sessions against a conviction or order (*ibid.*, s. 7). As to the appellate jurisdiction of quarter sessions, see title MAGISTRATES, Vol. XIX., pp. 638 *et seq.* As to public buildings in London, see title METROPOLIS, Vol. XX., p. 487.

(*b*) Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 37; see pp. 364, 414, *ante*. As to temporary buildings and wooden structures in London, see title METROPOLIS, Vol. XX., p. 488.

(*c*) As to what is a building, see note (*l*), p. 415, *ante*.

(*d*) The structure need not adjoin a highway; see *London County Council* v. *Herring*, [1894] 2 Q. B. 522; *Mellor* v. *Warden* (1896), 40 Sol. Jo. 567.

(*e*) The "owner" is defined as "the person for the time being entitled

and resident in the district, and also affix such a notice on the premises, or otherwise serve it on the occupier (if any), requiring the owner or occupier forthwith to take down, secure, or repair the dangerous structure, and, if he does not begin to do so within three days, and complete the work as speedily as the case will permit, two justices may, on complaint of the surveyor (*f*), order the owner, or, in his default, the occupier, to do the necessary work, to the satisfaction of the surveyor, within a fixed time. If the order is not complied with, or if no owner or occupier on whom to serve it can be found, the local authority must with all convenient speed cause the requisite work to be done (*g*) at the expense (*h*) of the owner (*i*).

to receive, or who, if such lands or buildings were let to a tenant at rack-rent, would be entitled to receive, the rack-rent from the occupier thereof" (Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 3); compare note (*o*), p. 427, *ante*. The term "owner" does not include the incumbent of a church (*R.* v. *Lee* (1878), 4 Q. B. D. 75). An owner may remain liable after receipt of notice to treat for compulsory purchase (*Barnet* v. *Metropolitan Board of Works* (1882), 46 L. T. 384).

(*f*) See *Cheetham* v. *Manchester Corporation* (1875), 39 J. P. 343, decided on a similar provision in a local Act.

(*g*) The authority is not liable for reinstatement of any pavement which has been disturbed (*Crisp* v. *London County Council*, [1899] 1 Q. B. 720).

(*h*) The local authority may recover expenses although the whole matter was dealt with entirely by its surveyor (*London County Council* v. *Hobbis* (1896), 61 J. P. 85; *Cheetham* v. *Manchester Corporation*, *supra*). For the expenses which may be recovered, see *Debenham* v. *Metropolitan Board of Works* (1880), 6 Q. B. D. 112. Such expenses are chargeable against income as between a tenant for life of leaseholds and remainderman (*Re Copland's Settlement*, *Johns* v. *Carden*, [1900] 1 Ch. 326; *Re Willis*, *Willis* v. *Willis*, [1902] 1 Ch. 15, C. A.; see title SETTLEMENTS), and are "outgoings" for the purpose of a contract of sale (*Tubbs* v. *Wynne*, [1897] 1 Q. B. 74; see title SALE OF LAND). With regard to the liability as between vendor and purchaser of leaseholds, see *Re Highett and Bird's Contract*, [1903] 1 Ch. 287, C. A.; and of a tenant under an ordinary covenant to repair, *Lister* v. *Lane and Nesham*, [1893] 2 Q. B. 212, C. A.; and see title LANDLORD AND TENANT, Vol. XVIII., pp. 493, 505. If an owner can be found in the district, and neglects to pay the expenses on demand, they may be levied by distress on a justices' warrant (Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 76); and see title DISTRESS, Vol. XI., pp. 210 *et seq.* If the owner cannot be so found or sufficient distress cannot be levied, the local authority may, after twenty-eight days' notice posted on the premises, take the building or land compulsorily, making compensation in the manner provided by the Lands Clauses Acts (see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 76 *et seq.*) and deducting therefrom the expenses (Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 77). The local authority may also, if the building is pulled down under the powers of the Act, sell the materials, rendering to the owner any overplus after payment of the expenses (*ibid.*, s. 78).

(*i*) *Ibid.*, s. 75. The provisions of this Act with regard to ruinous or dangerous buildings (namely, *ibid.*, ss. 75—78) are, for the purpose of regulating such buildings in an urban district, incorporated with the Public Health Act, 1875 (38 & 39 Vict. c. 55), by *ibid.*, s. 160. They may be put in force in a rural district by order of the Local Government Board (*ibid.*, s. 276). As to the incorporation of provisions of an Act by reference to a heading of a group of sections, see *Ferrar* v. *London Sewers Commissioners* (1869), L. R. 4 Exch. 227,

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SECT. 4.—*Care of the Sick, and Preventive Measures.*

SUB-SECT. 1.—*Hospitals.*

(i.) *In General.*

Duty of local authorities.

836. Hospitals for the reception of the sick may be provided by a local authority (*j*), or by a combination of local authorities, under the Public Health Acts (*k*), or by the intervention of the county council under the Isolation Hospitals Acts (*l*).

Liability for nuisance.

It is permissive and not obligatory upon local authorities to provide hospitals; and their statutory powers must be exercised so as not to cause a nuisance (*m*).

Liability for negligence.

A local authority providing a hospital must carry it on with reasonable skill and care (*n*), and make provision that patients therein shall have competent medical advice and assistance (*o*). The authority is also primarily liable for the decent burial of any patient dying therein (*p*).

Ex. Ch.; *Hammersmith, etc. Rail. Co.* v. *Brand* (1869), L. R. 4 H. L. 171; *Dungey* v. *London Corporation* (1869), 38 L. J. (C. P.) 298; *R.* v. *St. Luke's* (1871), L. R. 7 Q. B. 148, Ex. Ch.; *Fletcher* v. *Birkenhead Corporation*, [1907] 1 K. B. 205, C. A.; and see title STATUTES. For the provisions with respect to dangerous and neglected structures in force in London, see title METROPOLIS, Vol. XX., p. 493. As to fencing dangerous buildings and structures in or near streets, see the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), ss. 30, 31; *Carshalton Urban Council* v. *Burrage*, [1911] 2 Ch. 133; title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 252—254.

(*j*) See p. 372, *ante*. As to the liability of the local authority for claims on the part of the attendants at the hospital for compensation for injuries, see title MASTER AND SERVANT, Vol. XX., pp. 128 *et seq.* Where an attendant at the hospital contracts a disease, he is not deemed to have suffered injury by accident so as to entitle him to compensation under the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1 (1), unless it is shown that some "special" accident occasioned the disease; see *Martin* v. *Manchester Corporation* (1912), 76 J. P. 251, C. A.

(*k*) For a list of the Public Health Acts, see note (*a*), p. 361, *ante*. For the provision of hospitals and infirmaries by poor law authorities, including the Metropolitan Asylum Managers, see title POOR LAW, Vol. XXII., pp. 552, 557.

(*l*) 1893 (56 & 57 Vict. c. 68); 1901 (1 Edw. 7, c. 8); see p. 435, *post*.

(*m*) *Metropolitan Asylum District* v. *Hill* (1881), 6 App. Cas. 193; approved in *Canadian Pacific Railway* v. *Parke*, [1899] A. C. 535, P. C.; and see title NUISANCE, Vol. XXI., pp. 527, 535, 561, note (*d*).

(*n*) As to evidence of negligence in relation to neighbours or owners of adjoining property, see title NEGLIGENCE, Vol. XXI., pp. 395 *et seq.*; and see *Sherwell* v. *Alton Urban District Council* (1909), 25 T. L. R. 417.

(*o*) *Evans* v. *Liverpool Corporation*, [1906] 1 K. B. 160; *Chapman* v. *Gillingham Urban District Council* (1903), *Times*, 28th March; and see, further, titles MEDICINE AND PHARMACY, Vol. XX., p. 334; NEGLIGENCE, Vol. XXI., pp. 479, 480. As to the detention in hospital of infected persons without proper lodging, see p. 454, *post*; and as to the keeping in small-pox hospitals of lists of vaccinated patients, see p. 479, *post*.

(*p*) *R.* v. *Stewart* (1840), 12 Ad. & El. 773; and see title BURIAL AND CREMATION, Vol. III., pp. 404, 405. But the guardians should bury any pauper sent to the hospital in pursuance of an agreement (see note (*s*) p. 433, *post*); and they may bury the body of any poor person (Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 31); see title BURIAL AND CREMATION, Vol. III., pp. 539 *et seq.*

(ii.) *Under the Public Health Acts* (*q*).

837. Any local authority (*r*) may provide, for the use of the inhabitants of its district (*s*), hospitals or temporary places for the reception of the sick (*t*), and for that purpose may itself build such hospitals or places of reception (*a*), or contract for the use of

(*q*) The Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 120, 121, 124—126, 128, 131—133 (see respectively pp. 434, 449, 452, 454, 455, 457, 458, 468, *post*), are extended to vessels within or near the districts of local authorities (Public Health (Ships, etc.) Act, 1885 (48 & 49 Vict. c. 35), s. 2), and the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 110, is applied for the purposes of these provisions (*ibid.*); and compare pp. 446, 447, *post*. Similar provisions in force in the administrative County of London are applied to merchant vessels lying in any water within the district of a sanitary authority (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 110, 141); and see title METROPOLIS, Vol. XX., p. 466.

(*r*) See p. 372, *ante*.

(*s*) And for the use of persons in ships or vessels; see note (*q*), *supra*. No distinction is made by the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 131, between pauper and non-pauper inhabitants, and where a hospital is provided it should be open to all; see the cases referred to in note (*i*), p. 434, *post*. The Local Government Board, however, holds that there is a fundamental distinction between the duties of the guardians and of a sanitary authority in respect of the provision of hospital accommodation, the test being destitution. It is the duty of the guardians to relieve destitution, and if a pauper is sick, or if by reason of sickness a person, whether an inmate of a hospital or not, becomes a pauper, they should, when the circumstances are brought to their notice, provide for any hospital treatment which may be necessary. If the case is infectious, or otherwise cannot be properly treated in a workhouse infirmary, they should enter into arrangements for its treatment in a suitable hospital on agreed terms. Agreements for this purpose may be of a general character. On the other hand, if the case is one which requires treatment solely on the ground of public health, as, for instance, where, being an infectious case, isolation is necessary, then it is one for the sanitary authority to deal with under its statutory powers. As to the provision of sanatoria for non-residents as well as residents, see p. 445, *post*.

(*t*) The hospitals may be for infectious cases, including tuberculosis, whether notifiable or not, or for other, *e.g.*, accident, cases. In *Withington Local Board of Health* v. *Manchester Corporation*, [1893] 2 Ch. 19, C. A., CHITTY, J., at p. 30, expressed the opinion that the provisions of the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 131, are not severable; the hospital to be provided is for the sick, without any distinction as to the nature of the sickness, whether it is infectious or not. The provision of sanatoria (see p. 443, *post*) is within the power referred to in the text, *supra*.

(*a*) The local authority may establish the hospital or place of reception in another district without the consent of the other local authority (*Withington Local Board of Health* v. *Manchester Corporation*, *supra*). It may borrow, with the consent of the Local Government Board, for the purpose of building a hospital; see pp. 382 *et seq.*, *ante*. That Board issues memoranda for the guidance of local authorities in selecting a site and erecting buildings. As to the acquisition of land, see titles COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 163; LOCAL GOVERNMENT, Vol. XIX., pp. 318 *et seq.*; METROPOLIS, Vol. XX., pp. 455 *et seq.* It is expedient to ensure that, in the case of voluntary acquisition, the land is not subject to any covenants preventing its use for a hospital; see *Bramwell* v. *Lacy* (1879), 10 Ch. D. 691; *Tod-Heatly* v. *Benham* (1888), 40 Ch. D. 80, C. A.; *Pembroke* (*Earl*) v. *Warren*, [1896] 1 I. R. 76, C. A.; and see titles LANDLORD AND TENANT, Vol. XVIII., p. 516; REAL PROPERTY AND CHATTELS REAL. Where land might be sold for "building sites" only, it was held that its use for the erection of a small-pox hospital was excluded (*English* v. *Tynemouth Corporation* (1903), 67 J. P. 239).

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any such hospital or part of a hospital or place of reception, or enter into any agreement with any person having the management of any hospital, for the reception of the sick inhabitants of its district, on payment of an agreed annual or other sum (*b*). Two or more local authorities may combine (*c*) to provide a hospital in common (*d*).

Contributions by county council to hospitals provided by local authority.

838. A county council may contribute (*e*) to any hospital provided by a local authority (including a joint board) (*f*) for the reception of patients suffering from an infectious disease (*g*), whether within the area of the county council or not, but the consent of the Local Government Board is required to an annual contribution by the county council to a hospital the cost of providing which, or of any permanent extension or enlargement of which, has been defrayed otherwise than out of borrowed money (*h*).

Recovery of cost of maintenance of patient in hospital.

839. Any expenses incurred by a local authority in maintaining a non-pauper patient in a hospital, or in a temporary place for the reception of the sick (whether or not belonging to such authority), becomes a debt due from him to the authority, and may be recovered from him at any time within six months after his discharge, or from his estate if he dies in such hospital or place (*i*).

(*b*) The Local Government Board considers that this provision may cover subscription to a sanatorium for tuberculous patients.

(*c*) The Local Government Board generally advises that the formation of a joint hospital board is the most convenient method of combining for this purpose; but, under a suitable agreement, the combination could be carried out by a joint committee formed in pursuance of the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 57; see title LOCAL GOVERNMENT, Vol. XIX., pp. 229 *et seq.*, *passim*. For the constitution of a joint hospital district by provisional order, see Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 279—284; see p. 373, *ante*. In London, the combination of sanitary authorities should be the subject of agreement.

(*d*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 131; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 75, 141. For forms in relation to hospitals, see Encyclopædia of Forms and Precedents, Vol. X., pp. 419—462.

(*e*) In manner provided by the Isolation Hospitals Act, 1893 (56 & 57 Vict. c. 68), s. 21; see p. 442, *post*. The county council may borrow for the purpose (Isolation Hospitals Act, 1893 (56 & 57 Vict. c. 68), s. 22); and see p. 441, *post*.

(*f*) The words are "within the meaning of the Public Health Act, 1875" (38 & 39 Vict. c. 55). As to such local authorities, see pp. 372, 373, *ante*; and, as to joint boards, see title LOCAL GOVERNMENT, Vol. XIX., p. 339.

(*g*) "Infectious disease" is not defined; compare the definition at p. 445, *post*.

(*h*) Isolation Hospitals Act, 1901 (1 Edw. 7, c. 8), s. 2 (1). Guardians may subscribe towards the support of any public hospital or infirmary (Poor Law Amendment Act, 1851 (14 & 15 Vict. c. 105), s. 4); and see title POOR LAW, Vol. XXII., p. 537.

(*i*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 132. According to *R.* v. *Rawtenstall Corporation* (1894), 10 T. L. R. 643, if there is accommodation, all sick inhabitants must be received into the hospital, whether paupers or not; but the obligation was questioned in *Farquhar* v. *Isle of Thanet Hospital Board* (1904), 68 J. P. 319, by Lord ALVERSTONE, C.J., and KENNEDY, J. The guardians must pay for paupers (*R.* v. *Rawtenstall Corporation*, *supra*), but apparently only where there is a contract, express or implied (*Bury and District Joint Hospital Board* v. *Chorlton Union Guardians* (1905), 70 J. P. 31). In other cases, payment can be recovered from patients only, and not from parents or guardians in the absence of contract (*Hull Corporation* v. *Maclaren* (1898), Local Government Chronicle, p. 585; *Farquhar* v. *Isle of Thanet Hospital Board*, *supra*). In London

But a local authority cannot be required to recover the cost of maintenance from a non-pauper patient, if satisfied that the circumstances of the case justify the remission of the debt (*k*).

Ambulances for infectious and other cases.

840. A local authority may provide and maintain a carriage or carriages suitable for the conveyance of persons suffering from an infectious disorder (*l*), and may pay the expense of carrying therein any such person to a hospital or other place of destination (*m*). An authority may also be empowered to provide and maintain an ambulance for use in any case of accident, or other sudden or urgent disability, together with suitable attendants, and means of traction, and other requisites; and may allow it to be used by any other local authority or person, subject to agreed terms and conditions (*n*).

(iii.) *Under the Isolation Hospitals Acts.*

(a) *Establishment of Hospitals and Hospital Districts.*

Establishment of isolation hospital by county council.

841. A county council may promote the establishment of hospitals for the reception of patients suffering from infectious diseases (*o*). Such a hospital is referred to as an "isolation hospital" (*p*). Treatment in an isolation hospital does not impose any disqualification, or any loss of franchise or other right or privilege, upon the patient (*q*).

Where established.

A county council may, in certain events, provide an isolation

a provision similar to that referred to in the text, p. 434, *ante*, applies to non-pauper non-infectious cases, and the debt is recoverable not only from the patient, but also from any person liable by law to maintain him (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 76, 141). As to liability to maintain, see title POOR LAW, Vol. XXII., pp. 573 *et seq.*

(*k*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 60. As to when this provision is operative, see pp. 364, *ante*.

(*l*) As to the meaning of "infectious disorder," compare note (*h*), p. 449, *post*.

(*m*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 123; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 78. As to ambulances maintained by the Metropolitan Asylum Managers, see title POOR LAW, Vol. XXII., p. 552, note (*m*).

(*n*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 50. As to the operation of this Act, see pp. 364, *ante*.

(*o*) Isolation Hospitals Act, 1893 (56 & 57 Vict. c. 68); Isolation Hospitals Act, 1901 (1 Edw. 7, c. 8). These Acts do not extend to the administrative county of London (see title METROPOLIS, Vol. XX., p. 393), or to any county borough, or, without the consent of the borough council, to any borough with a population of 10,000 or upwards (see note (*j*), p. 398, *ante*), or to any borough with a less population without the like consent, unless the Local Government Board directs that the Acts shall apply to such borough (Isolation Hospitals Act, 1893 (56 & 57 Vict. c. 68), s. 2). The expression "infectious disease," as used in the Acts, has the same meaning as in the Infectious Disease (Notification) Act, 1889 (52 & 53 Vict. c. 72); see p. 445, *post*. The provisions of the Isolation Hospitals Acts, 1893 (56 & 57 Vict. c. 68) and 1901 (1 Edw. 7, c. 8), apply to the infectious diseases mentioned in the Infectious Disease (Notification) Act, 1889 (52 & 53 Vict. c. 72), and may be applied to any other infectious disease by order of the county council or a committee thereof; see Isolation Hospitals Act, 1893 (56 & 57 Vict. c. 68), s. 26.

(*p*) *Ibid.*, s. 3.

(*q*) *Ibid.*, s. 23.

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hospital, or cause one to be provided, in any district (*r*) within their county (*s*).

842. Any one or more of the local authorities (*t*) having jurisdiction in any part of the county may apply to the county council to take steps to provide or secure isolation hospital accommodation.

Application to county council.

The application may be made in pursuance of a resolution passed by a majority of the members assembled at a meeting of such authority, and voting in manner required by law (*u*). The meeting must be called together by notice given in manner in which notices of the meetings of the authority concerned are required to be given by law (*v*), and specifying the object of the meeting to be the making of such an application to the county council. An application may also be made by any number of ratepayers, not less than twenty-five, in any contributory place (*a*) in a rural district (*b*).

Form of application.

The application must be made by petition, and state the district for which the isolation hospital is required, and the reasons which the petitioners adduce for its establishment (*c*).

Action on application.

843. The county council must, either itself or by a committee of its body appointed for that purpose, consider the petition, and, if satisfied by its statements, or by any amendments made therein, that a *primâ facie* case is made out for a local inquiry, the county council must cause such inquiry to be made as to the necessity for the establishment of an isolation hospital (*d*).

Action on report of medical officer of county.

844. Without any application, the county council may direct an inquiry to be made by its medical officer of health as to the necessity for the establishment of an isolation hospital for the use of the inhabitants of any particular district in the county, and, in the event of such medical officer reporting that such a hospital ought to be established, may take the same proceedings for its establishment as if a petition had been presented by a local authority for the establishment of an isolation hospital for the district named in the report (*e*).

Conduct of local inquiry.

845. The county council must conduct the local inquiry into the necessity for the establishment of an isolation hospital, and as

(*r*) Within the limits of the Acts ; see note (*o*), p. 435, *ante*. For form of petition against constituting a hospital district, see Encyclopædia of Forms and Precedents, Vol. X., p. 461.

(*s*) Isolation Hospitals Act, 1893 (56 & 57 Vict. c. 68), s. 3.

(*t*) The local authorities under the Acts are :—as respects an urban district, the urban district council (see Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 21 ; title LOCAL GOVERNMENT, Vol. XIX., p. 262) ; as respects a rural sanitary district, or any contributory place therein, the rural district council (see Isolation Hospitals Act, 1901 (1 Edw. 7, c. 8), s. 6).

(*u*) See title LOCAL GOVERNMENT, Vol. XIX., pp. 279, 334.

(*v*) See *ibid.*, pp. 278, 334. For form of notice, see Encyclopædia of Forms and Precedents, Vol. X., p. 449.

(*a*) For the meaning of "contributory place," see p. 381, *ante*.

(*b*) Isolation Hospitals Act, 1893 (56 & 57 Vict. c. 68), s. 4.

(*c*) *Ibid.*, s. 5 (1). For form of petition, see Encyclopædia of Forms and Precedents, Vol. X., p. 450.

(*d*) Isolation Hospitals Act, 1893 (56 & 57 Vict. c. 68), s. 5 (2).

(*e*) *Ibid.*, s. 6.

to the proper site for the hospital, and the district for which it is to be established (hereinafter called the "hospital district"), by a committee consisting of such number of members of the county council, either with or without the addition of such other persons, or in such other manner, as the county council thinks expedient. The local inquiry is held subject to such regulations and otherwise as the county council thinks fit. Due notice of its time and place must be given in such manner as the county council thinks the best adapted to inform any persons interested, and such persons may attend and state their case before the members appointed to conduct the inquiry (*f*).

Order as to dismissal of petition or constitution of district hospital.

846. On the conclusion of a local inquiry the county council must make an order either dismissing the petition, or constituting a hospital district and directing an isolation hospital for such district to be established (*g*). As soon as may be a copy of the order must be sent to the Local Government Board (*h*).

Hospital districts.

847. The county council may vary any proposed hospital district by adding or subtracting any local area (*i*). Every hospital district may consist of a single local area or two or more local areas (*k*). The county council must not take steps for the constitution of a hospital district for one or more contributory places forming a portion of a rural sanitary district within the jurisdiction of the county council, or for one local area, unless the sanitary authority (*l*) of such place or places, or area, assents to the application, or is proved to the satisfaction of the county council to be unable or unwilling to make suitable hospital accommodation for such place, places, or area (*m*). A local area which is already provided with such isolation hospital accommodation as in the opinion of the county council is sufficient for the reasonable exigencies of such area must not, without the assent, testified by a resolution, of the local authority of such area, be included in a hospital district (*n*).

Appeal to Local Government Board.

848. If any local authority or parish council (*o*), having jurisdiction within any part of the proposed hospital district, objects to the formation of such a district, or to the addition or subtraction thereto or therefrom of any local area within its jurisdiction, such authority or council may, at any time within three calendar months from the date of the order (*p*), appeal to the Local Government

(*f*) Isolation Hospitals Act, 1893 (56 & 57 Vict. c. 68), s. 7; see title LOCAL GOVERNMENT, Vol. XIX., pp. 374, 375.
(*g*) Isolation Hospitals Act, 1893 (56 & 57 Vict. c. 68), s. 9.
(*h*) Isolation Hospitals Act, 1901 (1 Edw. 7, c. 8), s. 7.
(*i*) Isolation Hospitals Act, 1893 (56 & 57 Vict. c. 68), s. 8 (2). "Local area" means either an urban district, a rural district, or any contributory place, or, where a local area is included in more than one county, the part of the area included in each county (*ibid.*, s. 26).
(*k*) *Ibid.*, s. 8 (1).
(*l*) That is, the "local authority"; see p. 372, *ante*.
(*m*) Isolation Hospitals Act, 1893 (56 & 57 Vict. c. 68), s. 9.
(*n*) *Ibid.*, s. 8 (2).
(*o*) See Isolation Hospitals Act, 1901 (1 Edw. 7, c. 8), s. 6 (1).
(*p*) As to the order, see the text, *supra*.

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Board (*q*), who may confirm, disallow, or modify the order as it thinks fit (*r*); the decision of the Board being conclusive (*s*).

Alteration of order.

849. The county council may, on the application of a hospital committee, and with the assent of any local authority concerned in such alteration, alter any order made by it for the establishment of a hospital (*t*).

(b) *Constitution of Hospital Committee.*

Constitution of hospital committee.

850. When a hospital district has been constituted, the county council must form a committee, consisting (1) wholly of representatives of the county council, whether members of the council or not, or (2) partly of such representatives (*u*) and partly of representatives of the local area or areas in the district, or (3) wholly of such local representatives. The county council must make regulations for the election, rotation, and qualification, and for all other matters relating to the constitution of the committee; subject to the qualifications that, where no contribution is made by the county council to the funds of the hospital (*a*), the committee is to consist, unless the constituent local authorities otherwise desire, wholly of representatives of the local area or local areas, and that, if any such local authority feels aggrieved by the mode in which any committee is constituted, it may appeal to the Local Government Board (*b*), and the Board may modify the constitution of the committee in such manner as the Board thinks expedient and just (*c*).

Incorporation of committee.

851. A hospital committee is a body corporate, having perpetual succession and a common seal, under such name and style as may be conferred on it by the county council (*d*).

Local authority as hospital committee.

852. Where a hospital district is an area wholly, or as to its greater part, under the jurisdiction of any local authority (*e*), the

(*q*) The Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 87 (1), (5), applies to the appeal (Isolation Hospitals Act, 1893 (56 & 57 Vict. c. 68), s. 24). The Local Government Board may hold a local inquiry (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 87 (1)), and charge the costs to the councils concerned (*ibid.*, s. 87 (5)).

(*r*) Isolation Hospitals Act, 1901 (1 Edw. 7, c. 8), s. 5.

(*s*) Isolation Hospitals Act, 1893 (56 & 57 Vict. c. 68), s. 8 (3).

(*t*) *Ibid.*, s. 20.

(*u*) *Ibid.*, s. 10, as amended by the Isolation Hospitals Act, 1901 (1 Edw. 7, c. 8), s. 8.

(*a*) See p. 434, *ante*, and p. 442, *post*.

(*b*) See note (*q*), *supra*.

(*c*) Isolation Hospitals Act, 1893 (56 & 57 Vict. c. 68), s. 10 (1). The order of the county council also determines the proportions in which the constituent authorities are to contribute to the expenses of the hospital; see p. 443, *post*.

(*d*) Isolation Hospitals Act, 1893 (56 & 57 Vict. c. 68), s. 10 (3).

(*e*) The words are "any corporate local authority"; see definition of local authority, note (*t*), p. 436, *ante*. Formerly a vestry was a local authority under the Act for any contributory place being a parish (Isolation Hospitals Act, 1893 (56 & 57 Vict. c. 68), s. 26), and the word "corporate" had then a significance, since a vestry was not incorporated, but now the rural district council is the local authority to the exclusion of any other authority in the case of any contributory place (Isolation Hospitals Act,

county council may, if it thinks fit, invest such local authority with all the powers of a hospital committee (*f*), and thereupon such authority is deemed to be the hospital committee for such district, and exercises all the powers of such committee under its original corporate name (*g*).

(c) *Provision of Hospital.*

Acquisition of land for hospital.

853. A hospital committee may acquire land, by devise, gift, purchase or otherwise, without licence in mortmain (*h*), and, subject to any directions given by the county council, may purchase or lease any land, whether within or without the hospital district, for the purpose of erecting thereon an isolation hospital (*i*).

Hospital committee's delegated powers.

A hospital committee has all such powers of acquiring land as are above mentioned, also all such other powers of providing a hospital by purchase or otherwise, and managing and maintaining the same when so provided, as the county council may delegate to them (*k*); but the county council must retain the power of inspecting, and of raising loans (*l*) for, such hospital (*m*).

Additional hospital accommodation.

854. A hospital committee may, in expectation or in the event of an outbreak of any infectious disease (*n*), provide any accommodation in addition to its existing accommodation, by hiring or otherwise acquiring, any buildings, tents, wooden houses, or other places for the reception of patients. In addition to, or instead of, providing a central hospital, a committee may establish within its district hospitals in cottages or small buildings, or otherwise as they may think expedient. A committee may also, before it has established a permanent hospital or hospitals, provide temporary accommodation for its district (*o*).

Contracts for hospital accommodation.

855. A hospital committee may make and give effect to agreements for the use of any hospital or part of a hospital, or for the reception into any hospital of the sick of its district, upon

1901 (1 Edw. 7, c. 8), s. 6), and all local authorities under the Act are corporate bodies.

(*f*) See the text, *infra*.

(*g*) Isolation Hospitals Act, 1893 (56 & 57 Vict. c. 68), s. 10 (4).

(*h*) *Ibid.*, s. 10 (3). As to licence in mortmain, see titles CORPORATIONS, Vol. VIII., pp. 369, 370; REAL PROPERTY AND CHATTELS REAL.

(*i*) Isolation Hospitals Act, 1893 (56 & 57 Vict. c. 68), s. 11. The committee may exercise all the powers of a sanitary authority under the Public Health Acts (for a list of which see note (*a*), p. 361, *ante*), relating to the purchase of lands. The Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 175—178, 296—298, are incorporated with the Isolation Hospitals Act, 1893 (56 & 57 Vict. c. 68), s. 11. For the applied provisions, see pp. 376, 377, *ante*; and see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 163 *et seq.*, 171.

(*k*) The delegated powers can be resumed at any time by the county council (*Huth* v. *Clarke* (1890), 25 Q. B. D. 391).

(*l*) See p. 441, *post*.

(*m*) Isolation Hospitals Act, 1893 (56 & 57 Vict. c. 68), s. 10 (2).

(*n*) "Infectious disease" is not defined; compare the definition at p. 445, *post*.

(*o*) Isolation Hospitals Act, 1893 (56 & 57 Vict. c. 68), s. 14. For form of agreement for temporary hiring of hospital, see Encyclopædia of Forms and Precedents, Vol. X., p. 419.

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payment of annual or other sums. Any expenses so incurred are defrayed as structural, establishment, or patients' expenses (*p*), in such proportions as the committee directs (*q*).

Transfer of hospital to county council.

856. Any local authority (including a joint board) (*r*), which has provided a hospital for the reception of the sick, may, with the sanction of the Local Government Board, and with the consent of the council, transfer it to the council of the county within which the hospital, or any part of the district of the authority, is situate. It must be appropriated to a hospital district (*s*).

Terms of sanction.

The Local Government Board may give its sanction, subject to such terms and conditions as it thinks fit, but must be satisfied that hospital accommodation sufficient for the needs of the district has been or will be provided.

Application of consideration money.

Any money paid to a local authority on any such transfer must be applied as the Local Government Board directs, either in repayment of any loan of the local authority, or for any other purpose for which capital moneys may properly be applied.

County council's expenses of transfer.

The expenses incurred by a county council in or incidental to the transfer of any hospital are defrayed as structural expenses incurred by a hospital committee (*t*).

(d) *Management of Hospital.*

Rules and regulations.

857. A hospital committee may from time to time make all necessary rules and regulations for the conduct and management of its hospital and the patients therein (*a*).

Ambulances.

858. Every isolation hospital must be provided with an ambulance or ambulances for the purpose of conveying patients to the hospital, and must, so far as practicable, be in connexion with the system of telegraphs (*b*).

Training nurses.

859. Subject to any regulations made by the county council, a hospital committee may make arrangements for the training of

(*p*) See p. 442, *post*.

(*q*) Isolation Hospitals Act, 1901 (1 Edw. 7, c. 8), s. 3. For forms of agreement for reception of sick, see Encyclopædia of Forms and Precedents, Vol. X., pp. 419, 429.

(*r*) The words are "a local authority within the meaning of the Public Health Act, 1875, which has provided under that Act, or any local Act, a hospital" etc. As to such local authorities, see p. 372, *ante*, and, as to joint boards, see title LOCAL GOVERNMENT, Vol. XIX., p. 339, and see note (*t*), p. 436, *ante*.

(*s*) Any hospital so appropriated may be adapted as an isolation hospital, and must be treated as if it had been originally established under the Isolation Hospitals Act, 1893 (56 & 57 Vict. c. 68), for the district (Isolation Hospitals Act, 1901 (1 Edw. 7, c. 8), s. 1).

(*t*) *Ibid.* As to structural expenses and the manner in which they are defrayed, see p. 442, *post*.

(*a*) Isolation Hospitals Act, 1893 (56 & 57 Vict. c. 68), s. 12. As to the delegation by the county council of powers to a hospital committee, see p. 438, *ante*; as to the detention of persons without proper lodging, see p. 454, *post*; and as to the keeping in small-pox hospitals of a list of vaccinated patients, see p. 479, *post*. For a model set of regulations, see Encyclopædia of Forms and Precedents, Vol. X., p. 443.

(*b*) Isolation Hospitals Act, 1893 (56 & 57 Vict. c. 68), s. 13; see also the general provision referred to on p. 435, *ante*.

nurses for attendance on infectious cases, either inside or outside the hospital, and may charge for such attendance outside the hospital; and the expenses of any such nurses, after deducting any profits derived from their services, are establishment expenses (*c*) of the hospital (*d*).

Charges for patients.

860. For every person admitted into the hospital there shall be charged such sum as the hospital committee thinks sufficient to defray the patients' expenses (*e*) incurred in respect of such person; and for any person brought from beyond the hospital district, such additional sum as the committee thinks fit, as a contribution to the structural and establishment expenses (*f*).

Exceptional treatment.

Persons desirous of being provided with accommodation of an exceptional character may be so provided on their undertaking, to the satisfaction of the committee, to pay therefor a sum fixed by the committee, and also to pay for all other expenses incurred in respect of their maintenance in the hospital; and all expenses so incurred are referred to as "special patients' expenses" (*g*).

(e) *Borrowing by County Council.*

Power to borrow.

861. A county council may borrow on the security of the county rate (*h*) any money required for the purpose of carrying the statutory provisions (*i*) into effect.

Repayment of loan.

Any loans so borrowed, and any other money expended by the county council for such purpose (*j*), together with interest thereon at such a rate as may be agreed upon between the county council and the hospital committee concerned, or, in default of agreement, determined by the Local Government Board (*k*), are repaid to the county council out of the local rate; and, in the case of a loan, within a period not exceeding that within which the loan is repayable by the county council (*l*).

(*c*) See p. 442, *post*.

(*d*) Isolation Hospitals Act, 1893 (56 & 57 Vict. c. 68), s. 15.

(*e*) As to patients' expenses, see p. 442, *post*.

(*f*) Isolation Hospitals Act, 1893 (56 & 57 Vict. 68), s. 16 (1). As to structural and establishment expenses, see p. 442, *post*.

(*g*) Isolation Hospitals Act, 1893 (56 & 57 Vict. c. 68), s. 16 (2). As to special patients' expenses, see p. 442, *post*.

(*h*) "In manner provided by the Local Government Act, 1888" (51 & 52 Vict. c. 41), *i.e.*, by *ibid.*, s. 69; see title LOCAL GOVERNMENT, Vol. XIX., p. 361.

(*i*) The words are "the provisions of this Act," *i.e.*, the Isolation Hospitals Act, 1893 (56 & 57 Vict. c. 68).

(*j*) But sums borrowed by a county council for the purpose of making a capital contribution to an isolation hospital (see p. 442, *post*), or any other hospital (see p. 434, *ante*), are not repayable out of the local rate (Isolation Hospitals Act, 1901 (1 Edw. 7, c. 8), s. 2 (2)).

(*k*) *Ibid.*, s. 4.

(*l*) Isolation Hospitals Act, 1893 (56 & 57 Vict. c. 68), s. 22. "Local rate" means, as respects an urban or rural district or contributory place, the rate out of which expenses incurred in the execution of the Public Health Acts (see note (*a*), p. 361, *ante*) are directed to be paid, and in the case of any contributory place the expenses incurred are to be deemed to be special expenses (Isolation Hospitals Act, 1893 (56 & 57 Vict. c. 68), s. 26). As to the rates referred to, and the incidence of "special expenses," see pp. 380, 381, *ante*.

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(f) *Expenses.*

Classification.

862. The expenses incurred in respect of any isolation hospital are classified as structural expenses, establishment expenses, and patients' expenses.

"Structural expenses."

"Structural expenses" include the original cost of providing the hospital, the purchase (if any) of the site, the furnishing the hospital with the necessary appliances and furniture required for the purpose of receiving patients, any permanent extension or enlargement of the hospital, or any alteration or repair of the drainage, and any structural repairs; but they do not include ordinary repairs, painting, cleaning, or the renewal or keeping in order of the appliances and furniture, or the supply of new appliances or furniture. All expenses incurred by a county council in and about the formation of a hospital district, including the costs of any inquiries, and the expenses of obtaining land and other preliminary expenses, are structural expenses.

"Establishment expenses."

"Establishment expenses" are the cost of keeping the hospital, its appliances and furniture, in a state requisite for the comfort of the patients, the salaries of the doctors, nurses (*m*), and servants, and all other expenses for maintaining the hospital in a fit state for the reception of patients.

"Patients' expenses."

"Patients' expenses" are the cost of conveying, removing, feeding, providing medicines, disinfecting, and all other things required for patients individually (*n*), exclusive of structural and establishment expenses.

"Special patients' expenses."

"Special patients' expenses" are expenses incurred in the provision of accommodation of an exceptional character, and other expenses incurred in respect of the maintenance of persons so provided, as already mentioned (*o*).

Committee's decision final.

In the case of any doubt arising as to what are structural expenses, establishment expenses, or patients' expenses, the decision of the hospital committee is conclusive (*p*).

Contribution by county council.

863. A county council may, where it deems it expedient so to do for the benefit of the county, contribute out of the county rate a capital or annual sum towards the structural and the establishment expenses of an isolation hospital, or to either class of such expenses (*q*).

Recovery of patients' expenses.

864. Patients' expenses (*r*), in respect of any person who, at the time of his reception into the hospital, or at any time within fourteen days previously, is or has been in receipt of poor law relief,

(*m*) See p. 440, *ante*.

(*n*) Including the burial of a patient dying in the hospital; see p. 443, *post*.

(*o*) See p. 441, *ante*.

(*p*) Isolation Hospitals Act, 1893 (56 & 57 Vict. c. 68), s. 17.

(*q*) *Ibid.*, s. 21. For form of precept for obtaining contribution, see Encyclopædia of Forms and Precedents, Vol. X., p. 460.

(*r*) For definition of "patients' expenses," see the text, *supra*. Any additional charge made for a patient brought from beyond the hospital district (see p. 441, *ante*) is recoverable as part of the patient's expenses (Isolation Hospitals Act, 1893 (56 & 57 Vict. c. 68), s. 19).

are a debt due to the hospital committee from the guardians of the union from which he is sent, and are recoverable from them in a summary manner (*s*) or otherwise.

Patients' expenses (*t*), in respect of a non-pauper patient, are a debt due to the hospital committee, and recoverable in a summary manner from the local authority (*u*) of the local area (*v*) from which the patient is sent, and are paid out of the local rate (*w*).

Special patients' expenses (*t*) are a debt recoverable in a summary manner (*a*) from the patient, or from the estate of the patient, in respect of whom the expenses have been incurred.

The expenses of the burial of any patient dying in the hospital are payable in the same manner in which the expenses of his maintenance are payable (*b*).

Payment of expenses.

865. All expenses incurred by a county council or by a hospital committee (*c*), with the exception of patients' expenses (*d*), and special patients' expenses (*d*), are, when a hospital district consists of a single area (*e*), defrayed out of the local rate (*f*) of that area. Where the hospital district consists of more than one local area (*e*), all the expenses, save as aforesaid, incurred by the hospital committee (*c*) are paid out of a common fund to which all receipts must be carried, and to which the local authorities in the hospital district contribute in such proportions as the county council by its order constituting the district (*e*) determines (*g*).

(iv.) *Sanatoria for Tuberculosis etc.*

Grants in aid to sanatoria.

866. In connection with the system of National Health Insurance (*h*) provisions have been enacted to further the establishment and maintenance of a special class of hospitals. Any sum made available by Parliament (*i*) for the purposes of the provision

(*s*) As a civil debt under the Summary Jurisdiction Acts; as to such procedure, see title MAGISTRATES, Vol. XIX., p. 609.

(*t*) See p. 442, *ante*.

(*u*) For definition of "local authority," see note (*t*), p. 436, *ante*. The local authority may recover the expenses from the patient under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 132; see p. 434, *ante*.

(*v*) For definition of "local area," see note (*i*), p. 437, *ante*.

(*w*) For definition of "local rate," see note (*l*), p. 441, *ante*.

(*a*) See note (*s*), *supra*.

(*b*) Isolation Hospitals Act, 1893 (56 & 57 Vict. c. 68), s. 19; and see p. 432, *ante*.

(*c*) The accounts of a committee and of its officers and assistants are audited by the district auditor, and the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 245, 247, 249, 250, apply as if the committee were an urban authority (Isolation Hospitals Act, 1893 (56 & 57 Vict. c. 68), s. 25); see p. 387, *ante*.

(*d*) For definition, see p. 442, *ante*.

(*e*) See p. 437, *ante*.

(*f*) For definition of "local rate," see note (*l*), p. 441, *ante*.

(*g*) Isolation Hospitals Act, 1893 (56 & 57 Vict. c. 68), s. 18. The Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 284 (see title LOCAL GOVERNMENT, Vol. XIX., p. 339), is to apply as if the local areas were component districts, and the hospital committee were a joint board (Isolation Hospitals Act, 1893 (56 & 57 Vict. c. 68), s. 18); and see p. 372, *ante*.

(*h*) As to national health and unemployment insurance generally, see title WORK AND LABOUR.

(*i*) £1,500,000 has been made available (Finance Act, 1911 (1 & 2 Geo. 5,

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of or making grants in aid to sanatoria and other institutions for the treatment of tuberculosis, or such other diseases as the Local Government Board with the approval of the Treasury may appoint, is to be distributed by the Board (*k*), with the consent of the Treasury (*l*), in making grants for those purposes, and the Treasury before consenting must consult with the Insurance Commissioners (*m*).

Provision of sanatoria by county councils.

867. If any such grant is made to a county council (*n*), the Local Government Board may authorise the county council to provide any such institution (*o*), and, where so authorised, the county council has power to erect buildings and to manage and maintain the institution and for that purpose to enter into agreements and make arrangements with the Insurance Committees (*p*) and other authorities and persons, and to do all such things as may be necessary for those purposes (*q*). Any expenses of the county council, so far as not defrayed out of the grant, are to be defrayed out of the county fund as expenses for general county purposes (*q*), or, if the order of the Local Government Board so directs, as expenses for special county purposes (*q*) charged on such part of the county as may be provided by the order (*r*).

Co-operation by local authorities.

868. For the purpose of facilitating co-operation amongst county councils, county borough councils, and other local authorities (not being poor law authorities (*s*)) for the provision of such sanatoria and other institutions, the Local Government Board may by order make such provisions as appear to it necessary or expedient, by the constitution of joint committees (*t*), joint boards (*t*), or otherwise, for the joint exercise by such authorities of their powers (*a*).

c. 48), s. 16 (1) (b)), and this sum is to be apportioned between England, Wales (including Monmouthshire), Scotland, and Ireland, in proportion to their respective populations according to the 1911 census (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), ss. 64 (1), 79). As to the census, see note (*j*), p. 398, *ante*. For a list of residential institutions affording treatment, see 76 J. P. (Journal) 378, 379.

(*k*) The Welsh Insurance Commissioners make the grants for Wales (including Monmouthshire) (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), ss. 79, 82 (3)); and in making grants regard is to be had to the provision of sanatoria etc. in Wales by any association established by royal charter within twelve months after the commencement (*i.e.*, 15th July 1912 ; see *ibid.*, s. 115) of the Act (*ibid.*, s. 82 (4)).

(*l*) See title CONSTITUTIONAL LAW, Vol. VII., p. 100.

(*m*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 64 (1). As to the Insurance Commissioners, see title WORK AND LABOUR.

(*n*) This includes the council of the Scilly Isles (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 79).

(*o*) The machinery of this enactment is generally more suitable for a county institution than that of the Isolation Hospital Acts ; see p. 435, *ante*.

(*p*) As to Insurance Committees, see title WORK AND LABOUR.

(*q*) See title LOCAL GOVERNMENT, Vol. XIX., p. 358.

(*r*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 64 (2).

(*s*) As to poor law authorities, see title POOR LAW, Vol. XXII., pp. 524 *et seq.*

(*t*) See p. 373, *ante*.

(*a*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 64 (3). The

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Treatment for insured persons in sanatoria and elsewhere.

869. A local authority (*b*) may provide treatment in sanatoria and other institutions approved by the Local Government Board for insured persons (*c*) suffering from tuberculosis (*d*) resident outside as well as within the area of the local authority. The local authority may also provide for such persons treatment, otherwise than in sanatoria or other institutions, in a manner approved by the Local Government Board, if authorised by the Board to undertake such treatment (*e*).

Agreements with Insurance Committees for sanatorium benefit.

870. An Insurance Committee (*f*) may, with the consent of the Insurance Commissioners (*f*), enter into agreements with any person or authority (other than a poor law authority (*g*)) that, in consideration of such person or authority providing treatment in a sanatorium or other institution or otherwise for persons recommended by the Committee for sanatorium benefit, the Committee will contribute, out of the funds available for sanatorium benefit towards the maintenance of the institution or provision of such treatment, such annual or other payment, and subject to such conditions and for such period as may be agreed (*h*).

SUB-SECT. 2.—*Infectious and Epidemic Diseases* (*i*).

(i.) *Notification of Infectious Disease.*

Definition of "infectious disease."

871. The term "infectious disease" means any of the following diseases, namely, small-pox, cholera, diphtheria, membranous croup, erysipelas, the disease known as scarlatina or scarlet fever, and the fevers known by any of the following names: typhus, typhoid, enteric, relapsing, continued, or puerperal; and includes, as respects any particular district, any infectious disease to which the

order may contain necessary supplemental provisions, including those relating to expenses (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 64 (3)).

(*b*) This expression is not defined; it appears to include a county council, but not a poor law authority; see p. 444, *ante*.

(*c*) As to insured persons, see title WORK AND LABOUR.

(*d*) Or any other disease as the Local Government Board, with the approval of the Treasury, may appoint (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), ss. 8 (1) (b), 16 (1)).

(*e*) *Ibid.*, s. 16 (1). And see order of the Local Government Board, dated 26th July, 1912, containing regulations as to the carrying out of such treatment; and see 76 J. P. (Journal) 376.

(*f*) As to Insurance Committees and the Insurance Commissioners, see title WORK AND LABOUR. It is obligatory on such committees, for the purpose of administering "sanatorium benefit" (namely, treatment of insured persons in sanatoria or other institutions, or otherwise, when suffering from tuberculosis, or such other diseases as the Local Government Board, with the approval of the Treasury, may appoint (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 8 (1) (b)), to make arrangements to the satisfaction of the Insurance Commissioners with persons or authorities referred to in the text, *supra* (*ibid.*, s. 16 (1)).

(*g*) As to poor law authorities, see title POOR LAW, Vol. XXII., pp. 524 *et seq.*

(*h*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 64 (4).

(*i*) As to cases of infectious disease on canal boats, see p. 505, *post*. As to the power of the guardians to take measures to prevent the spread of small-pox, see Vaccination Act of 1867 (30 & 31 Vict. c. 84), s. 28; and see p. 470, *post*

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When notification required.

Infectious Disease (Notification) Act, 1889 (*j*), has been applied by an order (*k*) of the local authority of the district (*l*).

872. The requirements as to notification of an infectious disease extend to persons suffering from such a disease, whether in any building (*m*), ship, vessel, boat, tent, van, shed or similar structure used for human habitation, other than hospitals for infectious cases, but do not extend to any building, ship, vessel, boat, tent, van, shed or similar structure belonging to the Crown, or to any inmate thereof, or to ships, vessels and boats belonging to a foreign Government (*n*). A ship, vessel, or boat lying in any river, harbour or

(*j*) 52 & 53 Vict. c. 72. For the notification of infectious disease in London, see Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 55—57.

(*k*) Fourteen clear days' special notice must be given to every member of the local authority of the intention to propose a resolution on the subject and of the meeting of the local authority for the purpose. If there is no usual mode of giving notices to attend meetings, the notice must be signed by the clerk and delivered to the member, or left at or posted to his usual or last known place of abode in England. An order may be permanent or temporary, the period of its continuance being specified therein; and it may be revoked or varied by the local authority. It is not valid until approved by the Local Government Board. When it is so approved, the local authority must give public notice thereof by advertisement in a local newspaper, and by handbills, and otherwise in such manner as it thinks sufficient for giving information to all persons interested. The local authority must also send a copy thereof to each registered medical practitioner whom, after due inquiry, it ascertains to be residing or practising in its district. The order will come into operation at such date, not earlier than one week after the publication of the first advertisement of the approved order, as the local authority fixes. In the case of emergency, three clear days' notice is sufficient, and the resolution must declare the cause of such emergency and must be for a temporary order. A copy thereof must be forthwith (see note (*u*), p. 448, *post*) sent to the Local Government Board and advertised, and the order will come into operation at the expiration of one week from the date of such advertisement, but, unless approved by the Board, will cease to be in force at the expiration of one month after it is passed, or any earlier date fixed by the Board. The approval of the Board is conclusive evidence that the case was one of emergency (Infectious Disease (Notification) Act, 1889 (52 & 53 Vict. c. 72), ss. 5, 7). For London, see the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 56. The London County Council has the same power as each sanitary authority has in respect of its own district to extend the definition so as to apply to every London district (*ibid.*, s. 56 (6)).

(*l*) Infectious Disease (Notification) Act, 1889 (52 & 53 Vict. c. 72), s. 6; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 55 (8). Among diseases to which the Acts have been applied are acute poliomyelitis, anthrax, cerebro-spinal fever, chicken-pox, glanders, hydrophobia, impetigo contagiosa, measles, mumps, ophthalmia neonatorum, rötheln or german measles, whooping cough, and yellow fever; see Thirty-ninth Annual Report of the Local Government Board, Part II., pp. lxxix., lxxx; and see order of Local Government Board, dated 15th August, 1912 (76 J. P. Journal, p. 402). Pulmonary tuberculosis was made notifiable to a limited extent by orders of the Local Government Board (see note (*q*), p. 464, *post*) made under other provisions. It is notifiable under some local Acts. As to the application of the Act to plague, cerebro-spinal fever, and acute poliomyelitis, see note (*q*), p. 464, *post*.

(*m*) See note (*l*), p. 415, *ante*. For provisions with respect to infectious diseases in canal boats, see p. 505, *post*; common lodging-houses, p. 512, *post*; lodging-houses, p. 508, *post*; and tents, vans, sheds etc., p. 516, *post*.

(*n*) See Infectious Disease (Notification) Act, 1889 (52 & 53 Vict. c. 72),

other water not within any urban, rural or port sanitary district (*o*), is deemed to be within the district of the local authority which nearest adjoins the place where such ship, vessel or boat is lying, unless the Local Government Board fixes a district for the purpose (*p*).

Notification by relatives and persons in attendance.

873. Where an inmate of any building (*q*) used for human habitation, other than a hospital for infectious cases, is suffering from an infectious disease, the head of the family to which the patient belongs, and in his default the nearest relative of the patient present in the building or being in attendance on the patient, and in default of such relative every person in charge of or in attendance on the patient, and in default of any such person the occupier (*r*) of the building, must, as soon as he becomes aware that the patient is suffering from an infectious disease, send notice (*s*) thereof to the medical officer of health of the district (*t*).

ss. 13, 15; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 55, 56. As to the ownership of ships, see title SHIPPING AND NAVIGATION.

(*o*) The Infectious Disease (Notification) Act, 1889 (52 & 53 Vict. c. 72), extends to every urban, rural, and port sanitary district (Infectious Disease (Notification) Extension Act, 1899 (62 & 63 Vict. c. 8), s. 1 (1)). Except in Huddersfield, local Acts for a like purpose have ceased to operate (*ibid.*, ss. 1 (2), 2; Infectious Disease (Notification) Act, 1889 (52 & 53 Vict. c. 72), s. 14). A port sanitary district does not, for the purposes of these Acts, form part of any other district (*ibid.*, s. 16). The local authority under the Acts is an urban authority, *i.e.*, a borough council, or other urban district council, a rural district council, or a port sanitary authority, as the case may be (*ibid.*); and see pp. 372, 373, *ante*. The expenses of a local authority in executing the Acts are paid as part of the expenses of executing the Public Health Acts (for a list of which see note (*a*), p. 361, *ante*), and, in the case of a rural authority, are paid as general expenses (Infectious Disease (Notification) Act, 1889 (52 & 53 Vict. c. 72), s. 9); and see pp. 380—382, *ante*. In London, the Corporation of the City of London and the metropolitan borough councils are the local authorities (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 99, 110, 111; City of London Sewers Act, 1897 (60 & 61 Vict. c. cxxxiii.), ss. 3, 5, 7; London Government Act, 1899 (62 & 63 Vict. c. 14), s. 4); and see title METROPOLIS, Vol. XX., pp. 408 *et seq.*

(*p*) Infectious Disease (Notification) Act, 1889 (52 & 53 Vict. c. 72), s. 13 (2); compare Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 110; see p. 433, *ante*.

(*q*) Or any ship, vessel, boat, tent, van, shed or similar structure; see p. 446, *ante*.

(*r*) "Occupier" includes a person having the charge, management, or control of a building, or of the part of a building in which the patient is, and, in the case of a house the whole of which is let out in separate tenements, or in the case of a lodging-house the whole of which is let to lodgers, the person receiving the rent payable by the tenants or lodgers either on his own account or as the agent of another person, and, in the case of a ship, vessel, or boat the master or other person in charge thereof (Infectious Disease (Notification) Act, 1889 (52 & 53 Vict. c. 72), s. 16; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 141). With regard to a rent-collecting agent, compare the similar reference in the definition of "owner" in the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 4, and the cases referred to in note (*o*), p. 427, *ante*.

(*s*) The notice must be in writing or in print, or partly in both, and may be delivered to the officer, or posted to him, or left, at his office or residence (Infectious Disease (Notification) Act, 1889 (52 & 53 Vict. c. 72), s. 8).

(*t*) For note (*t*), see next page.

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Notification by medical practitioner.

A medical practitioner attending on or called in to visit the patient must, on becoming aware that the patient is suffering from an infectious disease, forthwith (*u*) send to the medical officer of health (*a*) a certificate (*b*) stating the name of the patient, the situation of the building, and the infectious disease from which, in the opinion of such medical practitioner, the patient is suffering (*c*).

(ii.) *Exposure of Infected Persons and Things* (*d*).

(a) *In General.*

Infected person carrying on occupation.

874. If, where the enactment is in force (*e*), any person knows

As to London, see Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 55 (6). As to notice by a dairyman of infectious disease among his servants, see p. 459, *post*. For forms relating to the notification of infectious disease, see Encyclopædia of Forms and Precedents, Vol. X., pp. 393—400.

(*t*) Infectious Disease (Notification) Act, 1889 (52 & 53 Vict. c. 72), s. 3; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 55. A person who fails to give notice is liable on summary conviction to a fine not exceeding 40*s*., unless he satisfies the court that he reasonably supposed notice had been given by a person on whom a prior liability to give it is imposed (Infectious Disease (Notification) Act, 1889 (52 & 53 Vict. c. 72), s. 3 (2); Public Health (London) Act, 1891 (54 & 55 Vict. c. 76) s. 55 (2)). As to procedure in courts of summary jurisdiction, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq*.

(*u*) That is, within a reasonable time (*Thomas* v. *Nokes* (1868), L. R. 6 Eq. 521; see also *Gilbert* v. *Endean* (1878), 9 Ch. D. 259, 266, C. A.; *Thomas* v. *Nokes* (1894), 58 J. P. 672). Where more than one medical practitioner attends a patient, the obligation to send a certificate seems imposed on each one, and each is entitled to a fee; see note (*c*), *infra*.

(*a*) Where there are two or more such officers, the certificate must be given to such one of them as has charge of the area in which the patient is, or to such other of them as the local authority may from time to time direct (Infectious Disease (Notification) Act, 1889 (52 & 53 Vict. c. 72), s. 4 (3); Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 55 (5)). Failure to give a certificate is punishable summarily by a fine not exceeding 40*s*. (Infectious Disease (Notification) Act, 1889 (52 & 53 Vict. c. 72), s. 3 (2); Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 55 (2)).

(*b*) Forms of certificate were prescribed by the Local Government Board, 12th September, 1889 (Stat. R. & O. Rev., Vol. XI., Public Health, England, p. 1), and 3rd December, 1891 (for London) (*ibid*., p. 2), and must be gratuitously supplied by the local authority to any medical practitioner residing or practising in its district who applies for the same (Infectious Disease (Notification) Act, 1889 (52 & 53 Vict. c. 72), s. 4 (1) (2); Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 55 (3)). Certificates received by a medical officer relating to patients within the Metropolitan Asylum District have to be dealt with in a special manner (*ibid*., s. 55 (4)). As to the Metropolitan Asylum District, see title METROPOLIS, Vol. XX., pp. 411, 412.

(*c*) Infectious Disease (Notification) Act, 1889 (52 & 53 Vict. c. 72), s. 3 (1); Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 55 (1); as to the fees payable to medical men in respect of such certificates, see title MEDICINE AND PHARMACY, Vol. XX., pp. 338, 339; Infectious Disease (Notification) Act, 1889 (52 & 53 Vict. c. 72), s. 11; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 57. As to medical inspection of ships, see, further, title SHIPPING AND NAVIGATION.

(*d*) As to the burial of bodies dying of infectious disease, see title BURIAL AND CREMATION, Vol. III., pp. 549 *et seq*. For form of notice requiring disinfection of premises and chattels, see Encyclopædia of Forms and Precedents, Vol. X., p. 409.

(*e*) *I.e*., where by an order of the Local Government Board under the

that he is suffering from an infectious disease (*f*), he must not, under a penalty not exceeding 40*s*., engage in any occupation or carry on any trade or business, unless he can do so without risk of spreading the infectious disease (*g*).

Exposure of infected persons or things.

875. Any person who, (1) while suffering from any dangerous infectious disorder (*h*), wilfully exposes (*i*) himself without proper precautions against spreading the disorder in any street, public place, shop, inn (*k*), or public conveyance, or enters any public conveyance without previously notifying the owner, conductor, or driver that he is so suffering (*l*); or (2) being in charge of any person so suffering so exposes (*i*) such sufferer (*m*); or (3) gives, lends, sells, transmits, or exposes, without previous disinfection, any bedding, clothing, rags, or other things which have been exposed to infection from any such disorder, is liable to a penalty not exceeding £5 (*n*).

Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 3, that Act is declared to be in force; see p. 364, *ante*.

(*f*) This means any infectious disease to which the Infectious Disease (Notification) Act, 1889 (52 & 53 Vict. c. 72), for the time being applies within the district of the local authority (Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 13); and for the definition of "infectious disease," see p. 445, *ante*. Cerebro-spinal fever and acute poliomyelitis have, in effect, been included in the definition by the order referred to in note (*q*), p. 465, *post*, which makes the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), apply to these diseases throughout the provinces without adoption.

(*g*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 52. In London, a person so suffering must not milk any animal, or pick fruit, or engage in any occupation connected with food, or carry on any trade or business in a manner likely to spread the infectious disease (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 69, where the word "dangerous" is used before "infectious"). As to the making of wearing apparel on premises where there is scarlet fever or small-pox, or the prohibition of home work where there is infectious disease, see title FACTORIES AND SHOPS, Vol. XIV., p. 462.

(*h*) "Dangerous infectious disorder" is not defined for the purpose of this provision. It probably extends to all the diseases specified in the statutory definition of "infectious disease" given on p. 445, *ante*; compare note (*w*), p. 455, *post*.

(*i*) A person, knowing his children were recovering from small-pox, who took lodgings without disclosing the facts, was held liable in damages for communicating the disease (*Best* v. *Stapp* (1872), 2 C. P. D. 191, n.); and, as to the criminal liability, see title NUISANCE, Vol. XXI., p. 536, note (*t*).

(*k*) For the meaning of "inn," see title INNS AND INNKEEPERS, Vol. XVII., p. 302.

(*l*) As to the use of public conveyances for infectious cases, see, further, p. 452, *post*.

(*m*) Where the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 62, is in force by an order of the Local Government Board (see p. 364, *ante*), the provision is to be read as if the words "or causes or permits such sufferer to be so exposed" were added. As to the liability of a medical man who walked with his scarlet fever patient to a hospital, see *Tunbridge Wells Local Board* v. *Bisshopp* (1877), 2 C. P. D. 187.

(*n*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 126. The penalty is recoverable summarily (*ibid.*, s. 251), or in the county court (*ibid.*, s. 261); and see pp. 367 *et seq.*, *ante*; titles COUNTY COURTS, Vol. VIII., p. 678; MAGISTRATES, Vol. XIX., pp. 589 *et seq.* A sufferer who, without previously notifying the owner or driver, enters a public conveyance is also to be ordered by the court to pay to the owner and driver the amount of any loss or expense they may incur in the disinfection of the conveyance (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 126; see p. 452, *post*). No proceedings are to be taken against persons transmitting, with proper

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Inoculating persons with small-pox.

876. It is an offence (*o*) to produce or attempt to produce the disease of small-pox in any person by inoculation with variolous matter, or by wilful exposure to variolous matter or to any matter, article, or thing impregnated with variolous matter, or wilfully by any other means whatsoever to produce the disease in any person (*p*).

Infectious rubbish thrown into ashpits.

877. Any person who, where the enactment is in force (*q*), knowingly casts, or causes or permits to be cast, into any ashpit, ashtub,

precautions, any bedding, clothing, rags, or other things for the purpose of having them disinfected (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 126, specifically applied to ships by Public Health (Ships, etc.) Act, 1885 (48 & 49 Vict. c. 35), s. 2, Sched.; see note (*q*), p. 433, *ante*). The corresponding enactment in force in London (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 68) does not apply to public conveyances; and as to public conveyances, see, further, note (*c*), p. 453, *post*.

(*o*) Punishable summarily by imprisonment for not more than one month (Vaccination Act of 1867 (30 & 31 Vict. c. 84), s. 32), or a fine not exceeding £25 (Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 4); and see title MAGISTRATES, Vol. XIX., pp. 602 *et seq.*

(*p*) Vaccination Act of 1867 (30 & 31 Vict. c. 84), s. 32.

(*q*) *I.e.*, in any urban or rural district the local authority of which have adopted the Infectious Disease (Prevention) Act, 1890 (53 & 54 Vict. c. 34), s. 13 (see note (*s*), p. 451, *post*), by resolution at a meeting summoned by fourteen clear days' special notice in the same manner as indicated in note (*k*), p. 446, *ante*. As to publication of such resolution and as to forwarding a copy of the resolution to the Local Government Board (see Infectious Disease (Prevention) Act, 1890 (53 & 54 Vict. c. 34), s. 3; *ibid.*). No objection to the resolution, on the grounds that notice of the intention to propose it was not duly given, or that it was not sufficiently published, can be made after three calendar months from the date of the first advertisement thereof. All or any of the sections of the Act may thus be adopted (*ibid.*) and supersede similar provisions in any local Act (*ibid.*, s. 19). An adopting resolution may be rescinded by a resolution of the local authority to which the same provisions as above with respect to notice, publication etc. apply (*ibid.*, s. 21). The Act applies to the infectious diseases specifically mentioned in the Infectious Disease (Notification) Act, 1889 (52 & 53 Vict. c. 72) (see p. 445, *ante*), and may be applied to any other infectious disease in the same manner (see note (*k*), p. 446, *ante*) as that Act may be applied (Infectious Disease (Prevention) Act, 1890 (53 & 54 Vict. c. 34), s. 2). Obstruction of any officer, or of the execution of any justices' order, and offences for which no specific penalty is imposed, are punishable by a penalty not exceeding £5, and a daily penalty not exceeding 40*s.* (*ibid.*, s. 16). Penalties are recoverable summarily on the prosecution of the local authority or of its duly authorised officer but not otherwise, and are paid to the local authority (*ibid.*, s. 18); and see note (*s*), p. 451, *post*. In the provinces the Infectious Disease Prevention Act, 1890 (53 & 54 Vict. c. 34), is, for the purpose of the treatment of cerebro-spinal fever and acute poliomyelitis, everywhere in force, without adoption (Public Health (Cerebro-Spinal Fever and Acute Poliomyelitis) Regulations, 1912; see note (*q*), p. 465, *post*). In London, provisions corresponding to the several provisions of the Infectious Disease (Prevention) Act, 1890 (53 & 54 Vict. c. 34), are in force without adoption, namely, Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 58, 60—62, 65, 67, 71—74, 110. Any powers, rights, duties, capacities, and obligations under the Infectious Disease (Prevention) Act, 1890 (53 & 54 Vict. c. 34), with modifications, may, by order of the Local Government Board, be assigned to any port sanitary authority (Public Health (Ports) Act, 1896 (59 & 60 Vict. c. 20). By the Port Sanitary Authorities (Assignment of Powers) Order, 1912 (76 J. P. Journal, p. 415) powers contained in the Infectious Disease (Prevention) Act, 1890 (53 & 54 Vict. c. 34), s. 5, were with certain modifications assigned to all port sanitary authorities other than that of the Port of London; see note (*t*), p. 458, *post*. As to port sanitary authorities, see p. 373, *ante*.

or other receptacle for the deposit of refuse matter, any infectious rubbish (*r*), without previous disinfection, is guilty of an offence (*s*).

Infected clothes not to be sent to laundry.

878. Where the enactment is in force (*a*), a person must not, under a penalty not exceeding 40*s*., take or send to any public wash-house or to any laundry, for the purpose of being washed, any bedding, clothes, or other things which he knows to have been exposed to infection from any infectious disease (*b*), unless they have been disinfected by or to the satisfaction of the local authority (*c*) or their medical officer, or of a legally qualified medical practitioner (*d*), or are sent to a laundry with proper precautions for the purpose of disinfection, with notice that they have been exposed to infection. The local authority (*c*) may, on application, pay the expenses of disinfection if carried out by it or under its direction (*e*).

Library books.

879. Where the enactment is in force (*a*), a person who knows that he is suffering from an infectious disease (*b*) must not take any book or use or cause any book to be taken for his use from any public or circulating library; nor may a person permit any book taken from such a library, and under his control, to be used by anyone whom he knows to be suffering from an infectious disease (*b*); nor may a person return to any such library any book which he knows to have been exposed to infection from any infectious disease (*b*), or permit any such book under his control to be so returned, but he must give notice to the local authority (*c*) that the book has been so exposed to infection, and the authority must cause the book to be disinfected and returned to the library, or to be destroyed, and if destroyed must pay to the proprietor of the library the value of the book (*f*).

Destruction of infected bedding and articles.

880. Any local authority may direct the destruction of bedding, clothing, or other articles, which have been exposed to infection

(*r*) This, apparently, means any waste matters cast into an ashpit etc. which have been exposed to infection from any disease to which the Act applies; see note (*q*), p. 450, *ante*. In the enactment in force in London (see note (*s*), *infra*) the words are "any rubbish infected by a dangerous infectious disease," and such disease is defined in terms similar to the definition on p. 445, *ante*; see note (*k*), p. 446, *ante*.

(*s*) Infectious Disease (Prevention) Act, 1890 (53 & 54 Vict. c. 34), s. 13. Notice of this provision must be given to the occupier of any house in which the local authority is aware there is an infectious case (*ibid.*, s. 14). As to the penalty and its recovery, see *ibid.*, s. 16; note (*q*), p. 450, *ante*. For the similar provisions in force in London, see Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 62. On request of the master of any house, the sanitary authority must remove and disinfect or destroy such infectious rubbish (*ibid.*).

(*a*) See note (*e*), p. 448, *ante*; and see p. 364, *ante*.

(*b*) See note (*f*), p. 449, *ante*.

(*c*) That is, an urban sanitary authority, an urban district council, or a rural district council (Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 13); and see p. 372, *ante*.

(*d*) That is, one who is registered under the Medical Acts; see title MEDICINE AND PHARMACY, Vol. XX., pp. 325 *et seq.*

(*e*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 55.

(*f*) *Ibid.*, s. 59. Offences are punishable by a penalty not exceeding 40*s*. (*ibid.*).

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from a dangerous infectious disorder (*g*), and may give compensation for the same (*h*).

(b) *Use of Public Vehicles.*

Disinfection after use by infected person.

881. Every owner or driver of a public conveyance (*i*) must, under a penalty not exceeding £5 (*k*), immediately provide for its disinfection after it has to his knowledge conveyed any sufferer from a dangerous infectious disorder (*g*), but he cannot be compelled to convey such a sufferer until he has been paid sufficient to cover any loss or expense incurred in disinfecting (*l*).

Disinfection after carrying infected corpse.

882. Any person, where the enactment is in force (*m*), who hires or uses a public conveyance, other than a hearse (*n*), for the conveyance of the body of a person who has died from any infectious disease (*o*) without previously notifying to the owner or driver that the person has so died, and, after any such notification, any owner or driver who does not immediately afterwards provide for the disinfection of such conveyance so used, is guilty of an offence (*p*).

Notice of infection.

883. If, where the enactment is in force (*q*), any person suffering from any infectious disease (*r*) is conveyed in any public vehicle (*i*),

(*g*) See note (*h*), p. 449, *ante*.

(*h*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 121. The provision applies to ships (Public Health (Ships, etc.) Act, 1885 (48 & 49 Vict. c. 35), s. 2, Sched.; see note (*q*), p. 433, *ante*). As to the provisions in force in London, see note (*m*), p. 456, *post*. A medical officer of health cannot without authority direct the destruction of any articles; and, if he does so, compensation is not payable by the local authority (*Garlick* v. *Knottingley Urban District Council* (1904), 68 J. P. 694). It is probable that compensation is claimable notwithstanding the word "may" is used. "The enabling words are construed as compulsory wherever the object of the power is to effectuate a legal right" (*Julius* v. *Oxford* (*Lord Bishop*) (1880), 5 App. Cas. 214, *per* Lord BLACKBURN, at p. 244). For the determination of compensation, see Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 308; *Lingke* v. *Christchurch Corporation* (1912), 76 J. P. 265; and see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 163. The claimant must not himself be in default. For form of order for destruction, see Encyclopædia of Forms and Precedents, Vol. X., p. 405.

(*i*) A licensed "hackney carriage" or "omnibus" (see title STREET AND AERIAL TRAFFIC) is a public conveyance; but whether any vehicle which does not ply for hire and is let only by private arrangement comes within the provision is not clear; see also note (*n*), *infra*.

(*k*) Recoverable summarily (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 251), or in the county court (*ibid.*, s. 261); and see pp. 367 *et seq.*, *ante*; titles COUNTY COURTS, Vol. VIII., p. 678; MAGISTRATES, Vol. XIX., pp. 589 *et seq.*

(*l*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 127. As to the liability of drivers of hackney carriages and omnibuses to carry passengers see title STREET AND AERIAL TRAFFIC.

(*m*) See note (*q*), p. 450, *ante*.

(*n*) See note (*i*), *supra*. The reference to "hearse" suggests a wide meaning to the expression "public conveyance."

(*o*) See p. 445, *ante*; and see note (*q*), p. 450, *ante*.

(*p*) Infectious Disease (Prevention) Act, 1890 (53 & 54 Vict. c. 34), s. 11. As to the penalty and its recovery, see *ibid.*, s. 16; note (*q*), p. 450, *ante*. For the similar provisions in force in London, see Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 74, 117.

(*q*) See note (*e*), p. 448, *ante*; and see p. 364, *ante*.

(*r*) See note (*f*), p. 449, *ante*.

the owner or driver, as soon as it comes to his knowledge, must, under a penalty not exceeding £5, give notice to the medical officer, and cause such vehicle to be disinfected, and the owner or driver is entitled to recover in a summary manner from the person so conveyed, or from the person causing that person to be so conveyed, a sufficient sum to cover any loss and expense incurred by him in connection with such disinfection. When so requested by the owner or driver of such public vehicle, the local authority (*s*) must provide for the disinfection of the same free of charge, except in cases where the owner or driver conveyed a person knowing that he was suffering from infectious disease (*t*).

Conveyance of infected persons in omnibus.

884. Where the enactment is in force (*u*), the owner or driver of a public vehicle used for the carrying of passengers at separate fares (*a*) must not knowingly convey, and any other person must not knowingly place, in any such public vehicle, a person suffering from any infectious disease (*b*), and a person so suffering must not enter any such vehicle (*c*).

(c) *School Attendance.*

Infected child not to attend school.

885. Where the enactment is in force (*d*), no person being the parent or having the care or charge of a child within the district of the local authority (*e*) who is or has been suffering from infectious disease (*b*) or has been exposed to infection must, after a notice from the medical officer that the child is not to be sent to school, permit, under a penalty not exceeding 40*s*., such child to attend school without having procured from the medical officer a certificate, which is granted free of charge upon application, that in his opinion such child may attend without undue risk of communicating such disease to others (*f*).

Closure of public elementary school.

886. The local authority, or any two members acting on the advice of the medical officer, may require either the closure of any public elementary school, or any department, or the exclusion of certain children for a specified time, with a view to preventing the spread of disease or any danger to health from the condition of the school (*g*).

(*s*) See note (*c*), p. 451, *ante*.

(*t*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 64. As to London, see note (*c*), *infra*.

(*u*) See note (*e*), p. 448, *ante*; and see p. 364, *ante*.

(*a*) In other words a public omnibus; see title STREET AND AERIAL TRAFFIC.

(*b*) See note (*f*), p. 449, *ante*.

(*c*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 63; and see p. 449, *ante*. Offences are punishable by a penalty not exceeding 40*s*.; and see pp. 367 *et seq.*, *ante*. In London a similar prohibition applies to all public vehicles, and subject to this a provision as to notice and disinfection, like that in the preceding paragraph (see p. 452, *ante*), applies; see Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 70.

(*d*) See note (*e*), p. 448, *ante*; and see p. 364, *ante*.

(*e*) See note (*c*), p. 451, *ante*.

(*f*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 57.

(*g*) Code of Regulations for Public Elementary Schools, 1912, art. 57, which applies both to England and to Wales. As to the Code, see title EDUCATION, Vol. XII., pp. 10, 11. See also Code of Regulations for Public Elementary Schools, 1912, art. 57.

SECT. 4. Care of the Sick, and Preventive Measures.

List of scholars where infectious disease occurs in school.

887. Where the enactment is in force (*h*), the principal of a school in which any scholar is suffering from an infectious disease (*i*) must, if, required, furnish to the local authority, within a reasonable time fixed by the authority, a complete list of the names and addresses of the scholars in or attending at the school or any specified department thereof, other than boarders; and the local authority is to pay for every list so furnished the sum of 6*d.*, and, if the list contains not less than twenty-five names, a further sum of 6*d.* for every twenty-five names (*k*).

(iii.) *Treatment of Infected Persons.*

Removal to hospital of infected person.

888. Where any suitable hospital or place for the reception of the sick is provided within, or within a convenient distance of, any district of a local authority, any person who is suffering from a dangerous infectious disorder (*l*), and is without proper lodging or accommodation (*m*), or lodged in a room occupied by more than one family, or in any common lodging-house, or is on board any ship or vessel (*n*), may, on a certificate signed by a legally qualified medical practitioner (*o*), and with the consent of the superintending body of such hospital or place, be removed there at the cost of the local authority (*p*) by order of any justice or, in the case of a lodger in a common lodging-house, of the local authority, addressed to any constable or officer of the authority (*q*).

Detention of infected person.

889. Where the enactment is in force (*r*), any justice of the peace, upon proper cause shown to him, may make an order directing the

(*h*) See note (*e*), p. 448, *ante*; and see p. 364, *ante*.

(*i*) See note (*f*), p. 449, *ante*.

(*k*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 58. Failure to comply with the provision is punishable by a penalty not exceeding 40*s.* (*ibid.*). As to legal proceedings, see pp. 367 *et seq.*, *ante*; and, as to appeal to quarter sessions, see Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 7 (1); title LOCAL GOVERNMENT, Vol. XIX., pp. 387, 38

(*l*) See note (*h*), p. 449, *ante*.

(*m*) This refers not merely to the needs of the patient, but also to th danger which may be caused to others (*Warwick* v. *Graham*, [1899] 2 Q. B 191). But where the Public Health Acts Amendment Act, 1907 (7 Edw. c. 53), s. 65, is in force (see note (*e*), p. 448, *ante*; and see p. 364, *ante*) th provision in the text, *supra*, applies to all cases of persons suffering fro any dangerous infectious disease and being in or upon any house o premises where they cannot be effectually isolated so as to prevent th spread of the disease.

(*n*) The provisions of the Public Health Act, 1875 (38 & 39 Vict. c. 55 s. 124, are specifically applied to ships by the Public Health (Ships, etc Act, 1885 (48 & 49 Vict. c. 35), s. 2, Sched.; see note (*q*), p. 433, *ante*.

(*o*) That is, one who is registered under the Medical Acts; see tit MEDICINE AND PHARMACY, Vol. XX., p. 325. For form of certificate medical practitioner advising removal of infectious person, see Encycl pædia of Forms and Precedents, Vol. X., p. 405.

(*p*) Agreements for this purpose may be entered into under the Publ Health Act, 1875 (38 & 39 Vict. c. 55), s. 131; see pp. 433 *et seq.*, a For the "local authority," see p. 372, *ante*.

(*q*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 124. Disobedie e to or obstruction of the order is punishable by a penalty not exceedi 0 (*ibid.*); and see pp. 367 *et seq.*, *ante*. In proceedings for recovery of he penalty the order cannot be questioned (*R.* v. *Davey*, [1899] 2 Q. B. 1). For similar provisions in force in London, see Public Health (London) Ac 1891 (54 & 55 Vict. c. 76), s. 66 (1) (2).

(*r*) See note (*q*), p. 450, *ante*.

detention in a hospital for infectious disease, at the cost of the local authority (*s*), of any person therein suffering from any infectious disease (*s*) who would not, on leaving such hospital, be provided with lodging or accommodation in which proper precautions could be taken to prevent the spreading of the disorder by such person. Such order may be limited to some specific time, but any justice may enlarge such time as often as may appear to him to be necessary. Any officer of the local authority or inspector of police acting in the district, or any officer of the hospital, may take all necessary measures and do all necessary acts for enforcing the execution of any such order (*t*).

Removal of infected persons from ships.

890. A local authority may make regulations (to be approved by the Local Government Board and enforceable by penalties not exceeding 40*s.* (*u*)) for removing to and keeping in a hospital (*v*) persons brought within its district by any ship or boat who are infected with a dangerous infectious disorder (*w*).

Removal of persons to temporary accommodation.

891. The local authority may, where the enactment is in force (*x*), from time to time provide temporary shelter or house accommodation, with any necessary attendants (*a*), for any person who leaves a house (*b*) after any infectious disease has appeared therein (*c*). To any such temporary shelter or house accommodation so provided the local authority may, on the appearance of any

(*s*) See p. 445, *ante;* and see note (*q*), p. 450, *ante*.

(*t*) Infectious Disease (Prevention) Act, 1890 (53 & 54 Vict. c. 34), s. 12. For the similar provision in force in London, see Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 67.

(*u*) As to the recovery of penalties, see pp. 367 *et seq.*, *ante*.

(*v*) To which the local authority (see p. 372, *ante*) is entitled to remove patients; see preceding provision in the text, *supra*.

(*w*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 125, specifically applied to ships by the Public Health (Ships, etc.) Act, 1885 (48 & 49 Vict. c. 35), s. 2, Sched.; see note (*q*), p. 433, *ante*. As to "dangerous infectious disorder," see note (*h*), p. 449, *ante*. In the model regulations framed by the Local Government Board, the expression is defined to mean small-pox, diphtheria, membranous croup, scarlatina or scarlet fever, typhus fever, typhoid or enteric fever, relapsing fever and continued fever. In London, bye-laws on the same subject may be made by any sanitary authority (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 66 (3)). As to medical inspection of ships, see, further, title SHIPPING AND NAVIGATION.

(*x*) *I.e.*, the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53); see note (*e*), p. 448, *ante;* and see p. 364, *ante*.

(*a*) As to the provision of similar accommodation for members of the family in which infectious disease has appeared, see p. 459, *post*.

(*b*) Here the word "house" includes any tent, van, shed, or similar structure used for human habitation, or any boat lying in any canal or other water within the district of the local authority and used for the like purpose (Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 61 (3)); see, further, *ibid.*, s. 13; note (*g*), p. 401, *ante*.

(*c*) *Ibid.*, s. 61 (1). Where this provision is in force (see note (*e*), p. 448, *ante;* and see p. 364, *ante*), the local authority may exercise the powers of the Infectious Disease (Prevention) Act, 1890 (53 & 54 Vict. c. 34), s. 15 (see p. 459, *post*), without adoption, with the extension shown in the text, *supra*, and, for the purpose of providing shelter or house accommodation, may borrow under the Public Health Acts (Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 61 (1)); see pp. 382 *et seq.*, *ante*.

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infectious disease (*d*) in a house (*e*), and on the certificate of the medical officer, cause any person, who is not himself sick and who consents, or whose parent or guardian (where the person is a child) consents, to be removed (*f*). In the like case, on the like certificate, the local authority may cause any such person, who does not consent, to be so removed where two justices, on the application of the local authority and on being satisfied of the necessity of the removal, make an order for the removal, subject to such conditions, if any, as are imposed by the order. The removal must be effected, and the conditions of any order satisfied, without charge to the person removed or to the parent or guardian of that person (*f*).

Provision of nursing attendance.

892. A local authority may, where the enactment is in force (*g*), provide nurses for attendance on patients suffering from any infectious disease (*d*) who, owing to want of accommodation at the hospital or danger of infection, cannot be removed to the hospital, or in cases where removal to the hospital is likely to endanger the patients' health; and may charge reasonable sums for the services of such nurses (*h*).

(iv.) *Disinfection of Houses and Articles.*

Apparatus for disinfection.

893. Any local authority may provide a proper place (*i*), with all necessary apparatus and attendance, for the disinfection, free of charge, of infected bedding, clothing, or other articles (*j*).

Delivery of article for disinfection.

894. The authority, or its medical officer of health if generally empowered by it in that behalf, may, where the enactment is in force (*k*), by written notice require the owner of any infected article (*l*) to cause it to be delivered over, under a penalty not exceeding £10, to an officer of the authority for removal for disinfection (*m*).

(*d*) See note (*f*), p. 449, *ante*.

(*e*) See note (*b*), p. 455, *ante*.

(*f*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 61 (1). Disobedience or obstruction of an order is punishable by a penalty not exceeding £5 (*ibid.*, s. 61 (2)). As to legal proceedings, see pp. 367 *et seq.*, *ante*.

(*g*) *I.e.*, the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53); see note (*e*), p. 448, *ante*; and see p. 364, *ante*.

(*h*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 67.

(*i*) This may be in an adjoining district, with the consent of the local authority of that district (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 285). For the "local authority," see p. 372, *ante*.

(*j*) *Ibid.*, s. 122. In London the corresponding provision makes it obligatory on the sanitary authorities to provide such places, and they may combine for the purpose (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 59).

(*k*) *I.e.*, the Infectious Disease (Prevention) Act, 1890 (53 & 54 Vict. c. 34); see note (*q*), p. 450, *ante*.

(*l*) The words are "bedding, clothing, or other articles which have been exposed to the infection of any infectious disease" (Infectious Disease (Prevention) Act, 1890 (53 & 54 Vict. c. 34), s. 6).

(*m*) *Ibid.* The articles must be brought back and delivered to the owner free of charge, and he is to be compensated by the local authority if any of them suffer unnecessary damage. The compensation is recoverable in, and in case of dispute settled by, a court of summary jurisdiction

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Liability of outgoing occupiers to disinfect house or to give notice to owner.

895. Where the enactment is in force (*n*), every person who ceases to occupy any house, room, or part of a house in which any person has, within six weeks previously, been suffering from any infectious disease, without having it and all articles therein liable to retain infection disinfected to the satisfaction, as certified by him, of a registered medical practitioner, or without first giving to the owner of such house, room, or part of a house, notice of the previous existence of such disease, is liable to a penalty not exceeding £10 (*o*). Every person ceasing to occupy any house, room, or part of a house, who, on being questioned by the owner thereof, or by any person negotiating for the hire thereof, as to the fact of there having, within six weeks previously, been therein any person suffering from any infectious disease, knowingly makes a false answer is liable to a penalty not exceeding £10 (*o*).

False statements by persons letting infected houses.

896. Any person letting, or showing for the purpose of letting, for hire any house or part of a house, who, on being questioned by any person negotiating for the hire as to the fact of there being, or, within six weeks previously, having been therein any person suffering from a dangerous infectious disorder (*p*), knowingly makes a false answer, is liable to a penalty not exceeding £20, or to imprisonment with or without hard labour for not more than a month (*q*).

Letting house without previous disinfection.

897. Any person who knowingly lets for hire any house, room, or part of a house (*r*), in which any person has been suffering from any dangerous infectious disorder (*p*), without having it, and all articles therein liable to retain infection, disinfected to the satisfaction, as certified by him, of a legally qualified medical practitioner, is liable to a penalty not exceeding £20 (*s*).

(Infectious Disease (Prevention) Act, 1890 (53 & 54 Vict. c. 34), s. 6). In London the corresponding provision authorises removal for destruction or disinfection, subject to compensation (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 61). For further provisions as to the purification of filthy and dangerous articles, see p. 608, *post*. For forms of notice requiring the disinfection of articles, see Encyclopædia of Forms and Precedents, Vol. X., pp. 403, 409.

(*n*) See note (*q*), p. 450, *ante*.

(*o*) Infectious Disease (Prevention) Act, 1890 (53 & 54 Vict. c. 34), s. 7. Notice of this provision must be given to the occupier of any house in which the local authority is aware there is any infectious case (*ibid.*, s. 14). As to the infectious diseases to which these enactments apply, see pp. 445, 450, note (*q*), *ante*. For the similar provision in force in London, see Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 65. As to the liability of landlords for the habitable state of premises let by them, see title LANDLORD AND TENANT, Vol. XVIII., pp. 502—505; and see note (*f*), p. 528, *post*.

(*p*) See note (*h*), p. 449, *ante*.

(*q*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 129. Proceedings may be summary (*ibid.*, s. 251) or for a penalty only in the county court (*ibid.*, s. 261); and see pp. 367 *et seq.*, *ante*; titles COUNTY COURTS, Vol. VIII., p. 678; MAGISTRATES, Vol. XIX., pp. 589 *et seq.* As to the London provision, see the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 64, 117.

(*r*) Admitting entrants to a night shelter at one penny per head is not a letting within the provision (*Colclough* v. *Edwards* (1893), 57 J. P. 772).

(*s*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 128. The section applies to ships (Public Health (Ships, etc.) Act, 1885 (48 & 49 Vict. c. 35), s. 2, Sched.; see note (*q*), p. 433, *ante*. For the similar provision in force

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Cleansing and disinfecting of premises and articles therein.

898. If, where the enactment is in force (*t*), the medical officer of health, or any other legally qualified medical practitioner, certifies that the cleansing and disinfecting of any house, or part of a house, and of any articles therein likely to retain infection, or the destruction of those articles, would tend to prevent or check any dangerous infectious disease (*u*), the local authority (*v*) must serve notice on the master (*w*), or, where the house or part is unoccupied, on the owner (*a*) of the house or part, that such cleansing, disinfection or

in London, see Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 63. The penalty is recoverable summarily (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 251), or in the county court (*ibid.*, s. 261); and see pp. 367 *et seq.*, *ante*; titles COUNTY COURTS, Vol. VIII., p. 678; MAGISTRATES, Vol. XIX., pp. 589 *et seq.* As to the medical inspection of ships, see, further, title SHIPPING AND NAVIGATION. For the duties of innkeepers in this respect, see title INNS AND INNKEEPERS, Vol. XVII., p. 311.

(*t*) *I.e.*, the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 66; see note (*e*), p. 448, *ante*; and see p. 364, *ante*. The matter dealt with in the text, *supra*, forms also the subject of the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 120; and of the Infectious Disease (Prevention) Act, 1890 (53 & 54 Vict. c. 34), s. 5, which is in force where adopted (see note (*q*), p. 450, *ante*), and in that case repeals and supersedes the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 120. But neither of those provisions is superseded by the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 66, which is an additional provision. The three enactments differ in details: (1) the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 120, contemplates that the local authority will cleanse and disinfect only in default of the owner or occupier, whilst the other enactments are framed on the assumption that the local authority will do the work. The Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 120, and the Infectious Disease (Prevention) Act, 1890 (53 & 54 Vict. c. 34), s. 5, deal with cases of infection from "infectious disease," which for the purpose of the latter provision means any disease to which the Infectious Disease (Prevention) Act, 1890 (53 & 54 Vict. c. 34), applies (see note (*q*), p. 450, *ante*), and the expenses may be charged on the owner or occupier. The Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 66, is restricted to infection from any "dangerous infectious disease" (for definition see *ibid.*, s. 13; note (*h*), p. 449, *ante*), and provides that where the cleansing, disinfection or destruction is performed by officers of the local authority, it shall be at the cost of the authority; and see, as to destruction of bedding, p. 451, *ante*. The Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 120, applies to ships in the same manner as it does to houses, the master or other person in charge being deemed to be the occupier (Public Health (Ships, etc.) Act, 1885 (48 & 49 Vict. c. 35), s. 2, Sched.; see note (*q*), p. 433, *ante*); but in provincial port sanitary districts the enactment is superseded, and a modification of the Infectious Disease (Prevention) Act, 1890 (53 & 54 Vict. c. 34), s. 5, applies to ships; see Port Sanitary Authorities (Assignment of Powers) Order, 1912 (76 J. P. (Journal), p. 415); and see note (*f*), p. 459, *post*.

(*u*) As to "infectious disease," see pp. 445, 449, note (*f*), *ante*. The text applies to "dangerous infectious disease only," but all those specifically mentioned in the statutory definition may be dangerous; and see note (*t*), *supra*.

(*v*) See note (*c*), p. 451, *ante*.

(*w*) "Master" means the person in occupation of or having the charge, management, or control of the house or part of a house, and where the house is wholly let out in separate tenements, or is a lodging-house wholly let to lodgers, includes the person receiving the rent payable by the tenants or lodgers either on his own account or as the agent of another person (Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 66 (5)); and, as to a rent-collecting agent, see note (*r*), p. 447, *ante*. For forms of notice, see Encyclopædia of Forms and Precedents, Vol. X., pp. 403, 409.

(*a*) For the meaning of "owner," see note (*o*), p. 427, *ante*.

destruction will be done by the authority unless he (*b*) informs the authority within twenty-four hours that he will do so to the satisfaction of the medical officer or of any other legally qualified medical practitioner within a time fixed in the notice. If the master or owner does not so inform the authority, or, having informed it, does not do the work within the time fixed, or if he without any such notice gives his consent, the house, or part, and articles must be cleansed and disinfected, or the articles destroyed, by the officers and at the cost of the local authority under the superintendence of the medical officer (*c*). The local authority, for this purpose, may enter by day (*d*) on any premises (*e*). Compensation, recoverable summarily, is payable by the local authority for any unnecessary damage caused in disinfecting or for the destruction of any article (*f*).

Temporary accommodation for persons compelled to leave infected dwellings.

899. The local authority must, where the enactment is in force (*g*), from time to time provide, free of charge, temporary shelter or house accommodation, with any necessary attendants, for the members of any family in which any infectious disease has appeared, who have been compelled to leave their dwellings for the purpose of enabling such dwellings to be disinfected by the local authority (*h*).

(v.) *Cowsheds, Dairies, and Milkshops.*

(a) *Infectious Disease in Dairies etc.*

Notification by dairyman of infectious disease among his servants.

900. Every dairyman (*i*), where the enactment is in force (*k*), who supplies milk within the district of the local authority (*l*) from premises, whether within or beyond the district, must, under a penalty not exceeding 40*s*., notify to the medical officer all cases of infectious disease (*m*) among persons engaged in or in connection

(*b*) *I.e.*, the master or owner; see p. 458, *ante*.

(*c*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 66 (1), (2).

(*d*) That is, between 6 a.m. and 9 p.m. (*ibid.*, s. 66 (5)).

(*e*) *Ibid.*, s. 66 (3).

(*f*) *Ibid.*, s. 66 (4). The compensation would be recoverable as a civil debt (Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 35); see title MAGISTRATES, Vol. XIX., p. 609. Similar provisions are in force in London (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 60 (1), (2), (3), (5)). See further as to the purification of filthy or unwholesome houses, p. 608, *post*.

(*g*) See note (*q*), p. 450, *ante*.

(*h*) Infectious Disease (Prevention) Act, 1890 (53 & 54 Vict. c. 34), s. 15. As to the exercise of the powers of this provision, without adoption, see note (*c*), p. 455, *ante*. A similar enactment is in force in London (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 60 (4)). Sanitary authorities may borrow for the purpose (London County Council (General Powers) Act, 1896 (59 & 60 Vict. c. clxxxviii.), s. 32); see title METROPOLIS, Vol. XX., p. 448.

(*i*) This includes any cowkeeper, purveyor of milk, or occupier of a dairy within (unless otherwise expressed) the district of the local authority (Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 13).

(*k*) The provisions referred to in the text, *supra*, only apply where the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), ss. 53, 54, are in force in the district; see p. 364, *ante*. For other provisions, see the Dairies, Cowsheds and Milkshops Orders of 1885, 1886 and 1889; and see titles ANIMALS, Vol. I., pp. 433, 434; FOOD AND DRUGS, Vol. XV., pp. 63, 64.

(*l*) See note (*c*), p. 451, *ante*.

(*m*) See note (*f*), p. 449, *ante*.

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with his dairy (*n*), as soon as he becomes aware or has reason to suspect that such infectious disease exists (*o*).

List of sources of supply of milk.

901. If the medical officer of health certifies to the local authority that any person in the district is suffering from infectious disease attributable to milk supplied within the district, the local authority may require the dairyman supplying the milk to furnish, under a penalty not exceeding £5, and a daily penalty after conviction not exceeding 40*s*., to the medical officer, within a reasonable time fixed by the authority, a complete list (*p*) of all the farms, dairies, or places from which his supply of milk is derived or has been derived during the last six weeks (*q*). If the supply, or any part of it, is obtained through any other dairyman, the local authority may make a similar requisition upon that dairyman (*q*).

Inspection of dairies.

902. In places where the enactment is in force (*r*), a medical officer of health (*s*), having evidence that any person in the district is suffering from infectious disease attributable to milk supplied within the district from any dairy (*t*) situate within or without the district, or that the consumption of milk from such dairy is likely to cause infectious disease to any person residing in the district, may, if authorised by a justice's (*u*) order, inspect such dairy, and if accompanied by a veterinary inspector or some other properly qualified veterinary surgeon (*v*), may inspect the animals therein (*w*). If on such inspection the medical officer is of opinion that infectious disease is caused from consumption of the milk supplied from such dairy he must report to the local authority, and his report must be accompanied by any report (*x*) furnished to him by the veterinary inspector or surgeon (*w*).

(*n*) The term "dairy" includes any farm, farmhouse, cowshed, milk store, milkshop, or other place from which milk is supplied or in which milk is kept for the purposes of sale within (unless otherwise expressed) the district of the local authority (Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 13).

(*o*) *Ibid.*, s. 54.

(*p*) The local authority must pay 6*d*. for every twenty-five names in the list (*ibid.*, s. 53 (2)).

(*q*) *Ibid.*, s. 53 (1), (3).

(*r*) *I.e.*, where the Infectious Disease (Prevention) Act, 1890 (53 & 54 Vict. c. 34), has been adopted. As to the adoption, see note (*q*), p. 450, *ante*.

(*s*) This includes any person duly authorised to act temporarily as such medical officer (Infectious Disease (Prevention) Act, 1890 (53 & 54 Vict. c. 34), s. 2).

(*t*) See note (*n*), *supra*. In the Infectious Disease (Prevention) Act, 1890 (53 & 54 Vict. c. 34), "dairy" is defined in similar terms (*ibid.*, s. 2).

(*u*) The justice must have jurisdiction where the dairy is (*ibid.*, s. 4). For form of order, see Encyclopædia of Forms and Precedents, Vol. X., p. 344.

(*v*) That is, one whose name is in the register of veterinary surgeons; see Veterinary Surgeons Act, 1881 (44 & 45 Vict. c. 62); Veterinary Surgeons Amendment Act, 1900 (63 & 64 Vict. c. 24); title MEDICINE AND PHARMACY, Vol. XX., pp. 370 *et seq.*

(*w*) Infectious Disease (Prevention) Act, 1890 (53 & 54 Vict. c. 34), s. 4.

(*x*) For form of report, see Encyclopædia of Forms and Precedents, Vol. X., p. 345.

903. Thereupon the local authority may give notice to the dairyman (*a*) to appear before it within not less than twenty-four hours to show cause why an order should not be made requiring him not to supply any milk from such dairy within the district until such order has been withdrawn by the local authority, and if, in its opinion, he fails to show such cause, the local authority may make such order (*b*). The local authority must forthwith (*c*) give notice of the facts to the sanitary authority and county council, if any, of the district or county in which such dairy is situate, and also to the Local Government Board (*b*). An order must be forthwith (*c*) withdrawn on the local authority or the medical officer being satisfied that the milk supply has been changed, or that the cause of the infection has been removed (*b*).

Order prohibiting supply of milk.

Withdrawal.

(b) *Tuberculous Cows in London.*

904. Every dairyman (*d*) supplying milk within the Administrative County of London (*e*), who has in his dairy (*f*) any cow affected with or suspected of tuberculosis of the udder, must, under liability to a penalty on summary conviction (*g*) not exceeding 40*s.*, notify the fact to the medical officer of health (*h*).

Notice of tuberculous milch-cows.

905. Any person, the milk of the cows in whose dairy (*f*) is sold within the County of London, who, being aware that any cow in his dairy (*f*) is suffering from tuberculosis of the udder, keeps it in any

Isolation of tuberculous milch-cows.

(*a*) This includes any cowkeeper, purveyor of milk, or occupier of a dairy (Infectious Disease (Prevention) Act, 1890 (53 & 54 Vict. c. 34), s. 2); compare note (*i*), p. 459, *ante*.

(*b*) Infectious Disease (Prevention) Act, 1890 (53 & 54 Vict. c. 34), s. 4. No dairyman is liable to an action for a breach of contract due to an order of the local authority (*ibid.*). Proceedings for penalties (see note (*g*), p. 450, *ante*) must be taken before the justices having jurisdiction where the dairy is situate. Similar provisions are contained in the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 71. For forms of orders and notices, see Encyclopædia of Forms and Precedents, Vol. X., pp. 346 *et seq.*

(*c*) See note (*u*), p. 448, *ante*.

(*d*) This means any cowkeeper, purveyor of milk, or occupier of a dairy (London County Council (General Powers) Act, 1907 (7 Edw. 7, c. clxxv.), s. 3 (1)); compare note (*a*), *supra*.

(*e*) See title METROPOLIS, Vol. XX., p. 393.

(*f*) This means any farm, farmhouse, cowshed, milk store, milkshop, or other place from which milk is supplied, or in which milk is kept for purposes of sale (London County Council (General Powers) Act, 1907 (7 Edw. 7, c. clxxv.), s. 3 (1)); compare note (*n*), p. 460, *ante*.

(*g*) Before a petty sessional court having jurisdiction in the place where the dairy is situate (London County Council (General Powers) Act, 1907 (7 Edw. 7, c. clxxv.), s. 32); and see title MAGISTRATES, Vol. XIX., p. 567.

(*h*) London County Council (General Powers) Act, 1907 (7 Edw. 7, c. clxxv.), s. 30. *Ibid.*, Part IV. (Milk Supply (Tuberculosis)), comprising ss. 24—35, came into operation one calendar month after publication of its provisions by the London County Council and the Corporation of the City of London (*ibid.*, s. 31). The London County Council and the Corporation of the City of London and their medical officers can exercise powers concurrently in the City, and carry into effect agreed arrangements for so doing (*ibid.*, s. 35). Penalties are payable to the London County Council (*ibid.*, s. 80). There is a saving for other powers as to milk (*ibid.*, s. 81). As to metropolitan medical officers, see title METROPOLIS, Vol. XX., p. 466; and see *ibid.*, p. 409.

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field, shed, or other premises, along with other cows in milk, is liable on summary conviction (*i*) to a penalty not exceeding £5 (*k*).

Inspection of milch-cows and sampling of milk.

906. The medical officer (*l*), or any person with his written authority may, if accompanied by a properly qualified veterinary surgeon (*m*), at all reasonable hours, enter any dairy (*n*) from which milk is sold within the County of London, and inspect the cows (*o*), and, if he suspects any cow is suffering from tuberculosis of the udder, he may require it to be milked and take a sample (*p*). If the dairy is situate in a place outside the County of London, he must obtain an order from a justice having jurisdiction in the place authorising him to enter and inspect, and, if it will not involve delay, give notice of his intention to enter and inspect to the medical officer of the county in which the dairy is situate (*p*).

Slaughter of tuberculous cows.

907. If a veterinary surgeon appointed by the London County Council (*q*) suspects on any inspection that a cow in any dairy (*n*) in the County of London (elsewhere than in the City (*r*)) is suffering from tuberculosis of the udder, he may cause such cow to be removed from the dairy (*n*) forthwith (*s*). The full value of the cow must be agreed upon between the London County Council and the owner, and in default of agreement must be ascertained by a valuer appointed by the Board of Agriculture and Fisheries (*s*). As soon as the value is settled, the cow must be slaughtered and the carcase examined by a properly qualified (*m*) and, if so required by the owner, independent veterinary surgeon to ascertain if it was in fact suffering from tuberculosis of the udder (*t*).

(*i*) See note (*g*), p. 461, *ante*.

(*k*) London County Council (General Powers) Act, 1907 (7 Edw. 7, c. clxxv.), s. 29.

(*l*) Of the administrative county of London or of the City of London and his duly authorised deputy (*ibid.*, ss. 3 (1), 35).

(*m*) See note (*v*), p. 460, *ante*.

(*n*) See note (*f*), p. 461, *ante*.

(*o*) The dairyman and his employees must, under a penalty on summary conviction (see note (*g*), p. 461, *ante*) not exceeding £5, afford reasonable assistance (London County Council (General Powers) Act, 1907 (7 Edw. 7, c. clxxv.), s. 25 (4)). Expenses, which are treated as general (*ibid.*, s. 86), may be incurred by the London County Council and the City Corporation in the application by the surgeon of the tuberculin or other reasonable test for tuberculosis (*ibid.*, ss. 33, 86); but no such test is to be applied except with the previous consent of the owner of any cow (*ibid.*, s. 33).

(*p*) *Ibid.*, s. 25 (1), (3).

(*q*) "For the purposes of the Dairies, Cowsheds and Milkshops Order, 1899" (London County Council (General Powers) Act, 1904 (4 Edw. 7, c. ccxliv.), s. 27 (1)).

(*r*) See title METROPOLIS, Vol. XX., p. 400.

(*s*) London County Council (General Powers) Act, 1904 (4 Edw. 7, c. ccxliv.), s. 27. A person obstructing the removal is liable on summary conviction to a fine not exceeding £5 (London County Council (General Powers) Act, 1904 (4 Edw. 7, c. ccxliv.), s. 27 (8)). As to procedure before courts of summary jurisdiction, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*

(*t*) London County Council (General Powers) Act, 1904 (4 Edw. 7, c. ccxliv.), s. 27. Provision is made for payment by the London County Council of compensation to the owner if the cow is found to be not in fact suffering from tuberculosis of the udder, and of proportionately less compensation if it is found to be so suffering (London County Council

(c) *Tuberculous Milk in London.*

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Milk from cows suffering from tuberculous udder.

908. Every person who knowingly sells, or suffers to be sold, or used for human consumption, within the Administrative County of London, the milk of any cow suffering from tuberculosis of the udder, is liable on summary conviction (*u*) to a penalty not exceeding £10 (*v*).

Sampling of milk.

909. The medical officer (*a*), or any person with his written authority, may, on any railway premises or elsewhere, take samples (*b*) of milk produced or sold or intended for sale within the County of London. The power can only be exercised outside the County of London under the authority of an order of a justice having jurisdiction in the place where any sample is to be taken (*c*).

Order prohibiting supply of milk.

910. If the medical officer (*a*) is of opinion that tuberculosis is, or is likely to be, caused to residents in the County of London from consumption of the milk supplied from any dairy (*d*) or any cow therein, he must report to the London County Council (*e*) or to the Corporation of the City of London, and forward a report from the veterinary surgeon (*f*), and the Council or Corporation may serve a notice on the dairyman (*g*) to appear before it, within not less than twenty-four hours, to show cause against the making of an order requiring him, until its withdrawal (*h*), not to supply within the County of London milk from the dairy or any specified cow or

(General Powers) Act, 1904 (4 Edw. 7, c. ccxliv.), s. 27 (4), (5)). The expenses of the London County Council are defrayed as payments for special county purposes (*ibid.*, s. 27 (9)); and see title METROPOLIS, Vol. XX., p. 450.

(*u*) Before a petty sessional court having jurisdiction in the place where the dairy is situate or the offence is committed (London County Council (General Powers) Act, 1907 (7 Edw. 7, c. clxxv.), s. 32); and see title MAGISTRATES, Vol. XIX., p. 567.

(*v*) London County Council (General Powers) Act, 1907 (7 Edw. 7, c. clxxv.), s. 28; see note (*h*), p. 461, *ante*. As to proceedings in courts of summary jurisdiction, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.* As to the registration of milk sellers, see title FOOD AND DRUGS, pp. 63, 64.

(*a*) Of the Administrative County of London or of the City of London and his duly authorised deputy (London County Council (General Powers) Act, 1907 (7 Edw. 7, c. clxxv.), ss. 3 (1), 35).

(*b*) As to taking samples of milk from cows, see p. 462, *ante*.

(*c*) London County Council (General Powers) Act, 1907 (7 Edw. 7, c. clxxv.), s. 24 (1), (3). The London County Council may, subject to conditions, authorise the medical officer of any sanitary authority (namely, the Corporation of the City or any metropolitan borough council (*ibid.*, s. 3 (1)) to exercise within its district, in substitution for the county medical officer, this power of taking samples of milk for examination by the Council (*ibid.*, s. 24 (2)). As to metropolitan medical officers, see title METROPOLIS, Vol. XX., p. 466.

(*d*) See note (*f*), p. 461, *ante*.

(*e*) The Council may exercise its powers by a committee (London County Council (General Powers) Act, 1907 (7 Edw. 7, c. clxxv.), s. 34).

(*f*) As to entry for the purpose by such veterinary surgeon, see p. 462, *ante*.

(*g*) See note (*d*), p. 461, *ante*. For form of notice, compare Encyclopædia of Forms and Precedents, Vol. X., p. 346.

(*h*) See p. 464, *post*.

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cows (*i*). If in the opinion of the Council or Corporation the dairyman (*k*) fails to show cause, it may make the order, and must forthwith (*l*) serve notice of the facts on the Local Government Board, and, if the dairy is situate outside the County of London, on the council of the county and of the borough or district in which it is situate (*i*). A person contravening the order (*m*) is liable to a penalty not exceeding £5, and a daily penalty after conviction (*n*) not exceeding 40*s*. (*i*). An order must be forthwith (*l*) withdrawn, on the Council or Corporation or its medical officer being satisfied that the milk supply has been changed, or that it is not likely to cause tuberculosis to residents in the County of London (*o*).

Penalties.

Withdrawal.

(vi.) *Epidemic and Endemic Diseases.*

(a) *Of an Ordinary Character.*

Regulations as to cholera and other epidemic etc. diseases.

911. The Local Government Board may make regulations with a view to the treatment of persons affected with cholera or any other epidemic, endemic, or infectious disease (*p*), and the prevention of the spread of cholera and such other diseases, as well on the seas, rivers, and waters of the United Kingdom, and on the high seas within three miles of the coast thereof, as on land (*q*).

(*i*) London County Council (General Powers) Act, 1907 (7 Edw. 7, c. clxxv.), s. 25.

(*k*) The Council or Corporation may repay to the dairyman the whole or part of his reasonable expenses in appearing (London County Council (General Powers) Act, 1907 (7 Edw. 7, c. clxxv.), s. 25 (9)). Expenses are to be treated as general (*ibid.*, s. 86) ; and see title METROPOLIS, Vol. XX., p. 450.

(*l*) See note (*u*), p. 448, *ante*.

(*m*) A dairyman is not liable to an action for breach of contract if the breach is due to such an order (London County Council (General Powers) Act, 1907 (7 Edw. 7, c. clxxv.), s. 25 (8)) ; compare note (*b*), p. 461, *ante*.

(*n*) See note (*u*), p. 463, *ante*.

(*o*) London County Council (General Powers) Act, 1907 (7 Edw. 7, c. clxxv.), s. 25. The dairyman may appeal against an order or the refusal to withdraw it (1) if the dairy is in the County but not in the City of London, to the metropolitan police court of the district ; (2) if it is in the City of London, to the Lord Mayor or an alderman sitting at the Mansion House or Guildhall ; (c) if it is outside the County of London, either to a metropolitan police court or the Board of Agriculture and Fisheries (*ibid.*, s. 26). A dairyman who is not himself in default is entitled to compensation if an order is made without due cause, or there is an unreasonable refusal to withdraw it (*ibid.*, s. 27).

(*p*) There is no definition of these terms in the Public Health Act, 187 (38 & 39 Vict. c. 55) ; but for a definition of "infectious disease," compar p. 445, *ante*.

(*q*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 130. The Loc Government Board may declare by what authorities the regulations are t be enforced and executed. When made, the regulations have to be pub lished in the *London Gazette*, which is conclusive evidence of them (*ibid.*) The provisions apply to London (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 113, Sched. I.). By an order dated 19th September, 190 (Stat. R. & O. Rev., Vol. XI., Public Health, England, p. 5), plague wa made a notifiable disease for the purposes of the Infectious Disease (Notifi cation) Act, 1889 (52 & 53 Vict. c. 72), and the Public Health (London) Act 1891 (54 & 55 Vict. c. 76), s. 55 ; see pp. 445 *et seq.*, *ante*. An order relating t the destruction of rats was made on the 10th November, 1910 (Stat. R. & O

Regulations as to infected ships made by Local Government Board.

912. The Local Government Board may provide for the enforcement and execution of such regulations by the officers of Customs (*r*) and the officers and men employed in the Coastguard (*s*), as well as by other authorities and officers, and may provide for (1) the signals to be hoisted by vessels having any case of epidemic, endemic, or infectious disease on board; (2) the questions to be answered by masters, pilots, and other persons on board any vessel as to cases of such disease on board during the voyage or on the arrival of the vessel; (3) the detention of vessels and of persons on board vessels; and (4) the duties to be performed in cases of such disease by masters, pilots, and other persons on board vessels (*t*).

Nature of regulations to be made by the Local Government Board after consultation with the Board of Trade.

913. The power (*u*) conferred on the Local Government Board includes the power of making regulations, after consultation with the Board of Trade, authorising measures to be taken for the prevention of danger to public health arising from vessels arriving at any port, and for the prevention of the conveyance of infection by means of any vessel sailing from any port, so far as may be necessary or expedient for the purpose of carrying out any treaty, convention, arrangement, or engagement with any foreign country, and the regulations may in particular provide for the recovery of any expenses incurred in disinfection and of any charges authorised to be made by the regulations for the purpose of those regulations or any services performed thereunder, and also for the execution and performance of any powers and duties under the regulations by local authorities (*v*).

1910, p. 632), and orders requiring the notification to medical officers of health of cases of pulmonary tuberculosis by poor law officers (Public Health (Tuberculosis) Regulations, 1908, Stat. R. & O., 1908, p. 779) by the medical officers of hospitals (Public Health (Tuberculosis in Hospitals) Regulations, 1911, Stat. R. & O., 1911, p. 352), and by medical practitioners, including school medical inspectors (Public Health (Tuberculosis) Regulations, 1911, Stat. R. & O., 1911, p. 357), were made on the 18th December, 1908, 22nd March, 1911, and 15th November, 1911, respectively. The last two orders contain provisions for advice and assistance to patients. As to the notification and treatment of cerebro-spinal fever and acute poliomyelitis, see Order of Local Government Board dated 15th August, 1912 (76 J. P. Journal, p. 402); see note (*l*), p. 446, *ante*.

(*r*) As to officers of Customs, see title REVENUE.

(*s*) As to the Coastguard, see titles ROYAL FORCES; SHIPPING AND NAVIGATION.

(*t*) Public Health Act, 1896 (59 & 60 Vict. c. 19), ss. 1, 5. The consent of the Commissioners of Customs, the Admiralty, and the Board of Trade, so far as the regulations apply to Customs officers, the Coastguard and signals, is required. An offence is punishable by a penalty not exceeding £100, and £50 for each day of continuance, and the penalty, if not recovered under the Public Health Acts (see pp. 367 *et seq.*, *ante*), is recoverable by action on behalf of the Crown in the High Court (Public Health Act, 1896 (59 & 60 Vict. c. 19), ss. 1, 5). *Ibid.*, s. 6 and Sched., repealed the Quarantine Act, 1825 (6 Geo. 4, c. 78), and other enactments relating to quarantine. As to medical inspection of ships, see, further, title SHIPPING AND NAVIGATION.

(*u*) See the text, *supra*.

(*v*) Public Health Act, 1904 (4 Edw. 7, c. 16). Under the several provisions mentioned in the text, *supra*, three orders have been issued, dated 9th September, 1907, relating respectively to ships arriving from foreign ports infected with cholera, yellow fever, or plague (Stat. R. & O., 1907, p. 924), outward-bound ships from a cholera or plague-infected area

SECT. 4. Care of the Sick, and Preventive Measures.

Examination of infected incoming ships.

914. The Local Government Board may by order require that no person on board any home-coming ship from, or having touched at, any place abroad where yellow fever or other highly infectious distemper prevails shall, under a penalty not exceeding £100 (*a*), land before the state of health of the persons on board has been ascertained on examination by the proper officer of Customs, and before he has given permission to land (*b*). The master, pilot, or person in charge of the ship must, under a penalty not exceeding £100 (*a*), on arrival at the place of examination, hoist and continue such signal as shall be directed by the order, until given permission by the proper officer to haul it down (*b*).

(b) *Of a Formidable Character.*

Regulations of Local Government Board against spread of disease.

915. Whenever any part of England is threatened with or affected by any formidable epidemic, endemic, or infectious disease (*c*), the Local Government Board may make regulations (*d*) for the speedy interment of the dead; house to house visitation; the provision of medical aid and hospital accommodation; the promotion of cleansing, ventilation, and disinfection; and for guarding against the spread of disease; and may by order declare where the regulations shall be in force and for what period, and apply them to any vessels, whether on inland waters or on arms or parts of the sea within the jurisdiction of the Admiralty (*e*).

(Stat. R. & O., 1907, p. 944), and coasting ships within such an area (Stat. R. & O. 1907, p. 939). As to the general liability of the master of a ship for the safety of his crew or passengers, see title SHIPPING AND NAVIGATION; and as to harbour authorities, see, further, titles SHIPPING AND NAVIGATION; WATERS AND WATERCOURSES.

(*a*) Recoverable summarily (Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 234); see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.* In default of payment, imprisonment not exceeding six months may be imposed.

(*b*) Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 234; Public Health Act, 1896 (59 & 60 Vict. c. 19), s. 2.

(*c*) There is no definition of these terms in the Public Health Act, 1875 (38 & 39 Vict. c. 55); but compare p. 445, *ante*.

(*d*) The regulations and orders have to be published in the *London Gazette*, which is conclusive evidence of them (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 135; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 113, Sched. I.). No regulations are in force. The provisions of the Public Health Act, 1896 (59 & 60 Vict. c. 19), and the Public Health Act, 1904 (4 Edw. 7, c. 16), referred to on p. 465, *ante*, and in the text, *supra*, apply also to such regulations and orders. The amount expended by any sanitary authority in London in providing any building for the reception of patients or other persons is, to such extent as may be determined by the Local Government Board, together with two-thirds of the salaries of any officers or servants employed therein, to be repaid out of the Metropolitan Common Poor Fund (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 87); see titles METROPOLIS, Vol. XX., p. 415; POOR LAW, Vol. XXII., p. 550. The Local Government Board may assign to the London County Council any powers and duties under the Epidemic Regulations, and by order assign to that Council any powers and duties of a sanitary authority in default under the regulations (London County Council (General Powers) Act, 1893 (56 & 57 Vict. c. ccxxi.), s. 13).

(*e*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 134; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 113, Sched. I. As to the jurisdiction of the Admiralty, see titles CONSTITUTIONAL LAW, Vol. VI., p. 450; *ibid.*, Vol. VII., p. 90; ROYAL FORCES; SHIPPING AND NAVIGATION.

Execution of regulations by local authority.

916. The local authority in any part of whose district regulations are declared to be in force must superintend and see to their execution, and for that purpose, and for mitigating any such disease, must appoint and pay such medical or other officers or persons, and do and provide what may be necessary (*f*). The local authority and their officers may enter on any premises (*g*) or vessel for such purpose (*h*), and may prosecute for wilful violation or neglect of any regulations (*i*).

Borrowing for purposes of epidemic regulations.

917. For the purposes of the regulations, a local authority may borrow, and the Public Works Loans Commissioners (*j*) may lend, as if such purposes were works under the Public Health Acts (*k*); and any such loans may be made forthwith and without any preliminary public notice or inquiry (*l*), if it appears to the Local Government Board desirable for the prompt and effective execution of such regulations (*m*).

Combination of local authorities.

918. The Local Government Board may by order authorise or require two or more local authorities to act together for the purposes of the provisions as to epidemic diseases (*n*).

Charges of poor law officers for attendance on board vessels.

919. Whenever in compliance with any regulations any poor law medical officer (*o*) performs any medical service on board any vessels, he is entitled to charge extra for such service at the general rate of his allowance for poor law services, and such charge is payable by the captain on behalf of the owners of the vessel, together with any reasonable expenses for the treatment of the sick (*p*). Where such services are rendered by any other medical

(*f*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 136; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 82 (1). The Metropolitan Asylum Managers (see title POOR LAW, Vol. XXII., p. 552) may, by the regulations, have the powers and duties of a sanitary authority assigned to them (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 85). As to the London County Council being empowered to act in place of a defaulting sanitary authority, see note (*d*), p. 466, *ante*.

(*g*) This includes messuages, buildings, lands, and hereditaments of any tenure (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 4; and see Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 141).

(*h*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 137; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 82 (3).

(*i*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 136; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 82 (2). Offenders against the regulations are liable to a penalty not exceeding £5 (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 140; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 113, Sched. I.). As to its recovery, see pp. 367 *et seq.*, *ante*.

(*j*) See title MONEY AND MONEY-LENDING, Vol. XXI., pp. 58 *et seq.*

(*k*) For a list of the Public Health Acts, see note (*a*), p. 361, *ante*; and see p. 384, *ante*.

(*l*) See pp. 375, 383, *ante*.

(*m*) Epidemic and other Diseases Prevention Act, 1883 (46 & 47 Vict. c. 59), s. 2.

(*n*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 139; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 84.

(*o*) See title POOR LAW, Vol. XXII., p. 543, note (*l*).

(*p*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 138; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 83. As to the general liability of the master of a ship for the safety of his crew and passengers, see title SHIPPING AND NAVIGATION.

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practitioner, he is entitled to be paid charges for them by the captain, with extra remuneration on account of distance, at the same rate as those he receives from private patients of the same class, and any dispute as to charges may, if they do not exceed £20, be determined by a court of summary jurisdiction (*q*).

SUB-SECT. 3.—*Medicines.*

Temporary supply to poorer inhabitants.

920. Any local authority (*r*) may, with the sanction of the Local Government Board, itself provide, or contract with any person to provide, a temporary supply of medicine and medical assistance for the poorer inhabitants of their district (*s*).

SUB-SECT. 4.—*Vaccination* (*t*).

(i.) *Central Administration.*

Local Government Board as the central authority.

921. The Local Government Board is the central authority with respect to vaccination, having succeeded to all the powers and duties vested by statute in the Poor Law Board and the Privy Council (*u*), and its control over the administration is of a far-reaching character.

General powers as to rules, orders, and regulations.

922. The Local Government Board has the same powers with respect to guardians and vaccination officers in matters relating to vaccination as it has with respect to guardians and officers of guardians in matters relating to the relief of the poor, and may make rules, orders, and regulations accordingly (*a*). The Board may thereby prescribe the duties of guardians and their officers in relation to the institution and conduct of the proceedings to be taken for enforcing the provisions of the Vaccination Acts (*b*), and the payment

(*q*) As to courts of summary jurisdiction, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*

(*r*) See p. 372, *ante.*

(*s*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 133; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 77. The provisions apply also to ships; see note (*q*), p. 433, *ante.* For form of agreement, see Encyclopædia of Forms and Precedents, Vol. X., p. 431. As to the treatment which may be provided for insured persons suffering from tuberculosis, see p. 445, *ante.*

(*t*) The law relating to vaccination is contained in the Vaccination Acts, 1867 (30 & 31 Vict. c. 84), 1871 (34 & 35 Vict. c. 98), 1874 (37 & 38 Vict. c. 75), 1898 (61 & 62 Vict. c. 49), and 1907 (7 Edw. 7, c. 31). These Acts are to be construed together as one Act, and may be cited collectively as the Vaccination Acts, 1867 to 1907 (Vaccination Acts, 1898 (61 & 62 Vict. c. 49), s. 10 (3); 1907 (7 Edw. 7, c. 31), ss. 1, 3). In this sub-section of the title they are frequently referred to as "the Vaccination Acts." The Vaccination Act, 1898 (61 & 62 Vict. c. 49), was limited to remain in force until the 1st January, 1904 (Vaccination Act, 1898 (61 & 62 Vict. c. 49), s. 10 (2)), but has since been yearly continued by the annual Expiring Laws Continuance Acts. It is now continued until the 31st December, 1912; see Expiring Laws Continuance Act, 1911 (1 & 2 Geo. 5, c. 22). Words used in the Vaccination Acts are to be construed, except where inconsistency would ensue from such construction, in the same manner as in the Acts relating to the relief of the poor (Vaccination Act of 1867 (30 & 31 Vict. c. 84), s. 35); as to which, see title POOR LAW, Vol. XXII., pp. 521 *et seq.*

(*u*) Local Government Board Act, 1871 (34 & 35 Vict. c. 70), ss. 2, 7, Sched., Part II.; Vaccination Act, 1871 (34 & 35 Vict. c. 98), s. 16.

(*a*) Vaccination Act, 1871 (34 & 35 Vict. c. 98), s. 5.

(*b*) As to the Vaccination Acts, see note (*t*), *supra.*

of the costs and expenses relating thereto (*c*); and all enactments relating to such powers, and to such orders, rules, and regulations, apply *mutatis mutandis* (*d*).

Efficient performance of vaccination.

The Local Government Board also makes rules and regulations with respect to the duties and remuneration of public vaccinators, whether under contracts made before or after the 12th August, 1898 (*e*), with respect to the efficient performance of vaccination and the provision and supply of vaccine lymph by the public vaccinator (*f*), and with respect to the revaccination of persons who may apply to be revaccinated (*g*), and may, by order, from time to time repeal, alter, and add to the statutory forms (*h*). The Board must from time to time frame, provide, and distribute appropriate books and forms for the use of vaccination officers, public vaccinators, and medical practitioners under the Vaccination Acts (*i*).

Inquiries and application of national expenditure.

The Board may cause inquiries to be made relating to the observance of the regulations and to the execution of the Vaccination Acts (*j*), and must direct how any money provided by Parliament for defraying the expenses of the national vaccine establishment, or otherwise providing for the supply of vaccine lymph, shall be applied (*k*).

Principal order.

The principal order made under these various provisions by the Board, which rescinded all previous orders, has been amended by subsequent orders (*l*).

(ii.) *Local Administration.*

(a) *Guardians of the Poor.*

Appointment of officers and supervision by guardians.

923. The guardians of the poor are entrusted with the general administration of the Vaccination Acts (*m*) within their union or parish, which has to be divided by them into suitable districts for

(*c*) Vaccination Act, 1874 (37 & 38 Vict. c. 75), s. 1.
(*d*) Vaccination Act, 1871 (34 & 35 Vict. c. 98), s. 5.
(*e*) Vaccination Act, 1898 (61 & 62 Vict. c. 49), s. 6.
(*f*) Vaccination Act of 1867 (30 & 31 Vict. c. 84), s. 4.
(*g*) *Ibid.*, s. 8.
(*h*) Vaccination Act, 1871 (34 & 35 Vict. c. 98), ss. 15, 16. The statutory forms now in use were prescribed by the Orders of 1898 and 1907, referred to in note (*l*), *infra*.
(*i*) Vaccination Act, 1871 (34 & 35 Vict. c. 98), s. 5.
(*j*) As to the Vaccination Acts, see note (*t*), p. 468, *ante*.
(*k*) Vaccination Act of 1867 (30 & 31 Vict. c. 84), s. 4. The Local Government Board maintain the Government lymph establishment, from which glycerinated calf lymph is supplied to public vaccinators and certain educational vaccination stations.
(*l*) The principal order is the Vaccination Order, 1898, dated 18th October, 1898 (Stat. R. & O. Rev., Vol. XIII., Vaccination, England, p. 1); and the amending orders are the Vaccination Order, 1899, dated 19th June, 1899 (Stat. R. & O. Rev., Vol. XIII., Vaccination, England, p. 35), the Vaccination Order, 1907, dated 21st May, 1907 (Stat. R. & O., 1907, p. 1052), the Vaccination Order (No. II.), 1907, dated 21st December, 1907 (Stat. R. & O., 1907, p. 1064), the Vaccination Order, 1910, dated 27th January, 1910 (Stat. R. & O., 1910, p. 843); the Vaccination Order, 1898, Amendment Order, 1911 (Stat. R. & O., 1911, p. 449).
(*m*) A sanitary authority has not sufficient legal interest to entitle it to a mandamus to compel the guardians to enforce generally the Vaccination Acts (*R.* v. *Lewisham Union*, [1897] 1 Q. B. 498). As to the interest of a ratepayer and resident, see *R.* v. *Mile End Old Town Guardians* (1903),

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the purpose; but the duties of the public vaccinators and vaccination officers whom the guardians appoint are determined by statute and the orders of the central authority, and must be carried out apart from any direction of the guardians. The guardians, however, must see that a vaccination officer duly performs his duties, and in case of his continued neglect must report it to the Local Government Board (*n*).

Payment of expenses.

924. The guardians pay the fees of public vaccinators (*o*), vaccination officers (*p*), and registrars of births and deaths (*q*); the remuneration of temporary assistants to, and substitutes for, vaccination officers (*r*); and also the costs and expenses of vaccination officers in enforcing the Vaccination Acts (*s*). They may pay all reasonable expenses incurred by them in causing notices to be printed and circulated as to the provisions of the Vaccination Acts (*s*), and in and about inquiries and reports as to the state of small-pox or vaccination in their union or parish, and in taking measures to prevent the spread of small-pox and to promote vaccination upon any actual or expected outbreak of that disease (*t*).

Payment of charges incurred by guardians.

925. The charges in respect of vaccinations incurred by the guardians of a union outside the administrative County of London are payable out of the common fund (*a*); and those incurred by the guardians of a parish out of the poor rate (*b*). In London the expenses of the guardians are payable, with the approval of the Local Government Board, out of the common poor fund (*c*).

(b) *Vaccination Districts.*

Vaccination districts.

926. Unless their area is so limited as not to require subdivision for the purposes of vaccination, the guardians must divide it into vaccination districts (*d*). They may alter these districts when requisite, and must consolidate or alter them if required by an order of the Local Government Board (*e*), to whom any divisions, consolidations, or alterations must be reported for approval (*d*).

Notice of alteration in districts.

When the guardians make any alteration in a vaccination

Local Government Chronicle, p. 509. For the position of guardians generally, see title POOR LAW, Vol. XXII., pp. 530 *et seq.*

(*n*) Vaccination Order, 1898, art. 28.

(*o*) See p. 472, *post.*

(*p*) See p. 474, *post.*

(*q*) As to giving notices to parents and as to the monthly lists of births and deaths of children under twelve months which the registrar transmits to the vaccination officer, see title REGISTRATION OF BIRTHS, MARRIAGES, AND DEATHS.

(*r*) See notes (*c*), (*n*), p. 474, *post.*

(*s*) As to the Vaccination Acts, see note (*t*), p. 468, *ante;* and as to their enforcement, see p. 480, *post.*

(*t*) Vaccination Act of 1867 (30 & 31 Vict. c. 84), s. 28.

(*a*) Union Chargeability Act, 1865 (28 & 29 Vict. c. 79), s. 1; and see title POOR LAW, Vol. XXII., p. 549.

(*b*) As to the poor rate, see title RATES AND RATING.

(*c*) Metropolitan Poor Act, 1867 (30 & 31 Vict. c. 6), s. 69 (7); Metropolitan Poor Amendment Act, 1869 (32 & 33 Vict. c. 63), s. 18; see titles METROPOLIS, Vol. XX., p. 415; POOR LAW, Vol. XXII., p. 550.

(*d*) Vaccination Act of 1867 (30 & 31 Vict. c. 84), ss. 2, 3.

(*e*) As successor to the Poor Law Board; see Local Government Board Act, 1871 (34 & 35 Vict. c. 70), ss. 2, 7.

district, or otherwise in the local arrangements for vaccination, they must give public notice of such alteration by printed papers affixed in the districts affected for one calendar month prior to the alteration taking effect (*f*).

Districts of vaccination officers.

927. Unions or parishes may also be divided into districts for the purpose of the duties of vaccination officers (*g*), so, however, that a district of one vaccination officer must, unless the Local Government Board otherwise directs, coincide either with a vaccination district or districts, or with a district or districts of a registrar of births and deaths (*h*).

(c) *Public Vaccinators.*

Appointment by guardians.

928. The guardians must enter into a contract with some duly registered (*i*) medical practitioner for the vaccination of all persons resident within each vaccination district, and such medical practitioner is termed the "public vaccinator" of the district (*k*). The duty of the guardians to appoint such an officer may be enforced by mandamus (*l*).

Qualifications.

No person can be appointed a public vaccinator, or act as a deputy for a public vaccinator, who does not possess the qualification prescribed by the Local Government Board (*m*), except when the Board upon sufficient cause sanctions any departure from its regulations (*n*).

Conditions of contract with public vaccinator.

929. The guardians must, with the consent of the Local Government Board, make stipulations and conditions in the

(*f*) Vaccination Act of 1867 (30 & 31 Vict. c. 84), s. 13.

(*g*) See p. 473, *post*.

(*h*) Vaccination Act, 1871 (34 & 35 Vict. c. 98), s. 5. The Local Government Board considers that a vaccination officer's district should coincide with one or more registration sub-districts, as to which see title REGISTRATION OF BIRTHS, MARRIAGES, AND DEATHS.

(*i*) That is, one who is registered under the Medical Acts; see the Medical Act (21 & 22 Vict. c. 90), s. 34. No certificate required by any Act from a medical practitioner is valid unless the person signing it is so registered (*ibid.*, s. 37). A person holding a foreign medical degree not registered in England is not a medical practitioner for the purposes of the Vaccination Acts (*Cromack* v. *Brennand* (1873), 37 J. P. 276). Persons holding certain colonial and foreign diplomas are now registrable; see the Medical Act, 1886 (49 & 50 Vict. c. 48), ss. 11—18; title MEDICINE AND PHARMACY, Vol. XX., pp. 325, 326.

(*k*) Vaccination Act of 1867 (30 & 31 Vict. c. 84), s. 3. A public vaccinator is not the servant of the guardians and is not entitled to superannuation as such under the Poor Law Officers' Superannuation Act, 1896 (59 & 60 Vict. c. 50), s. 2 (as to which see title POOR LAW, Vol. XXII., p. 546) (*Lawson* v. *Marlborough Union*, [1912] 2 Ch. 154). For form of agreement between public vaccinator and guardians, see Encyclopædia of Forms and Precedents, Vol. XVI., p. 279.

(*l*) See *R.* v. *Dewsbury Guardians* (1884), 48 J. P. 521.

(*m*) As successors to the Privy Council; see Local Government Board Act, 1871 (34 & 35 Vict. c. 70), ss. 2, 7. Before the guardians enter into a contract for public vaccination with any registered medical practitioner, or approve of any such practitioner as deputy, he must produce a certificate of proficiency in vaccination given by some authorised person, as provided by the Vaccination Order, 1898, art. 2, and the Vaccination Order, 1898, Amendment Order, 1911; see note (*l*), p. 469, *ante*.

(*n*) Vaccination Act of 1867 (30 & 31 Vict. c. 84), s. 4.

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contract (*o*) to secure the due vaccination of persons, the observance of the statutory provisions with regard to the transmission of the certificate of successful vaccination, and the fulfilment of all other statutory provisions by the public vaccinator (*p*). No contract is valid without the approval of the Local Government Board (*q*), and the Board (*q*) may at any time determine an approved contract, either forthwith or at a future day (*r*).

Personal performance of duties.

930. A public vaccinator is required to perform his duties in person, except when reasonably absent from the district, or when on other sufficient ground he is obliged to leave any of them to be performed by a duly qualified deputy approved by the guardians (*s*).

Fees payable.

931. The minimum fees payable to public vaccinators by the guardians, under contracts with those officers for vaccination or revaccination (*a*) performed by them, are prescribed by orders of the Local Government Board (*b*).

Fees to be disallowed.

No payment in respect of vaccination is to be made where the Board (*c*) has not approved of a contract for its performance, or after it has determined any such contract; and every payment made contrary to this provision must be disallowed by the auditor in the accounts of every board of guardians, or of the overseers, or of any officer who has made the same (*d*).

(*o*) These statutory and other requirements are embodied in the forms of contract prescribed by the Vaccination Order, 1907, art. 1 and sched., in respect of a contract other than a contract with the medical officer of a workhouse for the vaccination of inmates, and by the Vaccination Order, 1898, art. 4 and Sched. II., in respect of a contract with any such medical officer. The orders contain savings for existing contracts (Vaccination Order, 1907, art. 3; Vaccination Order, 1898, art. 5).

(*p*) Vaccination Act of 1867 (30 & 31 Vict. c. 84), s. 7.

(*q*) As successors to the Poor Law Board; see Local Government Board Act, 1871 (34 & 35 Vict. c. 70), ss. 2, 7.

(*r*) Vaccination Act of 1867 (30 & 31 Vict. c. 84), s. 9. The power of determination extends to contracts for vaccination "entered into under the provisions of any other Act"; see Vaccination Act, 1871 (34 & 35 Vict. c. 98), s. 14.

(*s*) Vaccination Order, 1898, art. 6. Duties supplemental to the statutory duties (see pp. 476 *et seq.*, *post*) are imposed by the Vaccination Order, 1898, arts. 7—9, Scheds. I.—III., as amended by the Vaccination Order, 1907, and the Vaccination Order (No. II.), 1907.

(*a*) The duty of the guardians to pay fees in respect of successful revaccinations is dependent upon regulations as to that matter (see p. 468, *ante*) being made; see Vaccination Act of 1867 (30 & 31 Vict. c. 84), s. 8. Such regulations have been made by the Vaccination Orders, 1898, and 1907. For form of agreement between guardians and their medical officer as to vaccination fees, see Encyclopædia of Forms and Precedents, Vol. VI., p. 300; Vol. XVI., p. 279.

(*b*) See p. 468, *ante*. For the payments which may be made to a public vaccinator other than a medical officer of a workhouse, see Vaccination Order, 1907, arts. 1, 3; and, for the payments which may be made to a medical officer of a workhouse for the vaccination of inmates, see Vaccination Order, 1898, arts. 4, 5 (2).

(*c*) Or its predecessor, the Poor Law Board; see Local Government Board Act, 1871 (34 & 35 Vict. c. 70), ss. 2, 7.

(*d*) Vaccination Act of 1867 (30 & 31 Vict. c. 84), s. 10. As to disallowances by the auditor, and the suspension of his power of disallowance in the case of expenses sanctioned by the Local Government Board under the

Where a district has been assigned to a vaccinator, he must not be paid a fee in respect of the vaccination or revaccination of any child or other person resident out of his district, except in the case of a vacancy in the office of vaccinator in any adjoining district, or of the default of the vaccinator in such district notified to him in writing by the guardians, or when a relieving officer of his union or parish in writing refers any child to him for vaccination (*e*).

Allowances to public vaccinators.

On reports made with regard to the number and quality of the vaccinations performed in the several vaccination districts, or any of them, the Local Government Board (*f*) may from time to time, under regulations approved by the Treasury, authorise to be paid to any public vaccinators, in addition to the payments received by them from guardians or overseers, further payments not exceeding in any case the rate of 1*s.* for each child successfully vaccinated during the time to which the award relates (*g*).

Fees to poor law medical officer who vaccinates in same house as small-pox patient.

932. Where the medical officer of any board of guardians is in attendance as such medical officer upon a person sick of small-pox, and vaccinates any person who is resident in the same house with the sick person and has never been vaccinated or had the small-pox, or revaccinates any person who is so resident and has never been revaccinated and is of the age at which successful revaccination by a public vaccinator is paid for under the regulations for the time being in force (*h*), such medical officer upon transmitting the same certificates as he would be required to transmit if he were the public vaccinator for the district (*i*), is entitled to be paid, in respect of every such case of vaccination and revaccination, the same sum out of the same fund as he would be entitled to receive if he were the public vaccinator for the district (*k*).

(d) *Vaccination Officers.*

Appointment by guardians.

933. The guardians must appoint and pay a sufficient number (*l*) of vaccination officers to prosecute persons charged with offences against the Vaccination Acts (*a*) or otherwise to enforce their provisions (*b*). Such an appointment is subject to the

Local Authorities (Expenses) Act, 1887 (50 & 51 Vict. c. 72), see title LOCAL GOVERNMENT, Vol. XIX., p. 286.

(*e*) Vaccination Act of 1867 (30 & 31 Vict. c. 84), s. 11.

(*f*) Local Government Board Act, 1871 (34 & 35 Vict. c. 70), ss. 2, 7.

(*g*) Vaccination Act of 1867 (30 & 31 Vict. c. 84), s. 5. The reports of the inspectors of the Local Government Board are, as a rule, as nearly as practicable, biennial, and the sums which, on consideration of the periodical reports, the Board certifies to be due to public vaccinators are paid out of the county fund by the county council (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 24 (2) (a)); and see title LOCAL GOVERNMENT, Vol. XIX., p. 352.

(*h*) See note (*l*), p. 469, *ante*. The person revaccinated must be not less than ten years old to entitle the medical officer to the payment of a fee.

(*i*) See p. 477, *post*.

(*k*) Vaccination Act, 1871 (34 & 35 Vict. c. 98), s. 13. The sum payable by the guardians is the same that would be payable under any contract in force with the public vaccinator; see p. 472, *ante*.

(*l*) Vaccination Order, 1898, art. 10.

(*a*) As to the Vaccination Acts, see note (*t*), p. 468, *ante*.

(*b*) Vaccination Act, 1871 (34 & 35 Vict. c. 98), s. 5. The guardians cannot restrict by their appointment the exercise by the officer of the duties

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approval of the Local Government Board (*c*). The duty of the guardians to appoint and pay such officers may be enforced by mandamus, and it is no answer to an application on the part of the Board for a mandamus that the Board itself could have appointed any officer (*d*) in default of the guardians (*e*).

Personal performance of duties.

934. A vaccination officer is required to perform his duties in person, unless with the permission of the Local Government Board he is allowed to entrust all or any of them to some deputy approved by the guardians (*f*).

Vaccination register.

935. Every vaccination officer must keep a vaccination register (*g*), in which he must duly enter every certificate he may receive of the successful vaccination of a child (*h*), or of its insusceptibility to vaccination, or of its having already had small-pox (*i*), and every statutory declaration of conscientious belief that vaccination would be prejudicial to its health (*k*). No fee is payable for the registration of any certificate of vaccination (*l*).

Searches.

The officer must at all reasonable times allow searches to be made in the register, and upon demand give a copy under his hand of any entry in the same, on payment of a fee of 6*d.* for each search and 3*d.* for each copy; but no fee is to be charged for any search made by a public vaccinator, or any officer of the guardians, authorised by them to make such search, or any inspector appointed by the Local Government Board (*m*).

Fees payable to vaccination officer.

936. The minimum fees payable to a vaccination officer by the guardians are prescribed by the Local Government Board, and the amount of his remuneration is to be such as the Board approves or directs (*n*). He must send in a quarterly account to the guardians (*o*).

imposed upon him by the Acts and the Orders of the Local Government Board.

(*c*) Vaccination Order, 1898, art. 11. As to the appointment and tenure of office of such officers, and the appointment of temporary assistants and substitutes, see *ibid.*, arts. 10—19.

(*d*) Under the Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), s. 7, and the Metropolitan Poor Act, 1867 (30 & 31 Vict. c. 6), s. 6; see title POOR LAW, Vol. XXII., p. 542.

(*e*) *R.* v. *Leicester Union*, [1899] 2 Q. B. 632.

(*f*) Vaccination Order, 1898, art. 25. Duties supplemental to the statutory duties referred to in the text, *supra*, are imposed upon the vaccination officer by the Vaccination Order, 1898, arts. 26, 27, Sched. IV., as amended by the Vaccination Orders, 1907, (No. II.), 1907, and 1910. He must act as registrar of vaccination for his district; see that all children resident therein are duly accounted for as regards vaccination; and, generally, carry into effect all provisions of the Acts and Orders applicable to his office.

(*g*) Vaccination Act of 1867 (30 & 31 Vict. c. 84), s. 24. As to this register, see the Vaccination Order, 1898, Sched. IV. (2)—(4).

(*h*) See p. 477, *post.*

(*i*) See p. 478, *post.*

(*k*) See p. 475, *post.*

(*l*) Vaccination Act, 1871 (34 & 35 Vict. c. 98), s. 7.

(*m*) Vaccination Act of 1867 (30 & 31 Vict. c. 84), s. 25.

(*n*) Vaccination Order, 1898, art. 20. Arts. 20—23 (*ibid.*) deal with the remuneration of vaccination officers. Art. 24 (*ibid.*) deals with the remuneration of temporary assistants and substitutes payable by the guardians.

(*o*) *Ibid.*, art. 23.

(iii.) *Arrangements for Vaccination.*

(a) *In General.*

937. Primary vaccination of children under fourteen years of age is generally compulsory, and an obligation is laid upon parents and other persons having the custody of children to secure it (*p*). This they may do by having a child vaccinated by any registered medical practitioner, or, without charge, by the public vaccinator (*q*). Revaccination is not compulsory, but may be performed by the public vaccinator, without charge, under certain conditions (*r*). Compulsory vaccination and optional revaccination.

(b) *Obligation to have Child Vaccinated.*

938. The parent (*s*) of every child born in England (*t*), or where, by reason of the death, illness, absence, or inability of the parent, or other cause, any other person has the custody of such child, such person, must within six calendar months from the birth of the child (*u*) cause it to be vaccinated by some medical practitioner (*x*); and in the event of the vaccination being unsuccessful such person or parent must cause the child to be forthwith (*a*) again vaccinated (*b*). Duty of parent or person with custody of child.

939. The obligation to procure the vaccination of a child is enforceable by penalties; but no parent or other person is liable to any penalty (*c*) if within four calendar months from the birth of the child he makes a statutory declaration in the prescribed form (*d*), or Conscientious belief that vaccination would prejudice health.

(*p*) See Vaccination Act of 1867 (30 & 31 Vict. c. 84), ss. 16, 29, 31; Vaccination Act, 1898 (61 & 62 Vict.), s. 1. For the duty of registrars of births to give notice to parents and others as to the vaccination of children, see title REGISTRATION OF BIRTHS, MARRIAGES, AND DEATHS.

(*q*) See the text, *infra*, and p. 476, *post*.

(*r*) See p. 479, *post*.

(*s*) The word "parent" includes the father and mother of a legitimate child, and the mother of an illegitimate child (Vaccination Act, 1871 (34 & 35 Vict. c. 98), s. 4). It would seem, however, that where the parents of a legitimate child are living together, the obligation imposed by the statute lies under ordinary circumstances upon the father, as having the legal custody of the child, and not upon the mother. The instances in which, where the parents are living together, the mother might be presumed to have such custody as would make her liable appear to be where such circumstances, other than death, as are indicated in the text, *supra*, in connection with "any other person" prevail.

(*t*) England includes Wales and the town of Berwick-upon-Tweed (Wales and Berwick Act, 1746 (20 Geo. 2, c. 42), s. 3); and see title STATUTES.

(*u*) Vaccination Act, 1898 (61 & 62 Vict. c. 49), s. 1 (1). The regulations of a lying-in hospital, infirmary, or other similar institution cannot compel the parent of a child born in an institution to consent to vaccination at any time earlier than the expiration of six calendar months from its birth (*ibid.*, s. 1 (5)).

(*x*) Vaccination Act of 1867 (30 & 31 Vict. c. 84), s. 16. For the meaning of "medical practitioner," see note (*i*), p. 471, *ante*.

(*a*) That is, within a reasonable time (*Thomas* v. *Nokes* (1868), L. R. 6 Eq. 521; *Thomas* v. *Nokes* (1894), 58 J. P. 672).

(*b*) Vaccination Act of 1867 (30 & 31 Vict. c. 84), s. 17.

(*c*) "Under section 29 or section 31 of the Vaccination Act, 1867" (30 & 31 Vict. c. 84); see pp. 480 *et seq.*, *post*.

(*d*) For form of declaration, see Vaccination Act, 1907 (7 Edw. 7, c. 31), sched.

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to the like effect, that he conscientiously believes that vaccination would be prejudicial to the health of the child, and within seven days thereafter delivers or sends by post the declaration to the vaccination officer of the district (*e*). The declaration is exempt from stamp duty (*f*).

(c) *Vaccination by Public Vaccinator.*

Visit at child's home.

940. The public vaccinator of the district must, if the parent or other person having the custody of a child so requires (*g*), visit the home of the child for the purpose of vaccinating the child; and he must, if a child is not vaccinated within four calendar months after its birth (*h*), visit its home, after at least twenty-four hours' notice to the parent (*i*), and offer to vaccinate the child with glycerinated calf lymph, or such other lymph as may be issued by the Local Government Board (*k*). There is nothing to prevent vaccination being performed by the public vaccinator at his surgery, or elsewhere than at the home if the person concerned so wishes, and it is provided by the prescribed form of contract with a public vaccinator that it may be so performed in the case of a person other than a child, and, in the case of a child over a year old, if the parent or person having its custody so requests.

Subsequent treatment.

If, in the opinion of the public vaccinator, a child vaccinated by him requires medical treatment in consequence of the vaccination, he is required, if the parent or other person consents, to attend the child and prescribe any required treatment (*l*).

Vaccination stations in exceptional circumstances.

941. The Local Government Board may by order, if in its opinion it is expedient by reason of serious risk of outbreak of small-pox or of other exceptional circumstances, require the guardians to provide vaccination stations for the vaccination of

(*e*) Such a statutory declaration is not made a defence for any person other than the declarant. The mother of a legitimate child would not, apparently, be protected after the death of her husband by a declaration made by him. As to her general liability, see note (*s*), p. 475, *ante*. The limitation of time for making a declaration is to be noted in its bearing upon those persons who may not be protected by a declaration which has already been made.

(*f*) Vaccination Act, 1907 (7 Edw. 7, c. 31), s. 1.

(*g*) A form is supplied by vaccination officers; see Vaccination Order, 1898, Sched. IV. (16).

(*h*) The public vaccinator is informed by the vaccination officer as to this; see Vaccination Order, 1907, art. 6.

(*i*) Notice should ordinarily be sent to the father, if alive; see note (*s*), p. 475, *ante*. The form is prescribed by the Vaccination Order, 1898, art. 7, Sched. V. Under art. 7 (*ibid.*) the public vaccinator is required generally to give twenty-four hours' notice where he visits at the request of the parent. The Local Government Board has been advised by the Law Officers of the Crown that such notices may be served by post by prepaid letter, which need not be registered.

(*k*) Vaccination Act, 1898 (61 & 62 Vict. c. 49), s. 1 (2), (3). Glycerinated calf lymph is provided free to public vaccinators by the Local Government Board (see note (*k*), p. 469, *ante*), and must be used if required by the parent or other person. The time for visits of a public vaccinator is dealt with by the Vaccination Order, 1898, art. 7.

(*l*) Vaccination Order, 1907, Sched. I.

children with glycerinated calf lymph or such other lymph as may be issued by the Board, and modify, as respects the area to which the order applies, and during the period for which it is in force, the provisions which require the public vaccinator to visit the home of the child otherwise than on request of the parent (*m*).

(d) *Certificates of Vaccination.*

Certificate by private vaccinator of successful vaccination.

942. A medical practitioner (*n*), who is not a public vaccinator and who inspects a child to ascertain the result of vaccination, must, as soon as he has ascertained that the operation has been successfully performed, deliver to the parent (*o*) causing the child to be vaccinated a certificate of successful vaccination, in the proper form (*p*), and duly filled up and signed by him (*q*), and the parent must, within seven days after such ascertainment, transmit (*r*) the certificate by post or otherwise to the vaccination officer (*s*).

Certificate by public vaccinator of successful vaccination.

943. Every public vaccinator who has performed the operation of vaccination upon any child, and ascertained that it has been successful, must, within seven days after such ascertainment, transmit by post or otherwise a certificate of successful vaccination, according to the prescribed form (*t*), or to the like effect, to the vaccination officer (*u*), and upon request must deliver to the parent (*a*) a duplicate of the certificate (*b*).

Where it appears to the public vaccinator, upon personal examination of any child resident in his district who has not been successfully vaccinated by him, that such child has been successfully vaccinated, he may, on the request of the parent (*a*), grant a certificate to that effect, and such certificate must be transmitted and has the same effect as if it were a certificate of successful vaccination by the public vaccinator who gave the certificate (*c*). No fee is payable by the guardians for such a certificate.

Certificate of postponement

944. If any public vaccinator or medical practitioner is of opinion

(*m*) Vaccination Act, 1898 (61 & 62 Vict. c. 49), s. 7.
(*n*) For meaning of "medical practitioner," see note (*i*), p. 471, *ante*.
(*o*) As to the meaning of "parent," see note (*s*), p. 475, *ante*.
(*p*) For form, see the Vaccination Order, 1907, Sched. II., E. As to the penalty for making a false statement in the certificate, see note (*e*), p. 478, *post*.
(*q*) See note (*i*), p. 471, *ante*.
(*r*) Vaccination Act, 1871 (34 & 35 Vict. c. 98), s. 7.
(*s*) Vaccination Acts, 1867 (30 & 31 Vict. c. 84), s. 23; 1871 (34 & 35 Vict. c. 98), s. 6.
(*t*) For form, see Vaccination Order, 1907, Sched. II., E. As to the penalty for making a false statement in the certificate, see note (*e*), p. 478, *post*.
(*u*) Vaccination Act, 1871 (34 & 35 Vict. c. 98), s. 6.
(*a*) As to the meaning of "parent," see note (*s*), p. 475, *ante*.
(*b*) Vaccination Act of 1867 (30 & 31 Vict. c. 84), s. 21. For refusal to deliver a duplicate, a penalty not exceeding 20*s*. is incurred on summary conviction (*ibid.*, s. 30). As to proceedings, see p. 480, *post*.
(*c*) Vaccination Act, 1871 (34 & 35 Vict. c. 98), s. 12. For form of certificate, see Vaccination Order, 1907, Sched. II., F. As to the penalty for making a false statement in the certificate, see note (*e*), p. 478, *post*.

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that a child is not in a fit and proper state to be successfully vaccinated he must forthwith (*d*) give a certificate, called a "certificate of postponement of vaccination," under his hand (*e*), according to the prescribed form (*f*), or to the like effect, that the child is then in a state unfit for successful vaccination (*g*). Such certificate remains in force for two calendar months, and is renewable for successive periods of two calendar months until a public vaccinator or medical practitioner deems the child to be in a fit state for successful vaccination, when the child must, with all reasonable dispatch, be vaccinated, and the certificate of successful vaccination duly given, if warranted by the result (*g*).

of vaccination owing to state of child.

Certificate of postponement owing to state of house or district.

The public vaccinator must not vaccinate a child if, in his opinion, the condition of the house in which it resides is such, or there is or has been such a recent prevalence of infectious disease in the district, that it cannot be safely vaccinated, and in that case he must give a certificate of postponement of vaccination (*h*), and forthwith (*i*) give notice of the certificate to the medical officer of health for the district (*k*).

Certificate of insusceptibility.

If any public vaccinator or medical practitioner finds that a child whom he has three times unsuccessfully vaccinated is insusceptible of successful vaccination, or that a child has already had the small-pox, he must give a certificate under his hand according to the prescribed form (*l*), or to the like effect, and the parent (*m*) or person having the custody of such child is thenceforth not required to cause the child to be vaccinated (*n*).

Transmission of certificate to vaccination officer.

945. Every certificate of a child being unfit for or insusceptible of successful vaccination, if given by a public vaccinator, must be transmitted (*o*) by him, and if given by any other medical practitioner must be transmitted by the parent (*m*) of such child, to the vaccination officer, by post or otherwise (*p*), within seven days after the examination of the child upon which it is founded, and the public vaccinator must, upon request, and without fee or charge,

(*d*) As to the meaning of "forthwith," see note (*a*), p. 475, *ante*.

(*e*) A person who wilfully signs a false certificate or duplicate is guilty of a misdemeanour, punishable on conviction on indictment to imprisonment with or without hard labour for any term not exceeding two years, or to a fine, or to both; see Perjury Act, 1911 (1 & 2 Geo. 5, c. 6), ss. 5 (a), 15 (2), 17, repealing, in part, the Vaccination Act of 1867 (30 & 31 Vict. c. 84), s. 30.

(*f*) See Vaccination Order, 1907, Sched. II., B.

(*g*) Vaccination Act of 1867 (30 & 31 Vict. c. 84), s. 18.

(*h*) For form of certificate, see Vaccination Order, 1907, Sched. II., C.

(*i*) See note (*a*), p. 475, *ante*.

(*k*) Vaccination Act, 1898 (61 & 62 Vict. c. 49), s. 1 (4). For the prescribed form of notice, see Vaccination Order, 1898, Sched. V., P.

(*l*) Vaccination Order, 1907, Sched. II., D. As to the penalty for making a false statement in the certificate, see note (*e*), *supra*.

(*m*) For definition, see note (*s*), p. 475, *ante*.

(*n*) Vaccination Act of 1867 (30 & 31 Vict. c. 84), s. 20.

(*o*) "Instead of being delivered by him to the parent," as is still required to be done by the Vaccination Act of 1867 (30 & 31 Vict. c. 84), ss. 18, 20, where the certificate is given by any other medical practitioner.

(*p*) "As if it were a certificate of successful vaccination"; see Vaccination Act of 1867 (30 & 31 Vict. c. 84), ss. 18, 20.

deliver to the parent a duplicate of any such certificate so transmitted (*q*). There is no provision requiring the transmission to the vaccination officer of a certificate that a child has already had the small-pox; and therefore a parent to whom such a certificate has been delivered by a medical practitioner and who does not transmit it commits no offence (*r*).

Fees not chargeable.

946. No fee or remuneration is to be charged by the public vaccinator to the parent or other person for any certificate or duplicate certificate, nor for any vaccination done under his contract, nor is he entitled to payment under his contract for any vaccination in respect of which he has been paid by the parent or other person for whom or on whom it is performed; and if he receives payment under his contract he is not entitled to recover payment for the vaccination from any other person (*s*).

Payment of fee by revaccinated person where not inspected.

947. Where any person is revaccinated on his application by the public vaccinator without charge, the public vaccinator must deliver to him a notice requiring him to attend at the same place on the same day in the following week, in order that he may be inspected and the result of the operation ascertained, and stating that in default he will be liable to pay a fee for such revaccination of 2*s.* 6*d.* (*t*). The public vaccinator, if required, must deliver to the person revaccinated a certificate of the result of the operation (*t*). If such person fails to comply with such notice or to permit the public vaccinator or his deputy to ascertain the result of the operation, he is liable to pay the above-mentioned fee as a debt due from him to the guardians; all such fees must be paid to the guardians, and all expenses incurred in such revaccination are to be paid by them (*t*).

No disqualification from vaccination assistance.

948. The vaccination, or the surgical or medical assistance incident to the vaccination, of any person performed or rendered by a public vaccinator is not to be considered to be parochial relief, alms, or charitable allowance to such person or his parent, and no such person or his parent is by reason thereof to be deprived of any right or privilege, or be subject to any disability or disqualification (*u*).

List of vaccinated persons.

949. The clerk of any sanitary authority which maintains a small-pox hospital must keep a list of the names, addresses, ages,

(*q*) Vaccination Act, 1871 (34 & 35 Vict. c. 98), s. 7. Every person who contravenes the provision is liable on summary conviction to a penalty not exceeding 20*s.*; and every person who wilfully signs a false certificate or duplicate is guilty of a misdemeanour, and is liable to fine or to imprisonment with or without hard labour for a period not exceeding two years (*ibid.*); see Perjury Act, 1911 (1 & 2 Geo. 5, c. 6), s. 5 (a); and see note (*e*), p. 478, *ante*. As to proceedings, see p. 480, *post*.

(*r*) *Broadhead* v. *Holdsworth* (1877), 2 Ex. D. 321.

(*s*) Vaccination Act of 1867 (30 & 31 Vict. c. 84), s. 22.

(*t*) Vaccination Act, 1871 (34 & 35 Vict. c. 98), s. 9. The fees and expenses are to be paid to and out of the common fund or, in London, the common poor fund; see p. 470, *ante*.

(*u*) Vaccination Act of 1867 (30 & 31 Vict. c. 84), s. 26. As to parochial relief, see title POOR LAW, Vol. XXII., pp. 563 *et seq.*

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and condition as to vaccination of all patients, such entries being made on admission, and must at all reasonable times allow searches to be made therein, and upon demand give a copy under his hand, or under that of his deputy, of every entry, on payment of a fee of 6*d.* for each search and 3*d.* for each copy (*a*).

(iv.) *Proceedings against Offenders.*

Neglect of parent to procure vaccination.

950. Every parent (*b*) or person having the custody of a child who neglects to cause it to be vaccinated (*c*), or, after vaccination, to be inspected (*d*), and does not render a reasonable excuse for his neglect, is liable upon summary conviction to a penalty not exceeding 20*s.* (*e*).

Information by vaccination officer.

951. Any person may take proceedings; but the specific duty of doing so lies upon the vaccination officer (*f*), subject to his discretion whether he shall at the time proceed under the above provision (*g*) for a penalty or under the subsequent provision (*h*) for an order to have the child vaccinated (*i*). The matter of information does not arise until the expiration of the period of six calendar months allowed from the birth of the child for its vaccination (*k*), and the twelve months' limitation for taking proceedings begins from such expiration (*l*).

Defences :— Notice of law.

952. In any prosecution for neglect to procure the vaccination of a child, it is not necessary to prove that the defendant had received notice from the registrar or any other officer of the requirements of

(*a*) Vaccination Act, 1898 (61 & 62 Vict. c. 49), s. 8.

(*b*) See note (*s*), p. 475, *ante*.

(*c*) See p. 475, *ante*.

(*d*) There is now no other express provision requiring a child after vaccination to be "inspected"; but such inspection is necessary to secure successful vaccination.

(*e*) Vaccination Act of 1867 (30 & 31 Vict. c. 84), s. 29. As to procedure before courts of summary jurisdiction, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*

(*f*) See Vaccination Order, 1898, Sched. IV. (6) (d). It is the duty of the vaccination officer, by virtue of his appointment as such, without directions, general or special, from the guardians, at any time, and notwithstanding their directions not to prosecute in certain specified cases, to institute proceedings for offences under this provision (*Moore* v. *Keyte*, [1902] 1 K. B. 768).

(*g*) *I.e.*, the Vaccination Act of 1867 (30 & 31 Vict. c. 84), s. 29.

(*h*) *I.e.*, *ibid.*, s. 31; see pp. 481, 482, *post*.

(*i*) If a conviction for a penalty under the Vaccination Act of 1867 (30 & 31 Vict. c. 84), s. 29, is obtained, proceedings on account of the same child cannot, until it is four years old, be taken under *ibid.*, s. 31, for an order directing it to be vaccinated; see p. 484, *post*.

(*k*) See p. 475, *ante*.

(*l*) *Langridge* v. *Hobbs*, [1901] 1 K. B. 497. As to the time limit, see p. 485, *post*. The vaccination officer is directed, if he has not within the time limited received a statutory declaration of conscientious objection (see p. 475, *ante*), and, at the end of seven days after the expiration of six months from the birth of a child, has not received any of the statutory certificates (see pp. 477 *et seq.*, *ante*), forthwith to give notice in the prescribed form requiring the child to be vaccinated within fourteen days, and, in

Certificates.

the law in this respect (*m*), but the production of any certificate of postponement (*n*), or of insusceptibility, or of the child having had small-pox (*o*), or the register of vaccinations (*p*), in which the certificate of successful vaccination of the child has been duly entered, is a sufficient defence, except, in regard to the certificate of postponement of vaccination, where the time allowed has expired before the information has been laid (*q*).

Reasonable excuses.

What constitutes a reasonable excuse is a matter for the determination of the court; and although to substantiate proceedings proof is not required of the public vaccinator having visited the home and offered to vaccinate the child, yet upon the question of reasonable excuse it may be material to consider whether there has been such a visit (*r*).

Conscientious objection.

Where conscientious objection has not been evidenced in the statutory manner (*s*), the defendant's defence that he believed that vaccination would be injurious to his child is one which the court is bound to consider (*t*).

Medical certificate.

A medical certificate given the day before the hearing that a child eleven months old was then unfit to be vaccinated is no excuse for neglect during the statutory period of six months (*u*).

Previous conviction.

A person cannot be twice convicted under the same provision in respect of the same child (*a*).

Conviction for alternative offence.

953. Where a person is charged with the offence of neglecting to cause any child to be vaccinated, and on the defence made by him it appears to the justices that he is not guilty of such offence, but is guilty of not transmitting any certificate with respect to the vaccination of such child (*b*), the justices may convict him of the last-mentioned offence in like manner as if he had been charged therewith (*c*).

Order for the vaccination of child under fourteen years.

954. If any vaccination officer (*d*) gives information in writing to a justice of the peace that he has reason to believe that a child

default, to take proceedings for the enforcement of the law; see Vaccination Orders, 1898, Sched. IV. (6) (d); (No. II.) 1907.

(*m*) See note (*p*), p. 475, *ante*.

(*n*) See p. 477, *ante*.

(*o*) See p. 478, *ante*.

(*p*) See p. 474, *ante*.

(*q*) Vaccination Act of 1867 (30 & 31 Vict. c. 84), s. 34. As to the time so allowed, see p. 478, *ante*.

(*r*) *Moore* v. *Keyte*, [1902] 1 K. B. 768.

(*s*) See p. 475, *ante*.

(*t*) *Rutter* v. *Norton* (1892), 57 J. P. 8.

(*u*) *Hinds* v. *Elsam* (1903), 88 L. T. 867.

(*a*) *Black* v. *Epping Union Guardians* (1884), 49 J. P. 19; and see p. 484, *post*.

(*b*) See p. 478, *ante*.

(*c*) Vaccination Act, 1871 (34 & 35 Vict. c. 98), s. 11.

(*d*) *Ibid.*, s. 6. A vaccination officer requires no special authority to institute proceedings (*Bramble* v. *Lowe*, [1897] 1 Q. B. 283); see also note (*f*), p. 480, *ante*. His appointment as vaccination officer is sufficient authority, and may be proved by the minute book of the guardians containing the minutes of his appointment and the consent of the Local Government Board (*Knight* v. *Halliwell* (1874), L. R. 9 Q. B. 412; *Bramble* v. *Lowe*, *supra*). The clerk to the guardians is required to furnish the vaccination officer with a copy of the resolution appointing him, signed by the chairman

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under the age of fourteen, who or whose parent (*e*) is within the union or parish for which the informant acts, has not been successfully vaccinated, and that he has given notice (*f*) to the parent or person having the custody of such child to procure its being vaccinated, and that this notice has been disregarded (*g*), the justice may summon such parent or person to appear with the child before him at a certain time and place (*h*).

The hearing of the summons.

955. Upon the appearance, if the justice finds, after such examination as he deems necessary, that the child has not been vaccinated, or has not already had the small-pox, he may, if he sees fit (*i*), make an order under his hand and seal (*k*) directing such child to be vaccinated within a certain time (*l*); and, on the hearing, the justice,

of the meeting at which the appointment was made, or of the ensuing meeting; or, in the case of an appointment before the 1st January, 1898, with a copy of the resolution under seal of the guardians; see Vaccination Orders, 1898, art. 12; 1907, art. 5. For the purpose of the twelve months' limitation of proceedings (see p. 480, *ante*, and see p. 485, *post*), the matter of information arises immediately after the expiration of the notice to the parent or other person subsequently referred to in the text, *supra*, so that where on the 10th May, 1872, a notice to procure vaccination within fourteen days was disobeyed, an information laid on the 24th June, 1873, was too late, but a fresh notice could have been given on which to base an information within the limited time (*Knight* v. *Halliwell* (1874), L. R. 9 Q. B. 412). Proceedings have been held not to be bad because the child was between six and eighteen months of age (*Bowden* v. *Toll* (1901), 85 L. T. 486).

(*e*) Vaccination Act, 1871 (34 & 35 Vict. c. 98), s. 11.

(*f*) A form of notice has been prescribed by the Local Government Board; see Vaccination Order, 1898, Sched. V., Form K. *Ibid.*, Sched. IV. (6) (d), as amended by the Vaccination Order (No. II.), 1907, provides for its use; and see note (*l*), p. 480, *ante*. But no particular form of notice seems necessary (*Tebb* v. *Jones* (1877), 37 L. T. 576).

(*g*) The notice need not be served in any particular way so long as it reaches the parent or other person (*Holloway* v. *Coster*, [1897] 1 Q. B. 346). The Local Government Board was advised by the Law Officers of the Crown in 1901 (Circular to Guardians, dated 17th September, 1901) that it is sufficient if the notice is served by post by prepaid letter, which need not be registered; that upon the hearing of a summons it was not necessary in the first instance to prove that any such notice was in fact given; and that, if any such proof is required by the justices, the service of the notice would be *primâ facie* established by showing it was sent to the defendant properly addressed, prepaid, and posted, and its contents might be sufficiently proved by verbal evidence.

(*h*) Vaccination Act of 1867 (30 & 31 Vict. c. 84), s. 31.

(*i*) The justice must act judicially and not by way of caprice; he cannot arbitrarily and illegally refuse to exercise his discretion; see *R.* v. *Boteler* (1864), 4 B. & S. 959; title MAGISTRATES, Vol. XIX., p. 658. A special case can be stated on the order of the justice (*Holloway* v. *Coster*, *supra*, as reported 66 L. J. (Q. B.) 293); and see title MAGISTRATES, Vol. XIX., pp. 650 *et seq.*

(*k*) In *Nutter* v. *Moorhouse* (1903), 68 J. P. 134, an order under the hand only of a justice was made, and a summons for non-compliance withdrawn on objection taken that the order was not under seal. Subsequently a fresh order was made, with an extended time for compliance, under the hands and seals of two justices who were sitting at the court when the first was made, and, in due course, a summons for non-compliance with the second order was issued. It was held that the second order was also invalid, as it was not a drawing-up of the order of the court at the hearing.

(*l*) Vaccination Act of 1867 (30 & 31 Vict. c. 84), s. 31. If the justice is of opinion that the person was improperly summoned, and refuses to make

who need not be the justice who issued the summons (*m*), may proceed and issue an order, although neither the child (*n*) nor the defendant (*o*) appears. A parent (*p*) who fails to produce a child when required by the summons is liable on summary conviction to a penalty not exceeding 20*s.* (*q*).

Effect of default of public vaccinator.

The failure of the public vaccinator to give the required notice to the parent of his intended visit, or to visit the home of the child (*r*), is no answer to proceedings for an order directing the child to be vaccinated (*s*).

Penalty for disobedience to an order.

956. If at the expiration of the time specified in the order the child has not been successfully vaccinated, or has not been shown to be then unfit to be vaccinated, or to be insusceptible of vaccination, the person upon whom such order has been made must be proceeded against summarily (*t*), and, unless he can show some reasonable ground for his omission to carry the order into effect, is liable to a penalty not exceeding 20*s.* (*a*). The burden of proof that an order has been disobeyed lies upon the prosecution (*b*).

Valid answer to non-compliance with order.

The offence is disobedience to the order of the justice, and the provisions (*c*) concerning the production of certificates or register do not apply (*d*); but the neglect of the public vaccinator, on

any order for the vaccination of the child, he may order the informant to pay such person a sum as a fair compensation for his expenses and loss of time in attendance (Vaccination Act of 1867 (30 & 31 Vict. c. 84), s. 31). If an order for vaccination is made, the defendant may be ordered to pay the informant's costs (Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 18); and the payment may be enforced by distress, and imprisonment in default of distress (*R.* v. *Burrows, Ex parte Wilson* (1897), 61 J. P. 724); and see title MAGISTRATES, Vol. XIX., pp. 602 *et seq.*

(*m*) *Southcombe* v. *Yeovil Union Guardians*, [1897] 1 Q. B. 343.

(*n*) *Dutton* v. *Atkins* (1871), L. R. 6 Q. B. 373.

(*o*) In pursuance of the applied provisions of the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 13 (see p. 485, *post*) (*R.* v. *Cinque Ports Justice* (1886), 17 Q. B. D. 191); and see title MAGISTRATES, Vol. XIX., pp. 595 *et seq.*

(*p*) For definition of "parent," see note (*s*), p. 475, *ante*.

(*q*) Vaccination Act, 1871 (34 & 35 Vict. c. 98), s. 11.

(*r*) See p. 476, *ante*.

(*s*) *Pym* v. *Wilsher*, [1901] 2 K. B. 806; *Bowden* v. *Toll* (1901), 85 L. T. 86.

(*t*) The vaccination officer may take proceedings without any directions of the guardians (*R.* v. *Brocklehurst*, [1892] 1 Q. B. 566); see also note (*f*), p. 480, *ante*.

(*a*) Vaccination Act of 1867 (30 & 31 Vict. c. 84), s. 31. He cannot be fined more than once in respect of the same order (*R.* v. *Portsmouth Justices*, [1892] 1 Q. B. 491); nor may a second order be made in respect of the same child on a person previously convicted; see the text, *infra*.

(*b*) The deposition of the vaccination officer that he has not received any of the statutory certificates (see pp. 477 *et seq.*, *ante*) is *primâ facie* proof (*Over* v. *Harwood*, [1900] 1 Q. B. 803).

(*c*) See Vaccination Act of 1867 (30 & 31 Vict. 84), s. 34; and see p. 481, *ante*.

(*d*) See *Allen* v. *Worthy* (1870), L. R. 5 Q. B. 163, *per* COCKBURN, C.J., at p. 172, where he said "the offence under s. 31 is that of disobeying the order of the justice. The offence to which a certificate is an answer under s. 34 is that of neglecting to procure the vaccination of the child. That shows that what is enacted in s. 34 has reference to ss. 15, 16 and 29, and not to s. 31. . . . It is for the justice, therefore, in determining

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requisition, to visit the home for the purpose of vaccinating the child (*e*) might be a reasonable ground for omission to carry the order into effect (*f*).

Repeated prosecutions prohibited.

957. Where a parent or person has been convicted of neglect to procure vaccination (*g*), no other proceedings can be taken against him on account of the same child until it has reached the age of four years (*h*); nor may an order directing a child to be vaccinated (*i*) be made on any person who has previously been convicted of non-compliance with a similar order relating to the same child (*k*).

Costs and legal expenses of vaccination officer.

958. The reasonable costs and expenses incurred by the vaccination officer in any proceedings taken by him (*l*), including the reasonable costs of obtaining necessary legal assistance, must be paid by the guardians (*m*). The vaccination officer must when required by the guardians give them full information as to any legal proceedings he takes (*n*); and any sums recovered by him from a defendant in respect of costs or expenses or penalties must be paid by him to the treasurer of the guardians within seven days after receipt (*o*).

whether an order shall be made under s. 31 to consider the effect of any certificate."

(*e*) See p. 476, *ante*.

(*f*) "Upon the question of reasonable excuse it may be very material to consider whether there has or has not been a visit" (*Moore* v. *Keyte*, [1902] 1 K. B. 768, *per* Lord ALVERSTONE, C.J., at p. 774). But where, before the duty of visiting the home was imposed upon the public vaccinator, that officer attended half-yearly at a vaccination station, the fact that there had been no attendance during the time limited for compliance with an order of a justice was held to be no ground for omitting to obey the order, since the child might have been vaccinated before (*Francis* v. *Smith* (1894), 58 J. P. 429).

(*g*) See p. 480, *ante*.

(*h*) Vaccination Act, 1898 (61 & 62 Vict. c. 49), s. 4.

(*i*) See p. 482, *ante*.

(*k*) Vaccination Act, 1898 (61 & 62 Vict. c. 49), s. 3; compare p. 481, *ante*. But this does not prevent a second order being made when a summons for non-compliance with a previous order has been dismissed (*R.* v. *Trafford*, [1900] Local Government Chronicle, p. 224); and see note (*a*), p. 483, *ante*.

(*l*) It is his duty to prosecute offenders; see note (*f*), p. 480, *ante*.

(*m*) Vaccination Order, 1898, art. 29. Where the officer honestly considers legal assistance is necessary the court will not overrule his decision, and the guardians must pay (*Hitchcock* v. *Wandsworth and Clapham Guardians, Cheshire* v. *Same* (1904), 68 J. P. 348); and the obligation of the guardians to pay reasonable legal costs is enforceable by mandamus (*R.* v. *Wellingborough Union Guardians* (1903), 68 J. P. 179).

(*n*) Vaccination Order, 1898, art. 27.

(*o*) *Sic* in the Order. But as there is no direction in the Vaccination Acts (for a list of which see note (*t*), p. 468, *ante*) for the payment of penalties, they are therefore payable in accordance with the applied provisions of the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 31; and see title MAGISTRATES, Vol. XIX., pp. 604, 628. When recovered before a metropolitan police magistrate they are to be paid to the Receiver for the Metropolitan Police District (Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), s. 47); and see title POLICE, Vol. XXII., pp. 468, 476.

Application of Summary Jurisdiction Acts.

959. The Summary Jurisdiction Acts (*p*) apply to all proceedings (*q*), and the justices for the county, city, borough, or other place where the offence has been committed have jurisdiction to hear and determine the complaint, and where a union or parish is comprised in several jurisdictions the complaint as to any matter arising in such union or parish may be heard and determined in any one of such jurisdictions (*r*).

Time limit.

960. Any complaint may be made and any information laid for an offence at any time not exceeding twelve calendar months from the time when the matter of such complaint or information arose and not subsequently (*s*). The period of limitation runs from the time when the cause of complaint or information first arose (*t*).

Appearance.

961. The defendant in any proceedings may appear by any member of his family or any other person authorised by him for the purpose (*u*).

Treatment of prisoners.

962. Persons committed to prison on account of non-compliance with any order or non-payment of fines or costs must be treated in the same way as first-class misdemeanants (*v*).

SUB-SECT. 5.—*Midwives* (*a*).

Use of title by uncertified person.

963. Any woman who, not being certified (*b*), takes or uses the name or title of "midwife," either alone or in combination with any

(*p*) The Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 11, which provides that prosecutions must be commenced within six months of an offence, is excepted, being replaced by the provision in the text, *supra*, imposing a twelve months' limitation. For proceedings before courts of summary jurisdiction, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*

(*q*) By the Perjury Act, 1911 (1 & 2 Geo. 5, c. 6), s. 16 (3), proceedings for making false statements may, where not punishable only on summary conviction, be taken under that Act, or under the provisions referred to in note (*q*), p. 479, *ante*.

(*r*) Vaccination Act of 1867 (30 & 31 Vict. c. 84), s. 33. All prosecutions by the guardians or the vaccination officer are deemed to be within the Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 59, and the Union Chargeability Act, 1865 (28 & 29 Vict. c. 79), s. 9, under which the costs and expenses are to be charged to the common fund; and see title POOR LAW, Vol. XXII., pp. 540, 549. But as to a parish for which there is a separate board of guardians, and a parish or union in London, see p. 470, *ante*.

(*s*) Vaccination Act, 1871 (34 & 35 Vict. c. 98), s. 11. The limitation applies within the Metropolitan Police District (*Miller* v. *Rhind* (1873), 29 L. T. 29).

(*t*) See p. 480, *ante*.

(*u*) Vaccination Act, 1871 (34 & 35 Vict. c. 98), s. 11.

(*v*) Vaccination Act, 1898 (61 & 62 Vict. c. 49), s. 5; and see title PRISONS, p. 247, *ante*.

(*a*) As to midwives generally, see title MEDICINE AND PHARMACY, Vol. XX., pp. 366 *et seq.*

(*b*) *I.e.*, certified under the Midwives Act, 1902 (2 Edw. 7, c. 17). As to the printed copy of the roll of midwives under the Midwives Act, 1902 (2 Edw. 7, c. 17), the original of which is kept by the secretary appointed by the Central Midwives Board, being evidence of certification, see *ibid.*, s. 7; title MEDICINE AND PHARMACY, Vol. XX., p. 369. The obtaining of, or an attempt to obtain, a certificate by false representation is punishable

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other word or words, or any name, title, addition, or description implying that she is so certified or is a person specially qualified to practise midwifery, or is recognised by law as a midwife, is punishable summarily by a fine not exceeding £5 (*c*).

Notice required before practising.

964. Every certified midwife must, before practising as a midwife in any area, give written notice of her intention to do so to the local supervising authority (*d*), and give a like notice yearly in January whilst she continues to practise in such area. The notice must contain the particulars required by the rules framed by the Central Midwives Board (*e*) to secure the identification of the midwife, and, if she omits to give any such notice, or knowingly or wilfully makes, or causes or procures any other person to make, any false statement in any such notice, she is punishable summarily by a fine not exceeding £5 (*f*).

Prosecutions.

965. Offences punishable summarily may be prosecuted by the local supervising authority (*g*), and the expenses are defrayable by the council of the county or county borough in which the prosecution takes place (*h*). A woman aggrieved by any determination of a court of summary jurisdiction may appeal to quarter sessions (*i*).

SECT. 5.—*Cleansing of the Person.*

SUB-SECT. 1.—*Public Baths and Washhouses.*

(i.) *Baths and Washhouses Acts.*

Operation by adoption.

966. The powers of local authorities to provide facilities for promoting cleanliness of person and clothing among the inhabitants of their districts depend mainly upon the provisions of a series of

on conviction on indictment by imprisonment for any term not exceeding twelve months, or to a fine, or both; see Perjury Act, 1911 (1 & 2 Geo. 5, c. 6), s. 6.

(*c*) Midwives Act, 1902 (2 Edw. 7, c. 17), s. 1 (1). As to procedure before courts of summary jurisdiction, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*

(*d*) Namely, the council of a county, or of a county borough (Midwives Act, 1902 (2 Edw. 7, c. 17), s. 8), or the body to whom the powers of the council have been delegated (*ibid.*, ss. 9—11); see title MEDICINE AND PHARMACY, Vol. XX., p. 368. The notice must be given to the authority of the area in which the midwife usually resides or carries on her practice, and the like notice must be given to every other authority within whose area she at any time practises, within forty-eight hours after she commences to do so (Midwives Act, 1902 (2 Edw. 7, c. 17), s. 10). Expenses under the Act are payable out of the county fund (see title LOCAL GOVERNMENT, Vol. XIX., p. 358), or out of the borough fund or rate (*ibid.*, p. 319), as the case may be (Midwives Act, 1902 (2 Edw. 7, c. 17), s. 15).

(*e*) As to these rules and the Central Midwives Board, see title MEDICINE AND PHARMACY, Vol. XX., pp. 366, 367. The English Branch Council occupies the place of the General Medical Council for all purposes of the Midwives Act, 1902 (2 Edw. 7, c. 17); see *ibid.*, s. 17.

(*f*) *Ibid.*, s. 10.

(*g*) See note (*d*), *supra*.

(*h*) Midwives Act, 1902 (2 Edw. 7 c. 17), s. 13. As to the fund out of which the expenses are to be paid, see note (*d*), *supra*.

(*i*) Midwives Act, 1902 (2 Edw. 7, c. 17), s. 14. As to such appeals to quarter sessions, see title MAGISTRATES, Vol. XIX., pp. 642—650.

enactments known as the Baths and Washhouses Acts (*k*), which are only operative in a particular district when they have been adopted in the prescribed manner by the local authority of that district.

Partial adoption impossible.

The Baths and Washhouses Acts (*k*) can only be adopted as a whole; there is no power to adopt only a particular Act or a particular section of an Act, but, on the other hand, there is no obligation on the adopting authority to provide every accommodation authorised by the Baths and Washhouses Acts (*k*). There is no provision for the abandonment of the Baths and Washhouses Acts (*k*) when once adopted, but unnecessary baths and washhouses may be sold (*l*).

(ii.) *Adopting and Executing Authorities.*

Metropolitan boroughs.

967. The Baths and Washhouses Acts (*k*) may be adopted in a metropolitan borough (*m*) by a resolution of the borough council; and, where the Acts adopted before the appointed day under the London Government Act, 1899 (*n*), do not extend to the whole borough, they may be adopted in the rest of the borough as if it were a separate borough and the borough council were the council thereof (*o*). The borough council is the authority for executing the Baths and Washhouses Acts (*k*), whether adopted before the

Executing authority.

(*k*) These Acts are the Baths and Washhouses Acts, 1846 (9 & 10 Vict. c. 74), 1847 (10 & 11 Vict. c. 61), 1878 (41 & 42 Vict. c. 14), 1882 (45 & 46 Vict. c. 30), 1896 (59 & 60 Vict. c. 59), and 1899 (62 & 63 Vict. c. 29). They are frequently referred to in this section of this title as "the Baths and Washhouses Acts." In the Acts meanings are assigned to expressions as follows, unless there be something in the subject or context repugnant to such construction:—"Borough" means city, borough, port, Cinque Port, or town corporate; "clerk" means, as regards an incorporated borough, the town clerk, and, as regards a parish, the clerk appointed by the commissioners; "commissioners" means the commissioners appointed for any parish, and for the time being in office and acting as such commissioners; "justice" means justice of the peace for the county, riding, division, liberty, borough, or place where the matter requiring the cognisance of justices arises; "lands" means lands, tenements, and hereditaments, of whatsoever nature and tenure; "parish" means not only every place having separate overseers and separately maintaining its own poor, but also every place maintaining its own poor and having a vestry; "ratepayers" means all persons for the time being assessed to and paying rates for the relief of the poor of the parish; words importing the masculine gender include the feminine; words of the plural number include the singular, and words of the singular number include the plural (Baths and Washhouses Act, 1846 (9 & 10 Vict. c. 74), s. 2); "covered swimming bath" means a swimming bath protected by a roof or other covering from the weather (Baths and Washhouses Act, 1878 (41 & 42 Vict. c. 14), s. 1). Provisions with respect to the same subject-matter, but of more limited scope, are also contained in the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), ss. 136—141, which are incorporated with many local improvement Acts; see title LOCAL GOVERNMENT, Vol. XIX., p. 328. These provisions are mentioned in the appropriate places.

(*l*) See p. 493, *post*.

(*m*) "In like manner as in a borough outside London, and not otherwise"; see London Government Act, 1899 (62 & 63 Vict. c. 14), s. 4 (4), the effect of the provision being as stated in the text, *supra*.

(*n*) 62 & 63 Vict. c. 14.

(*o*) London Government Act, 1899 (62 & 63 Vict. c. 14), ss. 4 (4), 34; and see title METROPOLIS, Vol. XX., p. 405.

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appointed day or not (*a*). Where the Baths and Washhouses Acts (*b*) are in force in part only of a borough, councillors representing wards where they are not in force are not to be members of any committee of the council appointed for the purpose of the Acts (*c*).

Municipal boroughs and urban districts.

968. The Baths and Washhouses Acts (*b*) may be adopted, by resolution, in a municipal borough or other urban district by the council of the borough or district (*d*). The council is the executing authority within its district (*e*).

Rural parishes.

969. In a rural parish the parish meeting has exclusively the power of adoption (*f*). There is no power to adopt for part of a parish (*g*). The resolution for adoption must be carried by at least two-thirds of the votes given at the parish meeting, or, if a poll is taken, of the parochial electors who vote (*h*). A copy of the resolution of adoption, extracted from the minutes of the parish meeting, or, if there is a poll, of the declaration signed by the returning officer that the proposal to adopt the Baths and Washhouses Acts (*b*) was carried by the requisite majority of votes, must be sent to the Local Government Board (*i*) for its approval, and upon such approval being signified the Baths and Washhouses Acts (*b*) come into operation in the parish (*g*).

Executing authority.

If the parish has a parish council, the authority for executing the

(*a*) London Government Act, 1899 (62 & 63 Vict. c. 14), ss. 4 (1), (2), 34. As to the transfer to metropolitan borough councils of the powers of vestries, district boards, and commissioners for public baths and washhouses, see title METROPOLIS, Vol. XX., pp. 402 *et seq.* The London (Adoptive Acts) Scheme, 1900, approved by Order in Council dated 7th August, 1900 (Stat. R. & O. Rev., Vol. VIII., London County, p. 28), which was made in pursuance of the London Government Act, 1899 (62 & 63 Vict. c. 14), provided for the abolition of commissioners, the transfer of their powers, duties, property and liabilities, and their existing officers, to the metropolitan borough councils and for other administrative arrangements. A member of a metropolitan borough council is not personally liable for anything done under the Baths and Washhouses Acts (Baths and Washhouses Act, 1846 (9 & 10 Vict. c. 74), s. 29; London Government Act, 1899 (62 & 63 Vict. c. 14), s. 31 (2)).

(*b*) See note (*k*), p. 487, *ante*.

(*c*) London (Adoptive Acts) Scheme, 1900, art. 6.

(*d*) As "the urban authority" (see Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 10), which, in a borough, is the mayor, aldermen and burgesses, acting by the council (*ibid.*, s. 5), and, in other urban districts, the urban district council (see the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 21; p. 372, *ante*; title LOCAL GOVERNMENT, Vol. XIX., p. 262). Into the definition in the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 4, of the "Baths and Washhouses Acts," as meaning the Baths and Washhouses Act, 1846 (9 & 10 Vict. c. 74), and the Baths and Washhouses Act, 1847 (10 & 11 Vict. c. 61), must now be read the further amending Acts of 1878 (41 & 42 Vict. c. 14), 1882 (45 & 46 Vict. c. 30), 1896 (59 & 60 Vict. c. 59), and 1899 (62 & 63 Vict. c. 29); see note (*k*), p. 487, *ante*.

(*e*) See Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 10.

(*f*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 7 (1); and see title LOCAL GOVERNMENT, Vol. XIX., pp. 254 *et seq.*, 257.

(*g*) Baths and Washhouses Act, 1846 (9 & 10 Vict. c. 74), s. 5.

(*h*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 7 (2).

(*i*) In place of the Secretary of State; see Local Government Board Act, 1871 (34 & 35 Vict. c. 70), s. 2.

Baths and Washhouses Acts (*k*) is the parish council (*l*). In a rural parish not having a separate parish council, the parish meeting must appoint commissioners to carry the Baths and Washhouses Acts (*k*) into execution (*m*), unless by an order of the county council the parish meeting has conferred on it the power of a parish council for such execution (*n*), in which case the parish meeting may appoint a committee for the purpose (*o*).

Power to borrow.

970. For carrying the Baths and Washhouses Acts (*k*) into execution a metropolitan borough council (*p*) with the approval of the Local Government Board, and the commissioners with the sanction of the parish meeting (*q*) and the approval of the Local Government Board, may borrow at interest, on the security of a mortgage of the borough fund or of the poor rates, as the case may be (*r*), and the

(*k*) See note (*k*), p. 487, *ante*.

(*l*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 7 (5), (7).

(*m*) Baths and Washhouses Act, 1846 (9 & 10 Vict. c. 74), s. 6. The parishes in which commissioners are likely to act will be few, if any. But, where the circumstances arise, from three to seven ratepayers are to be appointed, and one-third retire each year (*ibid.*). A commissioner may resign (*ibid.*, s. 7), and vacancies in the office may be filled by the parish meeting (*ibid.*, s. 8). The acts of commissioners, notwithstanding any disqualification or irregularity of appointment, are valid (Baths and Washhouses Act, 1847 (10 & 11 Vict. c. 61), s. 3). The commissioners are incorporated (Baths and Washhouses Act, 1846 (9 & 10 Vict. c. 74), s. 20), and are free from personal liability (*ibid.*, s. 29). They must meet at least once a month (*ibid.*, s. 9), and may do so at other times (*ibid.*, s. 10); one-third of their number, but not less than two, form a quorum (*ibid.*, s. 11), and a minute book must be kept (*ibid.*, s. 13). Their account books are to be open at all reasonable times to inspection by every commissioner, churchwarden, overseer, and ratepayer (*ibid.*, s. 14), and must be audited every March by two persons appointed by the parish meeting, to which body the auditors must report (*ibid.*, s. 15). Where the Baths and Washhouses Acts (see note (*k*), p. 487, *ante*) have been adopted and commissioners appointed by the parish meetings of two or more neighbouring parishes, those meetings, apparently, may concur in carrying the Acts into execution and, with the approval of the Local Government Board, agree for the provision of baths, washhouses and bathing places, under the management of one body of commissioners, for use in common by the respective parishes (Baths and Washhouses Act, 1846 (9 & 10 Vict. c. 74), s. 19), but there may be practical difficulties in acting upon the provision. It might be more convenient, if any such joint action were feasible, for the parish meetings concerned to obtain the powers of a parish council (Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 19 (10)), and act by means of a joint committee (*ibid.*, s. 57); see title LOCAL GOVERNMENT, Vol. XIX., p. 246.

(*n*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 19 (10).

(*o*) *Ibid.*, s. 19 (3).

(*p*) See London Government Act, 1899 (62 & 63 Vict. c. 14), s. 31 (2).

(*q*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 7. For form of particulars for consent of Local Government Board, see Encyclopædia of Forms and Precedents, Vol. XVI., p. 373.

(*r*) Baths and Washhouses Act, 1846 (9 & 10 Vict. c. 74), s. 21; Baths and Washhouses Act, 1878 (41 & 42 Vict. c. 14), s. 9; and see title METROPOLIS, Vol. XX., p. 446. The provisions of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), with respect to the borrowing of money, are incorporated, so far as applicable, with the substitution of the council or commissioners for the company and directors, and the clerk for the secretary of the company (Baths and Washhouses Act, 1846 (9 & 10

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Public Works Loans Commissioners may lend to the council or commissioners for the purpose (*a*). Other executing authorities may borrow under their general powers (*b*).

Expenses in metropolitan borough.

971. The expenses of carrying the Baths and Washhouses Acts (*c*) into execution are, in a metropolitan borough, paid out of the general rate (*d*), but where the Acts (*c*) do not extend to the whole of the borough the rate levied is an additional item of that rate over the area to which they do (*c*) extend (*e*).

In municipal boroughs and urban districts.

In a borough or other urban district the expenses are paid as expenses under the Public Health Acts (*f*).

In rural parishes.

In a rural parish the expenses, to such an amount as is from time to time sanctioned by the parish meeting (*g*), are paid out of the poor rate (*h*), and the parish meeting must order the overseers to levy with and as part of the poor rate such sums as the parish meeting deems necessary, and such sums are paid by the overseers, according to the order of the parish meeting, to the person appointed by the parish council or commissioners, as the case may be, to receive them (*i*).

Application of income from baths and washhouses.

972. In a rural parish the money raised for defraying expenses and the income arising from the baths and washhouses and bathing places are applied by the parish council or commissioners (*k*) in or towards defraying the expenses of carrying the Baths and Washhouses Acts (*c*) into execution: and whenever, after repayment of

Vict. c. 74), s. 23; Baths and Washhouses Act, 1878 (41 & 42 Vict. c. 14), s. 9). For the applied provisions of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), namely, ss. 38—55, see title COMPANIES, Vol. V., pp. 731—739.

(*a*) Baths and Washhouses Act, 1846 (9 & 10 Vict. c. 74), s. 22; Baths and Washhouses Act, 1878 (41 & 42 Vict. c. 14), s. 9. Baths and washhouses provided by local authorities are among the works in the Public Works Loans Act, 1875 (38 & 39 Vict. c. 89), Sched. I., for which the commissioners are authorised by *ibid.*, s. 9, to make loans; see pp. 382 *et seq.*, *ante*; and see title MONEY AND MONEY-LENDING, Vol. XXI., pp. 59 *et seq.*

(*b*) Town councils and other urban district councils under the Public Health Acts (see pp. 382 *et seq.*, *ante*, and note (*a*), p. 361, *ante*), and parish councils under the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 12 (see title LOCAL GOVERNMENT, Vol. XIX., p. 244). For forms of mortgage by local authorities, see Encyclopædia of Forms and Precedents, Vol. VI., p. 310; Vol. VIII., pp. 194—205.

(*c*) See note (*k*), p. 487, *ante*.

(*d*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 10; and see title METROPOLIS, Vol. XX., p. 451.

(*e*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 10 (3).

(*f*) For a list of the Public Health Acts, see note (*a*), p. 361, *ante*, and see pp. 380 *et seq.*, *ante*.

(*g*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 7 (3).

(*h*) Baths and Washhouses Act, 1846 (9 & 10 Vict. c. 74), s. 16; Baths and Washhouses Act, 1878 (41 & 42 Vict. c. 14), s. 13.

(*i*) Baths and Washhouses Act, 1846 (9 & 10 Vict. c. 74), s. 17.

(*k*) In the statute (*ibid.*, s. 18) "the commissioners" only are mentioned, but it appears to apply also to the parish council as part of its duties in executing the Acts, and to a metropolitan borough council in substitution for the commissioners; see London Government Act, 1899 (62 & 63 Vict. c. 14), s. 31 (2).

all moneys borrowed and the interest thereof, and after satisfying all the liabilities with reference to such execution, and providing such a balance as is deemed by the council or commissioners sufficient to meet their probable liabilities during the then next year, there is at the time of holding the parish meeting at which the yearly report of the auditors is produced (*l*) any surplus, it must be paid to the overseers in aid of the poor rate (*m*).

(iii.) *Provision of Baths and Washhouses.*

(a) *Acquisition of Lands and Premises.*

Incorporation of Lands Clauses Acts.

973. The Lands Clauses Acts (*n*) are incorporated with the Baths and Washhouses Acts (*o*); but the commissioners and other authorities are not by the latter Acts empowered to purchase or take any lands otherwise than by agreement (*p*).

Purchase or renting of land.

The council of a metropolitan borough, municipal borough, or other urban district, and, with the approval of the parish meeting (*q*), the parish council or commissioners of a parish, may contract for the purchase or renting of any lands (*a*) in or in the immediate neighbourhood of (*b*) such borough, district, or parish necessary for the purposes of the Baths and Washhouses Acts (*c*), and the property therein is, in the case of a borough, to be vested in the metropolitan borough council or the municipal corporation, and, in any other case, in the council of the urban district or parish or in the commissioners (*d*).

(*l*) See note (*m*), p. 489, *ante*. Where Acts are executed by a parish council, the time for ascertaining any surplus is the 31st March.

(*m*) Baths and Washhouses Act, 1846 (9 & 10 Vict. c. 74), s. 18; Baths and Washhouses Act, 1878 (41 & 42 Vict. c. 14), s. 13. A provision in the Baths and Washhouses Act, 1846 (9 & 10 Vict. c. 74), s. 4, that in a borough the income is to be paid to the credit of the borough fund would have to be satisfied by paying it to the credit of the fund out of which the expenses are now paid; and see title LOCAL GOVERNMENT, Vol. XIX., pp. 280 *et seq.* Profits on baths and washhouses are assessable to income tax; see title INCOME TAX, Vol. XVI., p. 625.

(*n*) As to the meaning of the term "Lands Clauses Acts," see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 12.

(*o*) See note (*k*), p. 487, *ante*.

(*p*) Baths and Washhouses Act, 1847 (10 & 11 Vict. c. 61), s. 4. As to the provisions thus incorporated, see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 56 *et seq.* Councils (see pp. 487 *et seq.*, *ante*) executing the Baths and Washhouses Acts (see note (*k*), p. 487, *ante*) may, however, under their general powers acquire land compulsorily; see note (*d*), *infra*. For form of agreement, see Encyclopædia of Forms and Precedents, Vol. XII., pp. 227, 230.

(*q*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 7 (3).

(*a*) For definition of "lands," see note (*k*), p. 487, *ante*.

(*b*) Baths and Washhouses Act, 1882 (45 & 46 Vict. c. 30), s. 3.

(*c*) See note (*k*), p. 487, *ante*.

(*d*) Baths and Washhouses Act, 1846 (9 & 10 Vict. c. 74), s. 24. This provision, it is submitted, applies to a metropolitan borough council and an urban district council, but it specifically refers to a "borough" (see definition, note (*k*), p. 487, *ante*) and "parish" only; and the amending provision in the Baths and Washhouses Act, 1882 (45 & 46 Vict. c. 30), likewise refers to "the immediate neighbourhood of such borough or parish," although, since 1872, the Acts have been executed in urban districts by the urban authority; see note (*d*), p. 488, *ante*. The effect of the legislation whereby metropolitan borough councils (see p. 487, *ante*) and urban district

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The like authorities may contract for the purchase or lease of any baths, washhouses, and covered swimming baths (*e*) in or in the immediate neighbourhood of (*f*) such borough, district, or parish; and may appropriate such baths, washhouses, and covered swimming baths to the purposes of the Baths and Washhouses Acts (*g*), with any necessary additions or alterations (*h*).

Purchase and leasing of existing baths.

Acquisition from trustees of baths etc. provided by private subscriptions etc.

The trustees of any public baths, washhouses, and covered swimming baths, built or provided by private subscriptions or otherwise, with the consent of such borough or urban district council, or, in the case of a rural parish, with the consent of the parish council or commissioners and the approval of the parish meeting, and, in each case, with the consent of a majority of the committee or other persons by whom they were appointed trustees, may sell or lease such baths, washhouses, and covered swimming baths, or make over their management to the council or commissioners (*i*).

Appropriation of municipal and parochial land.

974. For the purposes of the Baths and Washhouses Acts (*g*), the council of a municipal borough may, with the approval of the Local Government Board (*k*), appropriate in the borough any lands vested in the corporation; and the commissioners (*l*) may, for the

councils (see p. 488, *ante*) are, in their boroughs and districts, the authorities for adopting and executing the Baths and Washhouses Acts (see note (*k*), p. 487, *ante*) seems to be to put such councils in the same position as regards their boroughs or districts as commissioners were in as regards their parish; and see London Government Act, 1899 (62 & 63 Vict. c. 14), s. 31 (2). But in purchasing or renting lands, authorities other than commissioners of a parish may proceed under general enactments applying to such authorities and enabling them to purchase land, not only by agreement, but also compulsorily. A metropolitan borough council may proceed under the London Government Act, 1899 (62 & 63 Vict. c. 14), s. 5 (2) (see title METROPOLIS, Vol. XX., pp. 455 *et seq.*); the council of a municipal borough or other urban district under the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 175—178 (as to which see titles COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 163 *et seq.*; CONSTITUTIONAL LAW, Vol. VII., p. 221; SALE OF LAND), as the effect of the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 10, is to make the execution of the Acts a purpose of that Act; and a parish council, subject to the approval of the parish meeting as required by the Baths and Washhouses Act, 1846 (9 & 10 Vict. c. 74), under the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 9 (see title LOCAL GOVERNMENT, Vol. XIX., p. 248).

(*e*) See Baths and Washhouses Act, 1878 (41 & 42 Vict. c. 14), ss. 2—4. For definition of "covered swimming bath," see note (*k*), p. 487, *ante*.

(*f*) Baths and Washhouses Act, 1882 (45 & 46 Vict. c. 30), s. 2.

(*g*) See note (*k*), p. 487, *ante*.

(*h*) Baths and Washhouses Act, 1846 (9 & 10 Vict. c. 74), s. 27.

(*i*) *Ibid.*; Baths and Washhouses Act, 1878 (41 & 42 Vict. c. 14), s. 3. This provision, and the amending provision in the Baths and Washhouses Act, 1882 (45 & 46 Vict. c. 30), s. 2, specifically refer to a "borough or parish" only; but see note (*d*), p. 491, *ante*.

(*k*) In place of the Treasury; see Local Authorities (Treasury Powers) Act, 1906 (6 Edw. 7, c. 33).

(*l*) For definition of "commissioners," see note (*k*), p. 487, *ante*. The effect of the legislation referred to in note (*d*), p. 491, *ante*, may be, as regards a parish, to place a council executing the Acts in the same position as the commissioners in a rural parish without a parish council; subject to this, that where the parish is urban, the approval of the vestry, if it still retains its civil powers (see title LOCAL GOVERNMENT, Vol. XIX., p. 261), will have to be obtained. In the case of the council of a metropolitan or municipal borough, or of an urban district, it is probable that, apart from any other

like purposes, with the approval of the parish meeting (*m*) and of the guardians of the poor and of the Local Government Board (*n*), appropriate in the parish any lands vested in such guardians, or in the churchwardens, or in the overseers (*o*) of the parish, or in any feoffees, trustees, or others, for the general benefit of the parish (*p*).

(b) *Sale and Exchange of Lands and Premises.*

Sale and exchange of land.

975. With the approval of the Local Government Board (*q*) and, in the case of commissioners, of the parish meeting (*r*), an authority executing the Baths and Washhouses Acts (*s*) may sell and dispose of any lands vested in the authority for the purposes of the Acts (*s*) and apply the proceeds in or towards the purchase of other lands better adapted for such purposes, and may, with the like approval, exchange any lands so vested, either with or without paying or receiving any money for equality of exchange, for any other lands better adapted for such purposes (*t*).

Sale of unnecessary baths or washhouses.

976. Whenever any public baths or washhouses or open bathing places or covered swimming baths (*u*) which have been for seven years or upwards established under the Baths and Washhouses Acts (*a*) are determined, by the council of a metropolitan or municipal borough or of an urban district, or by the parish meeting (*b*) in accordance with a previous recommendation of the parish council or commissioners, to be unnecessary or too expensive to be kept up, the council, with the approval of the Local Government Board (*c*),

question, there would be a practical difficulty in obtaining the necessary approvals for the appropriation of parochial land, unless the borough or district were coterminous with the parish.

(*m*) In place of the vestry; see Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 19 (4).

(*n*) As successors to the Poor Law Board; see Local Government Board Act, 1871 (34 & 35 Vict. c. 70), s. 1.

(*o*) In an urban parish, where no order under the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 33, under which the churchwardens have ceased to be overseers is in force, for "overseers" (see the text, *supra*) read "churchwardens and overseers," as in the Baths and Washhouses Act, 1846 (9 & 10 Vict. c. 74), s. 24. In a rural parish, lands may be vested in the parish council as successors to the overseers or to the churchwardens and overseers (Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 5 (2)); or, if the parish has no parish council, in the chairman and overseers (*ibid.*, s. 19 (7)). In a parish in a metropolitan borough, the council are the overseers, and property formerly vested in the overseers or in the churchwardens and overseers is vested in the council; see London Government Act, 1899 (62 & 63 Vict. c. 14), ss. 11 (1), 23 (3); title METROPOLIS, Vol. XX., p. 407.

(*p*) Baths and Washhouses Act, 1846 (9 & 10 Vict. c. 74), s. 24.

(*q*) In place of the Treasury; see Local Authorities (Treasury Powers) Act, 1906 (6 Edw. 7, c. 33).

(*r*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 7 (3).

(*s*) See note (*k*), p. 487, *ante*.

(*t*) Baths and Washhouses Act, 1846 (9 & 10 Vict. c. 74), s. 31.

(*u*) Baths and Washhouses Act, 1878 (41 & 42 Vict. c. 14), s. 3. For definition of "covered swimming bath," see note (*k*), p. 487, *ante*.

(*a*) See note (*k*), p. 487, *ante*.

(*b*) In place of the vestry; see Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 7 (3).

(*c*) In place of the Treasury; see Local Authorities (Treasury Powers) Act, 1906 (6 Edw. 7, c. 33).

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may sell them for the best price reasonably obtainable, and the net proceeds of the sale must be paid to the credit of the fund or rate (*d*) out of which the expenses of the authority are paid (*e*).

(c) *Erection of Baths and Washhouses.*

Erection, alteration, and furnishing of baths.

977. The executing authority (*f*) may erect on any lands appropriated or acquired by it under the Baths and Washhouses Acts (*g*) any buildings suitable for public baths, washhouses with or without drying grounds, and covered swimming baths (*h*), and may make any open bathing places, convert any buildings into public baths and washhouses, and may from time to time alter, enlarge, repair, and improve the same respectively, and fit up, furnish, and supply the same respectively with all requisite furniture, fittings, and conveniences (*i*); but the number of baths (*k*) and the number of washing tubs or troughs, as the case may be, provided for the labouring classes in any building or buildings must respectively not be less than twice the number of the baths, tubs, or troughs of any higher class if but one, or of all the baths, tubs, or troughs of any higher classes if more than one in the same building or buildings (*l*).

Provisions as to contracts.

978. Contracts may be entered into by the executing authority (*f*) for building and making, and for altering, enlarging, repairing, improving, supplying with water, lighting, and fitting up the baths, washhouses, open bathing places, and covered swimming baths (*m*), and for furnishing any materials and things, and for executing and doing any other works and things necessary for the purposes of the Baths and Washhouses Acts (*g*); and such contracts must specify the several works and things to be done, the prices to be paid, the

(*d*) The words are, "of the borough fund or of the rate for the relief of the poor of the parish," but the effect of the legislation referred to in note (*d*), p. 491, *ante*, is, it is contended, as stated in the text, *supra*. For the fund or rate out of which the expenses are paid, see p. 490, *ante*.

(*e*) Baths and Washhouses Act, 1846 (9 & 10 Vict. c. 74), s. 32. There is a corresponding provision (see note (*k*), p. 487, *ante*) for the sale of unnecessary or expensive baths and washhouses in the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 141, but no approval of any central authority is required, and the discontinuance of the baths and washhouses must be by a "special order" made in pursuance of *ibid.*, ss. 132, 133.

(*f*) *I.e.*, the council or commissioners; see pp. 487 *et seq.*, *ante*.

(*g*) See note (*k*), p. 487, *ante*.

(*h*) Baths and Washhouses Act, 1878 (41 & 42 Vict. c. 14), ss. 2—4. For definition of "covered swimming bath," see note (*k*), p. 487, *ante*.

(*i*) Baths and Washhouses Act, 1846 (9 & 10 Vict. c. 74), s. 25. Where by a special Act (see note (*k*), p. 487, *ante*) the necessary provisions of the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), are incorporated, convenient land and buildings may, by a special order in pursuance of *ibid.*, ss. 132, 133, be purchased, rented, or otherwise provided and maintained under *ibid.*, s. 136, for use as public baths and washhouses.

(*k*) There is a corresponding provision (see note (*k*), p. 487, *ante*) as to the number of baths for the working classes in the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 137.

(*l*) Baths and Washhouses Act, 1846 (9 & 10 Vict. c. 74), s. 36; Baths and Washhouses Act, 1847 (10 & 11 Vict. c. 61), s. 5.

(*m*) Baths and Washhouses Act, 1878 (41 & 42 Vict. c. 14), s. 3. For definition of "covered swimming bath," see note (*k*), p. 487, *ante*.

times when the works and things are to be done, and the penalties to be suffered in cases of non-performance; and all such contracts or true copies must be entered in books to be kept for that purpose (*n*).

Notice where contract above £100.

No contract above the value of £100 may be entered into, unless previous to the making thereof fourteen days' notice is given in one or more of the public newspapers published in the county in which the borough or parish is situated, expressing the intention of entering into such contract, so that any person willing to undertake the same may, for that purpose, make proposals, which must be offered to the executing authority at a certain time and place mentioned in such notice; but the executing authority (*o*) need not contract with the person offering the lowest price (*n*).

(iv.) *Management.*

(a) *In General.*

Management, regulation, and control.

979. The general management (*p*), regulation, and control of the public baths, washhouses and bathing places are vested in and exercised by the executing authority (*q*).

Appointment and removal of officers etc.

980. The executing authority must appoint, and may remove at pleasure, such officers and servants as are necessary, and may pay them reasonable salaries, wages, and allowances (*r*). Officers and servants so employed in and about any baths, washhouses, open bathing places, or covered swimming baths in a metropolitan borough may be superannuated (*s*).

Corruption and disqualification of officers, councillors etc.

981. If any clerk or other officer, or any servant employed by any council or commissioners in pursuance of the Baths and Washhouses Acts (*t*), or any councillor or commissioner, exacts or

(*n*) Baths and Washhouses Act, 1846 (9 & 10 Vict. c. 74), s. 26.

(*o*) *I.e.*, the council or commissioners; see pp. 487 *et seq.*, *ante*.

(*p*) When necessary, a sufficient office for holding meetings and transacting business may be hired at a reasonable rent (Baths and Washhouses Act, 1846 (9 & 10 Vict. c. 74), s. 12). The authority is liable for negligence, *e.g.*, for damage arising from a dangerous wringing machine (*Cowley* v. *Sunderland Corporation* (1861), 6 H. & N. 565); and see title NEGLIGENCE, Vol. XXI., pp. 422 *et seq.*, 464 *et seq.*, 476 *et seq.*, 477, note (*h*).

(*q*) Baths and Washhouses Act, 1846 (9 & 10 Vict. c. 74), s. 33. As to the executing authority, see pp. 487 *et seq.*, *ante*.

(*r*) Baths and Washhouses Act, 1846 (9 & 10 Vict. c. 74), s. 12. Commissioners may appoint a clerk (*ibid.*), but other authorities should not appoint a separate clerk for the purposes of the Acts. In a rural parish the salaries, wages and allowances must be approved by the parish meeting (*ibid.*; Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 7 (3)). The provisions of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), with respect to the accountability of officers, so far as applicable, are incorporated, with the substitution of the council or the commissioners for the company and directors (Baths and Washhouses Act, 1846 (9 & 10 Vict. c. 74), s. 23). Security is to be taken from officers entrusted with money (Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 109). For the applied provisions of *ibid.*, ss. 109—114, see title COMPANIES, Vol. V., pp. 715, 716.

(*s*) Baths and Washhouses Act, 1878 (41 & 42 Vict. c. 14), s. 12, which applies to such officers the Superannuation (Metropolis) Act, 1866 (29 & 30 Vict. c. 31).

(*t*) See note (*k*), p. 487, *ante*.

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accepts any fee or reward, other than, in the case of a clerk, officer or servant, his salary, wages, or allowances, on account of anything done or forborne, or to be done or forborne, in pursuance of the Baths and Washhouses Acts (*a*), or in putting them into execution, or if any such clerk, officer or servant is in anywise concerned or interested in any bargain or contract made by the council or commissioners, or if any person while he holds the office of councillor or commissioner accepts or holds any office or place of trust created by virtue of the Baths and Washhouses Acts (*a*), or is concerned directly or indirectly in any such bargain or contract (*b*), he is incapable of ever serving or being employed under the Acts (*a*), and for every offence forfeits the sum of £50 (*c*).

Supply of water and gas.

982. Any water, canal, or gas companies, or other corporations, bodies, and persons having the management of waterworks, canals, reservoirs, wells, springs, streams of water, and gasworks, may in their discretion grant and furnish supplies of water or gas for public baths and washhouses, open bathing places, and covered swimming baths either without charge (*d*) or on such other favourable terms as they think fit (*e*).

(*a*) See note (*k*), p. 487, *ante*.

(*b*) As to what transactions may be within the provisions relating to bargains or contracts made by the council or commissioners, see the cases cited in title LOCAL GOVERNMENT, Vol. XIX., p. 304.

(*c*) Baths and Washhouses Act, 1846 (9 & 10 Vict. c. 74), s. 39. It is doubtful how far, if at all, this provision now applies to any council other than a metropolitan borough council, or to an officer or servant of such a council. When enacted it applied to a town council, a town clerk (see definition of "clerk," note (*k*), p. 487, *ante*), or other officer or servant employed by a town council (Baths and Washhouses Act, 1846 (9 & 10 Vict. c. 74), ss. 3 (repealed), 39). But town councils and urban district councils now administer the Acts by virtue of the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 10 (see note (*d*), p. 488, *ante*), the terms of which do not appear to warrant the application of the above provision to them or to any of their officers or servants. There seems no enactment which would apply it to a parish council, the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 52 (5), not referring to any transfer of powers under the adoptive Acts. A metropolitan borough council is, by the operation of the London Government Act, 1899 (62 & 63 Vict. c. 14), s. 31 (2), substituted for the commissioners (see note (*d*), p. 491, *ante*); see also the similar provision in the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 64; and see title METROPOLIS, Vol. XX., p. 453. Other modern enactments, however, apply. For urban authorities, reference may be made to the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 193; Public Health (Officers) Act, 1884 (47 & 48 Vict. c. 74); and the unrepealed provisions of the Public Health (Members and Officers) Act, 1885 (48 & 49 Vict. c. 53); and, for authorities generally, to the Public Bodies Corrupt Practices Act, 1889 (52 & 53 Vict. c. 69); see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 484, 485. Some kinds of corruption may be met by the Prevention of Corruption Act, 1906 (6 Edw. 7, c. 34); see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 710. As to disqualification of members of councils by reason of interest in contracts, see title LOCAL GOVERNMENT, Vol. XIX., pp. 304—306.

(*d*) As to recovery of arrears of gas charges for past years, see *South Metropolitan Gas Co.* v. *Bermondsey Borough Council* (1901), 17 T. L. R. 520.

(*e*) Baths and Washhouses Act, 1846 (9 & 10 Vict. c. 74), s. 28; Baths and Washhouses Act, 1878 (41 & 42 Vict. c. 14), s. 3; and see titles GAS, Vol. XV., p. 343; WATER SUPPLY. For forms of contract to supply

Local authorities may supply water on agreed terms and conditions from their waterworks to any public baths or washhouses, and may construct works for the gratuitous supply of public baths or washhouses supported out of poor or borough rates (*f*).

Offences against decency.

983. Any bath or washhouse, or open bathing place, or covered swimming bath, established under the Baths and Washhouses Acts (*g*) is to be taken to be a public and open place, so as to make offences against decency therein criminal offences (*h*).

Refusal of admittance and expulsion of offenders.

The executing authority (*i*) and its officers and servants may refuse admittance to any bath, washhouse, open bathing place, or covered swimming bath to any person who has been convicted of wilfully disobeying therein any of the bye-laws made under the Baths and Washhouses Acts (*g*), or who has been convicted of any offence against public decency therein (*k*); and they may remove therefrom any offender against the bye-laws (*l*).

Use of swimming bath for gymnasium, meeting-place etc.

984. The executing authority (*i*) may during a period, not exceeding five calendar months in any one year, from the beginning of November to the end of March, close any open or covered swimming bath, and may either keep it closed or may establish therein a gymnasium (*m*) or other means of healthful recreation, or may allow it to be used as an empty building for purposes of healthful recreation or exercise. The executing authority (*i*) may also make reasonable charges for the use of such gymnasium or other means of recreation, or for the use of any covered swimming bath as an empty room (*n*), and may appoint and remove at pleasure such officers and servants as are necessary for the management and superintendence of any such gymnasium or other means of recreation, and may pay them reasonable salaries, wages and allowances (*o*). The executing authority (*i*) may also at any time allow any portion of the public

gas or water, see Encyclopædia of Forms and Precedents, Vol. XV., p. 195.

(*f*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 65. As to constructing such works where there is already a statutory supply, see *West Surrey Water Co.* v. *Chertsey Union Guardians*, [1894] 3 Ch. 513. An authority, where the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 121 (see title LOCAL GOVERNMENT, Vol. XIX., p. 328), is in force, may supply any public baths or washhouses with water. Under the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 37, the undertakers must provide a sufficient supply of water upon agreed terms for public baths and washhouses established for the free use of the inhabitants or paid for out of any poor or borough rates; see title WATER SUPPLY. For the purposes of the Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), "domestic purposes" does not include a supply of water for public baths or washhouses (*ibid.*, s. 25).

(*g*) See note (*k*), p. 487, *ante*.

(*h*) Baths and Washhouses Act, 1878 (41 & 42 Vict. c. 14), s. 10.

(*i*) As to the executing authority, see pp. 487 *et seq.*, *ante*.

(*k*) Baths and Washhouses Act, 1878 (41 & 42 Vict. c. 14), ss. 2, 11. As to offences against decency, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 537.

(*l*) Baths and Washhouses Act, 1878 (41 & 42 Vict. c. 14), s. 10. As to bye-laws, see pp. 498 *et seq.*, *post*.

(*m*) As to gymnasiums under other adoptive Acts, see pp. 581 *et seq.*, *post*.

(*n*) Baths and Washhouses Act, 1878 (41 & 42 Vict. c. 14), s. 8.

(*o*) *Ibid.*, s. 7.

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baths not required by it to be used for holding vestry meetings or other parochial purposes (*a*), and may make bye-laws for the regulation, management, and use of the open or covered swimming baths when used for any of the purposes above mentioned (*b*).

Licence for music and dancing.

985. Before any such closed bath is used for music or dancing the executing authority (*c*) must obtain such licence as may be required for the use of a place for that purpose under any enactment in force in the area for which it acts (*d*), or, if no such enactment is in force, obtain a licence from the county council of the county in which such area is situated. No portion of the premises in respect of which the licence is granted must be let otherwise than occasionally to any person or persons, corporate or otherwise, and no money for admission must be taken at the doors (*e*); and the executing authority must be responsible for any breach of the conditions on which the licence is granted occurring during any entertainment given on such premises by its permission (*f*).

(b) *Bye-laws* (*g*).

Power to make bye-laws.

986. The executing authority (*c*) may make bye-laws, enforceable by penalties not exceeding £5 (*h*), for the management, use, and

(*a*) Baths and Washhouses Act, 1878 (41 & 42 Vict. c. 14), s. 5. Notice to the district surveyor before constructing temporary wooden flooring for a bath is not necessary under the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 145 (*Handover* v. *Meeson* (1903), 67 J. P. 313).

(*b*) Baths and Washhouses Act, 1878 (41 & 42 Vict. c. 14), s. 6. All the provisions as to bye-laws (see the text, *infra*) apply.

(*c*) As to the executing authority, see pp. 487 *et seq.*, *ante*,

(*d*) In the administrative County of London such licence is obtained under the Disorderly Houses Act, 1751 (25 Geo. 2, c. 36), as amended by the Local Government Act, 1888 (51 & 52 Vict. c. 41), from the London County Council at an annual licensing meeting, or at any other meeting duly convened with fourteen days' previous notice (see Baths and Washhouses Act, 1896 (59 & 60 Vict. c. 59), s. 3); in the administrative county of Middlesex, under the Music and Dancing Licences (Middlesex) Act, 1894 (57 & 58 Vict. c. 15); and, for any places within twenty miles of the cities of London and Westminster, but not within the administrative counties of London and Middlesex, under the Disorderly Houses Act, 1751 (25 Geo. 2, c. 36), and the Local Government Act, 1888 (51 & 52 Vict. c. 41), from the respective county councils; under the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 51, where that enactment is in force, such licence is obained from the licensing justices; elsewhere, subject to any local enactment, it must be obtained as stated in the text, *supra*. As to such licences generally, see title THEATRES AND OTHER PLACES OF ENTERTAINMENT.

(*e*) An application for an injunction against a council where its lessees took admission money at pay-boxes just outside the building was not granted (*A.-G.* v. *Walthamstow Urban Council*, [1910] 1 Ch. 347).

(*f*) Baths and Washhouses Act, 1899 (62 & 63 Vict. c. 29), ss. 2, 4. A similar provision in the Baths and Washhouses Act, 1896 (59 & 60 Vict. c. 59), s. 2, applies to the administrative County of London.

(*g*) As to bye-laws generally, see pp. 388 *et seq.*, *ante*; see note (*m*), p. 499, *post*. The provisions of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), with respect to the making of bye-laws, so far as applicable, are incorporated, with the substitution of the council or commissioners for the company (Baths and Washhouses Act, 1846 (9 & 10 Vict. c. 74), s. 23). For the applied provisions of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), ss. 124—127, see title

(*h*) For note (*h*), see next page.

regulation of the public baths and washhouses, open bathing places, and covered swimming baths (*i*), and of the persons resorting thereto respectively, and the charges for such use (*k*).

What bye-laws must provide for.

The bye-laws must make sufficient provision (1) for securing that the baths, washhouses, open bathing places, and covered swimming baths shall be under the due management and control of the officers and servants of the authority; (2) for securing adequate privacy to persons using them and security against accidents to persons using the open bathing places; (3) for securing that men and boys above eight years old shall bathe separately from women and girls and children under eight years old; (4) for preventing damage, disturbance, interruption, and indecent and offensive language and behaviour, and nuisances; (5) for determining the duties of the officers and servants (*l*); and (6), in parishes, for regulating the procedure of the commissioners. The bye-laws must be approved by the Local Government Board (*m*).

Notice of bye-laws.

987. A printed copy or sufficient abstract of the bye-laws relating to the use of the baths and bathing places respectively must be put up in every bath room and bathing place respectively, and of those relating to the use of the washhouses in some convenient place near

COMPANIES, Vol. V., p. 717. Bye-laws made by commissioners were kept in force when parish councils took over their powers (Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 87).

(*h*) The corresponding provision (see note (*k*), p. 487, *ante*) in the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 136, authorises the making of "such regulations as the commissioners may deem expedient," enforceable by penalties not exceeding 40*s*. For forms of bye-laws generally, see Encyclopædia of Forms and Precedents, Vol. XI., pp. 28—33.

(*i*) As to covered swimming baths, see Baths and Washhouses Act, 1878 (41 & 42 Vict. c. 14), ss. 1—3. With regard to bye-laws as to baths when used for gymnasia etc., see p. 498, *ante*.

(*k*) As to the power to make charges for the use of baths, washhouses, and bathing places, and the maximum rates, see Baths and Washhouses Acts, 1847 (10 & 11 Vict. c. 61), s. 7, Sched.; 1878 (41 & 42 Vict. c. 14), ss. 4, 14, Sched.; Towns Improvement Clauses Act, 1847 (10 & 11 Vict c. 34), s. 138. The officers, servants, and others having the management of the washhouses may detain the clothes brought to be washed or other goods and chattels of any person refusing to pay the charge, or any part, till full payment is made, and, if such payment is not made within seven days, on demand, may sell such clothes, goods, and chattels, or any of them, returning to such person the surplus proceeds of such sale, after deducting the unpaid charge, the expenses of such detention and sale, and the unsold articles, if any (Baths and Washhouses Act, 1846 (9 & 10 Vict. c. 74), s. 38). There is a corresponding provision (see note (*k*), p. 487, *ante*) in the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 139.

(*l*) Bye-laws as to the conduct of officers and servants and the due management of the affairs of the council may also be made (Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), ss. 124, 125; see note (*g*), p. 498, *ante*).

(*m*) Baths and Washhouses Act, 1846 (9 & 10 Vict. c. 74), s. 34, Sched. A. The Local Government Board was substituted for the Secretary of State by the Local Government Board Act, 1871 (34 & 35 Vict. c. 70), s. 2. The Board has issued model bye-laws with respect to baths and washhouses. Bye-laws under the Baths and Washhouses Acts (see note (*k*), p. 487, *ante*) are not subject to the provisions of the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 182—188; see note (*d*), p. 388, *ante*.

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every washing tub or trough, or every pair of washing tubs or troughs, in every washhouse (*n*).

(v.) *Proceedings against Offenders.*

Summary jurisdiction.

988. The Summary Jurisdiction Acts (*o*) are applicable to proceedings under the Baths and Washhouses Acts (*p*).

Application of penalties.

989. Such part of any penalty recovered under the Baths and Washhouses Acts (*q*) as is not awarded to the informer must be paid to the credit, as regards a borough, of the borough fund, and, as regards a parish, of the poor rate (*r*).

Appeal against bye-laws etc.

990. Every person who is aggrieved by any bye-law, order, direction, or appointment of or by the executing authority (*s*) has the like power of appeal to the general quarter sessions (*t*) as he has if aggrieved by any determination of any justice with respect to any penalty (*a*).

SUB-SECT. 2.—*Bathing Places.*

Bye-laws as to public bathing.

991. Where any part of the seashore or strand of any river used as a public bathing place is within its district, an urban authority, or a rural authority when invested with urban powers in that behalf (*b*), may make bye-laws for fixing the stands of bathing machines on the seashore or strand, and the limits within which persons of each sex may be set down for bathing and may bathe; for preventing indecent exposure; for regulating the use of, and

(*n*) Baths and Washhouses Acts, 1846 (9 & 10 Vict. c. 74), s. 35; 1878 (41 & 42 Vict. c. 14), s. 3. There is a corresponding provision (see note (*k*), p. 487, *ante*) in the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 140.

(*o*) See title MAGISTRATES, Vol. XIX., p. 589.

(*p*) Baths and Washhouses Act, 1846 (9 & 10 Vict. c. 74), s. 23; Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), ss. 4, 5, Sched. By the Baths and Washhouses Act, 1846 (9 & 10 Vict. c. 74), s. 23, the provisions of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), with respect to the recovery of damages not specially provided for, and penalties, so far as applicable, are incorporated, with the substitution of the council or commissioners for the company. For the unrepealed applied provisions, namely, Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), ss. 142—147, 150—152, 154—156, 158—160, see title COMPANIES, Vol. V., pp. 728, 729. The repealed provisions are superseded by the Summary Jurisdiction Acts. Proceedings are before two justices (Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), ss. 142, 147), and are not to be quashed for want of form etc. (*ibid.*, s. 158). Not more than half of a penalty may be awarded to the informer (*ibid.*, s. 152). There is an appeal to general quarter sessions against the determination of the justices (*ibid.*, ss. 159, 160); and see title MAGISTRATES, Vol. XIX., pp. 642 *et seq.*

(*q*) See note (*k*), p. 487, *ante*.

(*r*) Baths and Washhouses Act, 1846 (9 & 10 Vict. c. 74), s. 40. Subsequent legislation does not seem to have affected the application of this provision.

(*s*) As to the executing authority, see pp. 487 *et seq.*, *ante*.

(*t*) The words are "as under the provisions of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), as incorporated with this Act." The reference is to *ibid.*, ss. 159, 160; see note (*p*), *supra*.

(*a*) Baths and Washhouses Act, 1846 (9 & 10 Vict. c. 74), s. 30; and, as to such appeals, see title MAGISTRATES, Vol. XIX., pp. 642 *et seq.*

(*b*) As to the investing of a rural authority with urban powers, see title LOCAL GOVERNMENT, Vol. XIX., p. 332.

charges (*c*) for, the bathing machines, and the distance at which sailing or rowing pleasure boats let to hire must be kept from bathers (*d*).

Scope of bye-laws.

The Local Government Board, which is the confirming authority for such bye-laws (*e*), holds that such bye-laws must be restricted to the regulation of public bathing in connection with bathing machines; but, where the enactment in that behalf has been declared to be in force (*f*), the local authority may make such bye-laws with regard to any public bathing, whether from bathing machines or not, and also bye-laws for regulating the hours of bathing, and for enforcing the provision of life-saving apparatus by persons providing public bathing accommodation (*g*).

Provision of bathing places etc.

992. A local authority may, where the enactment is in force (*f*), provide and maintain on or at any place within its district, which abuts on the sea or any river, bathing sheds or other conveniences, with all necessary appliances, and may charge for their use (*h*). The authority may also provide and maintain life-saving appliances wherever it thinks those appliances are likely to be of use (*i*).

SUB-SECT. 3.—*Cleansing of Verminous Persons* (*k*).

Provision by local authorities.

993. The Common Council of the City of London (*l*), and any metropolitan borough council (*m*), county borough council, district council or board of guardians, may permit any person who applies

(*c*) The bye-laws cannot restrict the charges for costumes and towels (*Parker* v. *Clegg* (1903), 2 L. G. R. 608).

(*d*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 69; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 171. A set of model bye-laws was issued by the Local Government Board in July, 1912.

(*e*) Public Health (Confirmation of Bye-laws) Act, 1884 (47 & 48 Vict. c. 12); see p. 391, *ante*. The Board has issued model clauses for such bye-laws, the preface to which should be referred to.

(*f*) *I.e.*, the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 92; and see p. 364, *ante*.

(*g*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 92 (a). A model set of bye-laws was issued by the Local Government Board in July, 1912. There is no common law right of bathing from the seashore (*Brinckman* v. *Matley*, [1904] 2 Ch. 313, C. A., following *Blundell* v. *Catterall* (1821), 5 B. & Ald. 268); and see title WATERS AND WATERCOURSES. As to indecent bathing therefrom, see *R.* v. *Crunden* (1809), 2 Camp. 89; *R.* v. *Reed* (1871), 12 Cox, C. C. 1. A licence from a district council for the use of a bathing machine confers no right, as against the owner of the seashore, to place it thereon (*Mace* v. *Philcox* (1864), 15 C. B. (N. S.) 600). A condition in a licence that it may be revoked at any time is unreasonable and *ultra vires* (*Pelham* v. *Littlehampton Urban District Council* (1903), 63 J. P. 88). As to rateable occupation of the foreshore, see title RATES AND RATING; *Margate Corporation* v. *Pettman* (1912), 76 J. P. 145.

(*h*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 92 (b).

(*i*) *Ibid.*, s. 93. This power is not confined to the supply of appliances at bathing places.

(*k*) As to the cleansing of school-children, see title INFANTS AND CHILDREN, Vol. XVII., p. 174; and of inmates of common lodging-houses, see note (*n*), p. 502, *post*.

(*l*) As the "sanitary authority" for the execution of the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), as successors to the Commissioners of Sewers; see p. 373, *ante*; title METROPOLIS, Vol. XX., p. 400.

(*m*) As the "sanitary authority" for the execution of the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), as successors to the vestry or district board; see p. 373, *ante*; title METROPOLIS, Vol. XX., p. 404.

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to them, on the ground that he is infested with vermin, to have the use, free of charge, of any apparatus which they possess for cleansing the person and his clothing from vermin (*n*).

Expenses.

994. Such authorities may expend any reasonable sum on buildings, appliances, and attendants, which may be required for carrying out this provision, and the expenses may be defrayed out of any rate or fund applicable by the authority for general sanitary purposes (*o*) or for the relief of the poor.

No disqualification from use of apparatus.

995. The use of such apparatus is not to be considered to be parochial relief or a charitable allowance to the person using the same or to his parent; and neither such person nor his parent is by reason thereof to be deprived of any right or privilege or to be subject to any disqualification or disability (*p*).

SECT. 6.—*Clocks in Public Places.*

Provision by local authorities.

996. An urban authority, or a rural authority invested with urban powers in that behalf (*q*), may provide clocks and fix them on or against any public building, or, with the consent of the owner or occupier, on or against any private building of convenient situation, and may light the dials at night; and such clocks may be altered and removed to any other like situation by the authority (*r*). A faculty (*s*) is, however, necessary before a new clock can be fixed in a church tower or other ecclesiastical building.

Maintenance and repair.

997. The reasonable cost of repairing, maintaining, winding up, and lighting any public clock within the district of a local authority, may, where the enactment in that behalf is in force (*t*), be paid by the authority, although the clock is not vested in it (*u*).

Clocks provided as parts of buildings.

998. Public clocks may form parts of buildings provided under other Acts, as, for instance, town halls, public libraries, cemetery chapels, public baths, or, where the enactment in that behalf is

(*n*) Cleansing of Persons Act, 1897 (60 & 61 Vict. c. 31), ss. 1, 2. In London the medical officer of the London County Council or of the City Corporation, as the case may be, may, where the person or clothing of an inmate of a common lodging-house is verminous or in a foul or filthy condition, enforce the cleansing of his person or clothing (London County Council (General Powers Act, 1907 (7 Edw. 7, c. clxxv.), ss. 37, 39, 40). The Council may agree with any sanitary authority for the use of any premises or appliances of the authority (*ibid.*, s. 38). See also p. 511, *post.*

(*o*) See pp. 380 *et seq.*, *ante.*

(*p*) Cleansing of Persons Act, 1897 (60 & 61 Vict. c. 31), s. 1.

(*q*) As to the investing of a rural authority with urban powers, see title LOCAL GOVERNMENT, Vol. XIX., p. 332.

(*r*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 165. The Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 143, which is incorporated with many local Improvement Acts, contains a similar provision. For the similar powers conferred upon the councils of metropolitan boroughs, see London County Council (General Powers) Act, 1903 (3 Edw. 7, c. clxxxvii.), s. 65.

(*s*) See title ECCLESIASTICAL LAW, Vol. XI., pp. 540 *et seq.*

(*t*) *I.e.*, where the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 46, has been adopted or put in force; see p. 363, *ante.*

(*u*) Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 46. For the similar powers of the councils of metropolitan boroughs as to fixing, repairing, and maintaining clocks, see London County Council (General Powers) Act, 1903 (3 Edw. 7, c. clxxxvii.), s. 65.

in force (*v*), of a monument authorised by an urban or a rural authority in any street or public place. A parish council, or an authority having the same power as a parish council, may accept such a clock as a gift and maintain it (*w*).

SECT. 6. Clocks in Public Places.

SECT. 7.—*Dwelling Places* (*a*).

SUB-SECT. 1.—*Canal Boats.*

(i.) *Registration.*

999. A canal boat (*b*) must not be used as a place of dwelling (*c*) unless registered in accordance with regulations made by the Local Government Board (*d*), and then only in strict conformity with the terms of the certificate of registration (*e*). Necessity for registration.

1000. The Local Government Board must make regulations, regarding registration and the fees therefor, the lettering, marking and numbering of boats, the number, age, and sex of persons who Regulations for registration.

(*v*) *I.e.*, where the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 42, has been adopted or put in force; see p. 363, *ante*.

(*w*) Under the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 8 (1) (h) (i) (k); see title LOCAL GOVERNMENT, Vol. XIX., p. 248.

(*a*) As to sanitary accommodation, see pp. 596 *et seq.*, *post*.

(*b*) A "canal boat" means any vessel, however propelled, which is used for the conveyance of goods along any canal (including any river, inland navigation, lake, or water being within the body of a county, whether it is or is not within the ebb or flow of the tide), and which is not a ship duly registered under the Merchant Shipping Acts (see title SHIPPING AND NAVIGATION), but the Local Government Board may declare that particular classes of vessels shall not be deemed to be excluded from the operation of the Canal Boats Acts (see note (*c*), *infra*) merely by reason of their being registered as ships (Canal Boats Acts, 1877 (40 & 41 Vict. c. 60), s. 14; 1884 (47 & 48 Vict. c. 75), s. 10).

(*c*) The law governing the occupation of canal boats in the interests of public health is contained in the two Acts referred to in note (*b*), *supra*, which are to be read and may be cited together as the Canal Boats Acts, 1877 (40 & 41 Vict. c. 60) and 1884 (47 & 48 Vict. c. 75) (hereafter frequently referred to in the text as the "Canal Boats Acts"), and in Regulations of the Local Government Board dated 20th March, 1878, which were issued under powers conferred by the Canal Boats Act, 1877 (40 & 41 Vict. c. 60), and are referred to in the text, *infra*, as "the regulations."

(*d*) The registration authority is such one or more sanitary authority or authorities which has or have powers in districts abutting on the canal on which the boat is accustomed or intended to ply as may be prescribed by the regulations of the Local Government Board (Canal Boats Act, 1877 (40 & 41 Vict. c. 60), s. 7); and see note (*n*), p. 504, *post*. When a boat is registered, the owner receives from the registration authority two certificates of registration identifying the owner and the boat, stating the place to which the boat is registered as belonging, the number of persons who are allowed to dwell in it, and any other particulars which the Local Government Board prescribes. The master of the boat must have one of these certificates in his care (Canal Boats Act, 1877 (40 & 41 Vict. c. 60), s. 3). If, after registration, any structural alteration is made in a canal boat which affects the conditions on which registration has been obtained, the certificate of registration becomes void (Canal Boats Act, 1884 (47 & 48 Vict. c. 75), s. 1). The master of the boat must produce the certificate of registry to any person duly authorised to inspect the canal boats (Canal Boats Act, 1877 (40 & 41 Vict. c. 60), s. 5). For form of application for registration, see Encyclopædia of Forms and Precedents, Vol. X., p. 305.

(*e*) See Canal Boats Act, 1877 (40 & 41 Vict. c. 60), s. 1. As to the education of children living in registered canal boats, see title EDUCATION, Vol. XII., p. 67.

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may dwell in a boat, cleanliness, and the prevention of the spread of infectious disease (*f*). These regulations may from time to time be revoked or varied; but no order making or revoking or varying such regulations is in force till it has been laid, in its final form, before both Houses of Parliament for forty days (*g*).

Enforcement of regulations.

1001. The penalty for breach of any of these regulations is a fine not exceeding 20*s.*, recoverable summarily. Sanitary or registering authorities in whose district there is a canal must enforce them (*h*), and must, between the 1st and 22nd January in each year, report to the Local Government Board as to the execution of the Canal Boats Acts (*i*) in their districts, and the steps which they have taken to give effect to their provisions (*k*). The Local Government Board has also powers of independent inspection and inquiry into the execution of the Canal Boats Acts (*i*), and must present an annual report to Parliament on that subject (*l*).

(ii.) *Infectious and Other Diseases.*

Notice to sanitary authority and owner.

1002. If a person on a canal boat becomes seriously ill, or is evidently suffering from an infectious disorder (*m*), the master must as soon as practicable inform the sanitary authority (*n*) of the district

(*f*) Canal Boats Act, 1877 (40 & 41 Vict. c. 60), s. 2. As to the regulations, see note (*c*), p. 503, *ante*. They deal with ventilation, cleanliness, and air space, separation of cargo from dwelling cabins, fees (5*s.* for registration), lettering, marking and numbering of boats (which must be plainly visible on both sides of the canal (Canal Boats Act, 1884 (47 & 48 Vict. c. 75), s. 7)), age, number and sex of inhabitants and air space in proportion thereto, and infectious diseases (as to which last, see the text, *infra*). They provide for written reports to be made to the sanitary authority, by an officer appointed for the purpose, on the various points as to which the boat must comply with the regulations. Forms for these reports, for the register to be kept, and the certificate of registry, are set out in the regulations.

(*g*) Canal Boats Act, 1877 (40 & 41 Vict. c. 60), s. 9.

(*h*) Canal Boats Act, 1884 (47 & 48 Vict. c. 75), s. 2.

(*i*) As to the Canal Boats Acts, see note (*c*), p. 503, *ante*.

(*k*) Canal Boats Act, 1884 (47 & 48 Vict. c. 75), s. 3. Annually, in December, the Local Government Board address a circular letter to town clerks and clerks to district councils setting out the Board's views as to what such reports should contain.

(*l*) Canal Boats Act, 1884 (47 & 48 Vict. c. 75), s. 4. The Board may appoint inspectors for the purpose of collecting information on which to base this report, and these inspectors have, for the purpose of any inquiry under the Canals Boats Act, 1884 (47 & 48 Vict. c. 75), the same powers as poor law inspectors have under the Poor Law Board Act, 1847 (10 & 11 Vict. c. 109), s. 21 (see title POOR LAW, Vol. XXII., pp. 527, 528), with regard to examination of witnesses, production of papers, and inspection of places. They may enter and fully inspect any canal boat by day (*i.e.*, between 6 a.m. and 9 p.m. (Canal Boats Act, 1884 (47 & 48 Vict. c. 75), s. 4; see title TIME), and may detain any such boat so long as may be necessary for inspection. They may demand to see the certificate of registry (see note (*d*), p. 503, *ante*), and may copy it, and must be given all due assistance by the master in entering, inspecting, and leaving the boat. To refuse to comply with any of their requests is to obstruct them, and the obstructor may be prosecuted and fined up to 40*s.* by a court of summary jurisdiction (Canal Boats Act, 1884 (47 & 48 Vict. c. 75), ss. 4, 9). As to procedure before courts of summary jurisdiction, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.* For forms relating to the inspection of canal boats, see Encyclopædia of Forms and Precedents, Vol. X., pp. 306—311.

(*m*) Compare the definition of "infectious disease" given at p. 445, *ante*; and see p. 449, *ante*.

(*n*) This authority is the municipal, urban or rural council, or port

in which he is at the time when the illness or disease is first observed; and if the boat is travelling, he must, when she completes her journey, inform the sanitary authority having local control, and the owner of the boat (*o*). If the case of disease occurs while the boat is at its port or place of destination, the master must give information of it to the sanitary authority and the owner, and the owner must at once notify the case to the sanitary authority of the place to which the boat is registered as belonging (*o*).

Prevention of infectious disorder.

1003. A sanitary authority within whose district a canal or part of a canal is situated, on being informed that a person on a canal boat is suffering from an infectious disorder, must take steps to prevent the disorder from spreading, and may remove the sick person from the boat, and detain the boat so long as is necessary for its cleansing and disinfection (*p*). The sanitary authority may not let a boat proceed, when it has been so detained, until it has received a certificate from a duly qualified person that it is clean and disinfected (*q*).

(iii.) *Expenses.*

How defrayed.

1004. The expenses of carrying out the provisions of the Canal Boats Acts (*r*) are defrayed, in rural districts, out of the common fund raised out of the poor rate of the parishes in the district (*s*); in the areas of a port sanitary authority, out of the fund out of which such expenses are directed to be paid by the order constituting the authority (*t*); in urban districts (including municipal boroughs), out of the general district rate (*u*); and, in metropolitan boroughs, out of the general rate (*v*).

SUB-SECT. 2.—*Cellar Dwellings.*

Cellars built since 1875.

1005. No cellar, vault, or underground room may, outside the county of London, be let or occupied, or suffered to be occupied,

sanitary authority; and in London, outside the jurisdiction of the port sanitary authority, the metropolitan borough council; see Canal Boats Act, 1877 (40 & 41 Vict. c. 60), s. 14, pp. 372 *et seq.*, *ante;* see also note (*p*), *infra.*

(*o*) Regulations, s. 12; see note (*c*), p. 503, *ante.*

(*p*) Canal Boats Act, 1877 (40 & 41 Vict. c. 60), s. 4. For the execution of this duty the sanitary authority (see note (*n*), p. 504, *ante*) has all the powers with respect to infection given them by the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 120 *et seq.;* and a metropolitan borough council may exercise the similar powers conferred by the enactments in force in London (Canal Boats Act, 1877 (40 & 41 Vict. c. 60), s. 14); see pp. 452 *et seq.*, *ante.*

(*q*) Regulations, s. 13; see note (*c*), p. 503, *ante,* The certificate may be given by the medical officer of health or any other qualified medical man, to whom the authority may pay a reasonable fee for it. It must be handed to the master of the boat (*ibid.*).

(*r*) As to the Canal Boats Acts, see note (*c*), p. 503, *ante.*

(*s*) Canal Boats Act, 1877 (40 & 41 Vict. c. 60), s. 8; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 229; and see p. 381, *ante.*

(*t*) Canal Boats Act, 1877 (40 & 41 Vict. c. 60), s. 8; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 287; and see p. 373, *ante.*

(*u*) Canal Boats Act, 1877 (40 & 41 Vict. c. 60), s. 8; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 207; and see p. 380, *ante.*

(*v*) Canal Boats Act, 1877 (40 & 41 Vict. c. 60), s. 8; London Government Act, 1899 (62 & 63 Vict. c. 14), s. 10 (1); and see title METROPOLIS, Vol. XX., pp. 410, 440 *et seq.*

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as a dwelling place (*w*), if it has been built or rebuilt since the 11th August, 1875, or was not lawfully let or occupied at that date (*a*).

Cellars lawfully occupied before 1875.

Cellars which were lawfully occupied and let before that date and have not since been rebuilt can still be let and occupied if they are seven feet high all over, if every part of their ceilings is more than three feet above the level of the nearest street or ground, and if they have open areas in front of them, and proper drains, water-closets, earth closets, or privies, and ash-pits, and proper windows and fire-places (*b*). Steps leading down into areas and cellars from the ground level, and steps giving access to the building above the cellar, are allowed subject to restrictions (*c*).

Offence and closing order.

1006. Persons who let or occupy, or suffer any cellar to be occupied, contrary to the above-mentioned provisions may be fined on summary conviction (*d*), and cellars in respect of which two such convictions have taken place within three months may be closed temporarily or permanently by order of a court of summary jurisdiction (*e*).

Cellars in London.

1007. In the County of London the letting or separate occupation of underground rooms (*f*) or dwellings is prohibited unless certain conditions as to height of the rooms, construction of walls, open areas, drainage, ventilation, water-closets and ashpits, fire-places with chimneys or flues, and windows, are complied with (*g*).

(*w*) This means a place in which the occupant or occupants pass the night (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 74). As to underground sleeping places, see also p. 529, *post*.

(*a*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 71. Previous enactments (*i.e.*, Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 67; Sanitary Act, 1866 (29 & 30 Vict. c. 90), s. 42) had forbidden the future lease or occupation of such cellars. Cellars occupied before 1848 and 1866 are not touched by the absolute prohibition of the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 71, but are subject to the restrictions provided by *ibid.*, s. 72, as to which see the text, *infra*. As to underground bakehouses, see title FACTORIES AND SHOPS, Vol. XIV., pp. 459, 460. For forms of notice and consent in respect of cellar dwellings, see Encyclopædia of Forms and Precedents, Vol. X., pp. 312, 536, 537, 540.

(*b*) For the statutory requirements imposed under these several heads, see Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 72; see also the text, *infra*.

(*c*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 72.

(*d*) *Ibid.*, s. 73. Penalty, not exceeding 20*s.* for every day the cellar continues to be let or occupied after notice in writing from the local authority (*ibid.*). As to the local authority, see p. 372, *ante*. As to procedure before courts of summary jurisdiction, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*; and see pp. 367, 368, *ante*.

(*e*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 75. The court may empower the local authority to do the work of permanent closing and to defray the expenses thereof.

(*f*) *I.e.*, a room the floor of which is more than three feet below the level of the nearest adjoining ground (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 96 (9)).

(*g*) *Ibid.*, s. 96. The penalty for letting or occupying an underground room contrary to *ibid.* is a fine not exceeding 20*s.* for every day during which the room continues to be let or occupied (*ibid.*, s. 96 (2)). When two convictions in respect of the same premises have taken place within three months, the premises may be closed by order of a court of summary jurisdiction (*ibid.*, s. 98). As to legal proceedings, see pp. 367 *et seq.*, *ante*.

Enforcement of statutory provisions.

1008. The metropolitan borough councils may enforce these regulations (*h*), but have powers of dispensing with them in certain cases (*i*); and officers appointed by the councils may enter and inspect underground rooms when they have reasonable ground for believing they are being occupied in contravention of the statutory provisions (*k*), and must make such reports as the councils may order as to such cases of contravention (*l*).

SUB-SECT. 3.—*Common and Other Lodging-houses.*

(i.) *Houses Let in Lodgings.*

"Houses let in lodgings."

1009. "Houses let in lodgings" are houses of which part or the whole is let in lodgings or occupied by members of more than one family (*m*), and though common lodging-houses may seem to answer this description, it is clear that the special statutory provisions (*n*) applicable to "common lodging-houses" do not relate to houses let in lodgings (*o*).

Bye-laws.

1010. Bye-laws (*p*) for the management of houses let in lodgings may be made outside the county of London by the councils of boroughs and urban or rural districts (*q*), and in London by the sanitary authorities (*r*), who must enforce the bye-laws (*s*).

Outside London.

Outside London these bye-laws may fix, and from time to time vary,

(*h*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 99; London Government Act, 1899 (62 & 63 Vict. c. 14), s. 4.

(*i*) *I.e.*, regulations involving structural alteration if the council considers this can properly be done having regard to (1) the fitness of the room for human habitation; (2) the house accommodation in the district; (3) the sanitary condition of the inhabitants; and (4) other circumstances; but no regulation required before the 1st January, 1892, may be dispensed with or modified (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 96 (3)).

(*k*) *Ibid.*, s 97 (2).

(*l*) *Ibid.*, s. 97 (1). As to entry on a justice's warrant, see *ibid.*, s. 97 (3).

(*m*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 90.

(*n*) See pp. 509 *et seq.*, *post*.

(*o*) Whether a house is "let in lodgings" is a question to be determined by reference to the character of the occupation and, in some instances, the structure of the premises. The status of a lodger implies in the letting a reservation to the landlord of a control over the premises. In connection with the parliamentary occupation and lodger franchises it has been held that, unless the occupation is free and uncontrolled, the person is a lodger, and if the landlord lives in the house the presumption is that his lessees are lodgers; see title ELECTIONS, Vol. XII., p. 168, and the cases there cited. A block of artisans' dwellings where the landlord did not reside, let in separate tenements, each with a separate entrance from a common staircase, was held not to be a house let in lodgings, even though the inmates of the tenements on each floor used the same water-closet, water-tap and sink etc., placed in the passages outside their entrance doors (*Weatheritt* v. *Cantlay*, [1901] 2 K. B. 285); but an ordinary six-roomed house, not specially constructed to be let in tenements, which had a common staircase and front door always open, each floor of which was let to a separate family, was held, on the facts, to be a house let in lodgings, although neither the landlord nor his representative resided in the house (*Kyffin* v. *Simmons* (1903), 67 J. P. 227).

(*p*) As to bye-laws generally, see pp. 388 *et seq.*, *ante*.

(*q*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 90, as amended by the Housing of the Working Classes Act, 1885 (48 & 49 Vict. c. 72), s. 8; and see p. 372, 373, *ante*.

(*r*) As to the sanitary authorities in London, see p. 373, *ante*.

(*s*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 94; and see pp. 373, 374, *ante*.

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the number of persons who may occupy a house let in lodgings, may provide for the registration and inspection of such houses, for enforcing proper drainage, ventilation, and privy accommodation, for the cleansing and limewashing of the premises and the paving of courts, and for precautions to be taken against infectious disease (*t*), and may in the case of houses intended for the working classes impose duties upon the owners (*u*), in addition or substitution for other interested persons, which involve the execution of work (*v*).

In London.

In the county of London the powers of the sanitary authorities (*w*) are somewhat less extensive, but the making and enforcement of the bye-laws is obligatory (*x*).

(ii.) *Public Lodging-houses.*

"Public lodging house."

1011. The term "public lodging house" appears only in the Towns Improvement Clauses Act, 1847 (*a*), and, in boroughs or urban districts in which that Act (*a*) is in force (*b*), the local authority has certain powers, and certain statutory restrictions as to user are in force, with regard to houses which are public lodging-houses within the meaning of the Act (*c*).

Restrictions as to user.

1012. These restrictions are that a house may not be used as a public lodging-house unless it is (1) rated to the relief of the poor at a sum of £10 a year or more, and (2) registered as a lodging-house with the local authority, which must keep a register for the purpose (*d*).

Registration.

1013. The application for registration must come from the occupier (*e*); and, though the registration purports to be a registration

(*t*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 90, as amended by the Housing of the Working Classes Act, 1885 (48 & 49 Vict. c. 72), s. 8; and see *ibid.*, s. 7. As to the making and enforcing of bye-laws, notices, reasonableness etc., see pp. 388 *et seq.*, *ante*.

(*u*) For the definition of "owner," see note (*o*), p. 427, *ante*.

(*v*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 16 (1). To discharge any duty imposed, the owner or other person may at all reasonable times enter upon the premises, and *ibid.*, s. 51, applies (*ibid.*, s. 16 (2)); see p. 536, *post*. In default of the owner or other person executing the work required, the council or sanitary authority may do it at his expense (*ibid.*, s. 16 (3), applying, with the substitution of "owner" for "landlord," *ibid.*, s. 15 (5); see note (*f*) p. 528, *post*).

(*w*) As to the sanitary authorities in London, see p. 373, *ante*.

(*x*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 94. They may not provide for "varying" the number of lodgers, but it is, of course, open to an authority to revoke bye-laws and make fresh ones. In addition to the power of making bye-laws as to precautions against disease there are other powers under *ibid.*, ss. 55—74, for dealing with infectious disease; as to which see pp. 445 *et seq.*, *ante*.

(*a*) 10 & 11 Vict. c. 34, ss. 116—118. The definition is "every house in which persons are harboured or lodged for hire for a single night, or for less than a week at one time, or any part of which is let for any term less than a week" (*ibid.*, s. 116); but by words in another part of this provision licensed victualling houses, which would otherwise come within the definition, are excluded from it.

(*b*) See title LOCAL GOVERNMENT, Vol. XIX., p. 328.

(*c*) See note (*a*), *supra*.

(*d*) Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 116.

(*e*) This seems clear from *ibid.*, s. 117. An owner who is not an occupier may apply for registration; but if he does so there must, to satisfy the statute, be some "occupier" intermediate between the owner

of a house, the register must contain the names of the occupiers, or at all events of those who were in occupation when the first application for registration was made (*f*).

Regulations by local authority.

1014. The local authority may from time to time fix the number of lodgers in each house and may make rules for promoting cleanliness and ventilation, and must order a table of rules and a ticket, showing the number of lodgers allowed, to be posted in each room in the house in which lodgers are received. The keepers (*g*) must obey these rules and give access to inspectors appointed by the local authority or to persons who come, by order of the authority, to disinfect the house (*h*).

Offences and penalty.

1015. Failure to comply with the above-mentioned provisions as to registration, number of lodgers, tickets and table of rules, and inspection, and failure to enforce observance of the rules made by the local authority for the promotion of ventilation and cleanliness are offences punishable summarily with a fine (*i*).

(iii.) *Common Lodging-houses.*

(a) *Outside London.*

Definition.

1016. A common lodging-house (*j*) is a house in which persons are harboured or lodged for hire (*k*) for a single night or for less

and the lodgers, who must apply concurrently with the owner, whose name must be placed on the register. It is not clear whether the death or disappearance of an occupier would annul the registration.

(*f*) See note (*e*), p. 508, *ante*.

(*g*) In 1853 the Law Officers of the Crown, advising the General Board of Health on the Common Lodging Houses Act, 1851 (14 & 15 Vict. c. 28) (repealed, except as to the Metropolis, by the Public Health Act, 1875 (38 & 39 Vict. c. 55)), expressed the view that a person might be treated as the "keeper" of a lodging-house although he had only control of part of it as sub-tenant to an occupier or owner of the whole house. Their opinion on this point was not very decided, but they advised that an owner who does not reside in nor control a lodging-house, but merely receives the rent therefor, could not be treated as a keeper; see 1 Glen, Public Health, 1906 ed., pp. 419, 420. The person who has actual control of the house and with whom the lodgers deal, whether he be the agent or servant or the tenant of the owner, would probably be held to be the "keeper." But if such a person is a mere servant to carry out the orders of an absent master, the absent master would, if the opinion of the Law Officers above referred to is correct, be the "keeper."

(*h*) Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 117.

(*i*) Not exceeding 40*s*. (*ibid*., s. 118). As to proceedings, see pp. 367 *et seq*., *ante*.

(*j*) The term "common lodging-house" is used in a number of Acts; see the Common Lodging Houses Acts, 1851 (14 & 15 Vict. c. 28), and 1853 (16 & 17 Vict. c. 41); Common Lodging Houses, Ireland, Act, 1860 (23 & 24 Vict. c. 26); Public Health Act, 1875 (37 & 38 Vict. c. 55); London County Council (General Powers) Acts, 1902 (2 Edw. 7, c. clxxiii.), and 1907 (7 Edw. 7, c. clxxv.); Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53); and see note (*l*), p. 510, *post*. The definition of a "common lodging-house" in the Common Lodging Houses, Ireland, Act, 1860 (23 & 24 Vict. c. 26), s. 3, was in 1905 held to be applicable to the term as used in the Common Lodging Houses Acts, 1851 (14 & 15 Vict. c. 28), and 1853 (16 & 17 Vict. c. 41) (*Parker* v. *Talbot*, [1905] 2 Ch. 643, C. A.), and would no doubt be applied in any proceedings taken under the other Acts above referred to. By adding the substance of this definition to the *dicta* as to the meaning of the term given in various cases, the definition given in the text is arrived at.

(*k*) This is a necessary condition. If nothing at all is paid by the lodgers

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than a week at a time, or any part of which is let for less than a week (*l*), which is so open to all comers (*m*) as not to exclude any who are dirty and possibly infectious, or who from their character and appearance are likely to disseminate something offensive or dangerous (*n*), and in which the lodgers are allowed so to associate with one another as to render possible the occurrence and spread of insanitary conditions (*o*).

If part only of a house is used as a common lodging-house, that part alone, and not the whole house, is affected by the public health provisions relating to common lodging-houses (*p*).

Registration.

1017. Every local authority must keep a register and enter in it the names and addresses of those who keep common lodging-houses within its district, the situation of such common lodging-houses, and the number of lodgers authorised to be received therein (*q*).

Registered keeper.

No person may keep a common lodging-house unless it is registered and unless he himself is registered as the keeper of it; but if a registered keeper dies, his widow or any member of his

the house is not a common lodging-house (*Parker* v. *Talbot*, [1905] 2 Ch. 643, C. A., overruling *Gilbert* v. *Jones*, [1905] 2 K. B. 691). It is immaterial whether the house is or is not carried on as a charitable institution; see *Parker* v. *Talbot*, *supra*, where COZENS-HARDY, L.J., at p. 653, approving the rule laid down in *Logsdon* v. *Booth*, [1900] 1 Q. B. 401, said that a house does not cease to be a common lodging-house within the meaning of the Acts if it is carried on for charity and not for purposes of gain.

(*l*) The words from the beginning of the definition to this point are the definition given in the Common Lodging Houses, Ireland, Act, 1860 (23 & 24 Vict. c. 26), s. 3.

(*m*) Presumably a house of which all the inmates belong to the same family would not be a common lodging-house. In any proceedings relating to common lodging-houses, if the inmates allege that they are members of the same family, the burden of proof lies upon the person making the allegation (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 87).

(*n*) *Langdon* v. *Broadbent* (1877), 37 L. T. 434, *per* LINDLEY, J., at p. 436; *Logsdon* v. *Trotter*, [1900] 1 Q. B. 617, *per* CHANNELL, J., at pp. 624, 625. In 1853 the General Board of Health was advised by the Law Officers of the Crown that the expression common lodging-house did not include hotels, inns, public-houses or lodgings let to the upper or middle classes."

(*o*) In *Logsdon* v. *Trotter*, *supra*, stress was laid on the fact that the lodgers in the house in question lived together in common during the day. This is no doubt important, but in the sense indicated by CHANNELL, J., *ibid.*, at p. 626, *i.e.*, because when people live together insanitary conditions are more likely to arise and spread than if they live apart.

(*p*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 89. It must be a question of fact in such a case who is the "keeper" of the common lodging-house; and see note (*f*), *supra*.

(*q*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 76. As to the receipt of copies of the register in evidence, see *ibid.* The local authority cannot at its discretion cancel the registration of a keeper (*Blake* v. *Kell* (1887), 52 J. P. 263), unless the Public Health Acts Amendment Act, 190 (7 Edw. 7, c. 53), s. 69, has been put in force in its district (see p. 364 *ante*), and if it is to be put in force in a district every keeper of a co mon lodging-house is entitled to notice of the fact one month beforehand (Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 75). If it is in force, the registration may be cancelled under certain conditions, as to which see *ibid.*, ss. 71 (3), 72; and registration made after *ibid.*, s. 69 has been put in force lasts for such time only, not exceeding one year, a the local authority fixes, but may be renewed from time to time (*ibid* s. 69 (2)).

family may keep the house as a common lodging-house for not more than four weeks without being registered (*r*).

Deputy keepers.

1018. If the enactment (*s*) is in force, the local authority may register as deputy keepers persons whose names are submitted to it by a keeper, but may cancel the registration of these deputies if at any time it does not think them fit to act as such (*s*).

Approval by local authority's officer.

1019. The local authority must not register a house as a common lodging-house until it has been inspected and approved by one of its officers, and may refuse to register a person as a keeper unless he produces certificates of good character from three local ratepayers (*a*).

Notice to be affixed on premises.

1020. The keeper of a common lodging-house must, if required to do so by the local authority, fix a notice with the words "registered common lodging-house" in a conspicuous place on the front of his common lodging-house, and keep it undefaced and legible (*b*).

Bye-laws.

1021. Bye-laws (*c*) may be made from time to time by the local authority for fixing the number of lodgers, separating the sexes, promoting cleanliness and ventilation, giving notice to the local authority and taking precautions in case of infectious disease (*d*), and for the well-ordering of such houses (*e*).

Water supply.

1022. The local authority may also insist on the provision of an adequate water supply for common lodging-houses if a supply can

(*r*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 77. Compare note (*n*), p. 513, *post*. The expression "any member of his family" has not been defined.

(*s*) *I.e.*, Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 71; see p. 364, *ante*.

(*a*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 78. If the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 69, is in force (see p. 364, *ante*), the local authority may refuse to register a keeper if it thinks him unfit (see the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 69 (1)); but under the Public Health Act, 1875 (38 & 39 Vict. c. 55), the local authority may not so refuse if the applicant produces certificates of character in conformity with *ibid.*, s. 78. The Local Government Board issued a memorandum in June, 1877, containing rules which it wished the inspecting officer to observe; as to these, see Lumley's Public Health Acts, 1908 ed., pp. 154 *et seq.* If the inspecting officer declines to approve a house for registration, the local authority is not bound to hear the applicant before rejecting his request to be registered (*Ex parte Kavanagh* (1894), 10 T. L. R. 533).

(*b*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 79. The penalty for breach, after registration, of this provision is a fine not exceeding £5 and a continuing penalty of 10*s*. a day. If the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 72, is in force in the district, the local authority may also, after conviction, cancel the registration of the house (*ibid.*). As to legal proceedings, see pp. 367 *et seq.*, *ante*.

(*c*) Model bye-laws under this provision have been issued by the Local Government Board. As to bye-laws generally, see pp. 388 *et seq.*, *ante*.

(*d*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 80. In proceedings for not giving notice, it is no defence to say that the keeper did not know of the case of illness till after the period prescribed for notifying it had elapsed. The keeper must take steps to ascertain when any case occurs which makes it his duty to give notice (*Logsdon* v. *Holland* (1898), 14 T. L. R. 449). As to infectious disease in common lodging-houses, see p. 512, *post*; and see, generally, pp. 445 *et seq.*, *ante*.

(*e*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 80. For forms relating to the adoption of bye-laws and the carrying out thereof, see Encyclopædia of Forms and Precedents, Vol. X., pp. 317—334.

Limewashing.

be obtained at a reasonable rate (*f*), and the keeper of a common lodging-house must limewash the walls and ceilings in the first week of April and of October in each year to the satisfaction of the local authority (*g*).

Reports to local authority.

1023. The local authority may also require the keeper of a common lodging-house in which beggars or vagrants are received from time to time to report to the local authority, or to a person named by it, every person who resorted to the lodging-house during the preceding day or night, and must, for this purpose, fill up schedules provided by the local authority with the information required (*h*).

Infectious diseases.

Cases of fever or infectious disease must be reported by the keeper of the common lodging-house where they occur to the medical officer of the local authority and to the poor law relieving officer of the district (*i*).

Inspection.

1024. The keeper, and every person acting in the care or management, of a common lodging-house must give free access to every part of the house when required by any officer of the local authority (*k*).

(*f*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 81; and see title WATER SUPPLY. If the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 74, is in force, every common lodging-house must have suitable sanitary conveniences for the persons of both sexes, if both sexes are accommodated in it, with provision for separate conveniences for men and women, and must have a proper water supply for flushing cisterns. Local authorities may, in writing, order any defects in these respects to be made good, and, if the order is not complied with in twenty-eight days, may do the necessary work themselves and recover the expenses thereof summarily from the keeper, or may declare them to be private improvement expenses (*ibid.*, s. 74); and see p. 381, *ante*.

(*g*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 82. Penalty not exceeding 40*s*. As to legal proceedings, see pp. 367 *et seq.*, *ante*. The Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 46, 120, give general powers to local authorities to require whitewashing, cleansing and purification of houses where necessary. As to the reasonableness or unreasonableness of bye-laws, see pp. 388 *et seq.*, *ante*.

(*h*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 83. The penalty for non-compliance is a fine not exceeding £5, and a further penalty not exceeding 40*s*. for every day during which the offence continues (*ibid.*, s. 86). As to legal proceedings, see pp. 367 *et seq.*, *ante*. Harbouring thieves in a lodging-house is an offence under the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 10. As to warrants to search lodging-houses for thieves, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 310, 311.

(*i*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 84; and as to bye-laws on this matter, see p. 511, *ante*. The Infectious Disease (Notification) Act, 1889 (52 & 53 Vict. c. 72), is dealt with at pp. 445 *et seq.*, *ante*. The Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 120—124, contain further provisions against the spread of infectious diseases. *Ibid.*, s. 86 (see note (*h*), *supra*), provides a penalty for breach of the provisions of *ibid.*, s. 84, where the sufferer has been confined to bed; if the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 32, is in force (see note (*h*), p. 363, *ante*), a penalty not exceeding £2, and a further daily penalty not exceeding 5*s*. (*ibid.*), is in any case incurred; and, if the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 72, is in force, a conviction may be followed by cancelling the registration of the house; see note (*q*), p. 510, *ante*. As to legal proceedings, see pp. 367 *et seq.*, *ante*.

(*k*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 85. Penalty not exceeding £5 (*ibid.*). As to legal proceedings, see pp. 367 *et seq.*, *ante*.

Effect of third conviction for offence.

1025. In addition to imposing the penalties authorised for breaches of the law in regard to common lodging-houses, the competent court may, if a keeper is convicted for a third time of a statutory offence, adjudge that he shall not keep a common lodging-house for five years after such conviction, or some less time, without a written licence, which may be withheld or given on terms, from the local authority (*l*).

(b) *In London.*

Application to London County Council for licence.

1026. In the administrative county of London the London County Council is invested with large powers (*m*) for licensing and regulating common lodging-houses. No person may keep a common lodging-house in the county unless he has applied for and obtained a licence from the London County Council (*n*). The application must specify the premises in respect of which the licence is sought and the number of lodgers which it is proposed to receive (*o*).

Inquiry by London County Council and grant of licence.

1027. As soon as practicable after receiving the application, the London County Council must cause inquiry to be made into the fitness of the applicant to receive a licence, and the suitability of the premises for use as a common lodging-house for the number of persons whom it is proposed to receive (*p*). If satisfied on these points, the Council may grant (*q*) the applicant a licence in respect of the house. The licence must state the maximum number of persons who may at any one time occupy the premises (*a*), and

(*l*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 88. If the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), Part V., is in force in a district, the registration of a keeper may be cancelled by the competent court after a single conviction. This is so, whether the conviction be for a breach of the provisions of the Public Health Act, 1875 (38 & 39 Vict. c. 55), or of the provisions of the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), relating to common lodging-houses, or of the bye-laws made thereunder (*ibid.*, s. 72).

(*m*) By the London County Council (General Powers) Acts, 1902 (2 Edw. 7, c. clxxiii.), 1904 (4 Edw. 7, c. ccxliv.), and 1907 (7 Edw. 7, c. clxxv.). "Common lodging-house" in these Acts has the same meaning as in the Common Lodging Houses, Ireland, Act, 1860 (23 & 24 Vict. c. 26), as to which see note (*j*), p. 509, *ante*, and *Parker* v. *Talbot*, [1905] 2 Ch. 643, C. A., there cited. The administrative county of London includes the City; see title METROPOLIS, Vol. XX., p. 393. As to the cleansing of verminous inmates of common lodging-houses and their clothing, see note (*n*), p. 502, *ante*.

(*n*) London County Council (General Powers) Act, 1902 (2 Edw. 7, c. clxxiii.), s. 51. If immediate notice of the death of a licensee is given to the Council, his widow or a member of his family may for four weeks keep the common lodging-house open without a licence (*ibid.*, ss. 54, 56; Common Lodging Houses Act, 1853 (16 & 17 Vict. c. 41), s. 3); see note (*f*), p. 514, *post;* and compare p. 510, *ante*.

(*o*) London County Council (General Powers) Act, 1902 (2 Edw. 7, c. clxxiii.), s. 46.

(*p*) *Ibid.*, s. 47.

(*q*) If the London County Council refuses to grant the licence, the applicant is entitled to have its reasons for doing so in writing. These can only be that the applicant is unfit, or that the premises are not suitable or suitably equipped. Any person aggrieved by the refusal may appeal to a metropolitan magistrate, who may appoint a properly qualified surveyor or architect (in the case of premises alleged not to be suitable or not suitably equipped) to examine and report on the house. The costs of the appeal and of the examination must be paid as directed by the magistrate (*ibid.*, s. 50).

(*a*) *Ibid.*, s. 48.

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when granted lasts for a year, and begins and ends on a day fixed by the Council (*b*).

Residence of licensed keeper.

1028. The licensed keeper of a common lodging-house, or some proper deputy nominated by him and approved in writing by the London County Council, must reside constantly in the common lodging-house, and must remain there every night from 9 p.m. to 6 a.m. (*c*).

General Acts in force in London.

1029. The administration of the Common Lodging Houses Acts, 1851 (*d*) and 1853 (*e*), which, as amended, are still in force in the County of London, is in the hands of the London County Council (*f*).

(*b*) Under the London County Council (General Powers) Act, 1904 (4 Edw. 7, c. ccxliv.), s. 47, which contains provisions for bringing all licences of common lodging-houses to an end on the fixed day, but so that no licence lasts for less than a year.

(*c*) London County Council (General Powers) Act, 1907 (7 Edw. 7, c. clxxv.), s. 79 (1). Penalty, not exceeding £5 and a continuing penalty of £1 or less per day, recoverable summarily. If a keeper is convicted for a breach of this rule, his licence may be suspended, revoked, or withheld on expiration (*ibid.*, s. 79 (2)). As to summary procedure, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*

(*d*) 14 & 15 Vict. c. 28.

(*e*) 16 & 17 Vict. c. 41.

(*f*) County of London (Common Lodging Houses) Order, 1894, confirmed by the Local Government Board's Provisional Orders Confirmation (No. 12) Act, 1894 (57 & 58 Vict. c. cxxiv.). The Common Lodging Houses Act, 1851 (14 & 15 Vict. c. 28), s. 9, which authorised the making of regulations, is repealed (London County Council (General Powers) Act, 1902 (2 Edw. 7, clxxiii.), s. 53 (1)); and the London County Council may make bye-laws similar to those which may be made in the provinces (*ibid.*, s. 53 (2); see p. 511, *ante*), to which the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 114 (see title METROPOLIS, Vol. XX., p. 460; note (*d*), p. 388, *ante*), is applied (London County Council (General Powers) Act, 1902 (2 Edw. 7, c. clxxiii.), s. 53 (3)). The Common Lodging Houses Acts, 1851 (14 & 15 Vict. c. 28) and 1853 (16 & 17 Vict. c. 41), so far as not varied by or not inconsistent with the London County Council (General Powers) Act, 1902 (2 Edw. 7, c. clxxiii.), apply to a licensed common lodging-house keeper (*ibid.*, s. 56). The Common Lodging Houses Act, 1851 (14 & 15 Vict. c. 28), requires the London County Council to keep a register of common lodging-houses (*ibid.*, s. 7; see p. 513, *ante*), requires the keepers to give notice of fever or infectious disease (Common Lodging Houses Act, 1851 (14 & 15 Vict. c. 28), s. 11), authorises access at all times by the Council's officers (*ibid.*, s. 12; and see p. 515, *post*), and requires cleansing of the house and its drains etc. and limewashing in the first weeks of April and October (Common Lodging Houses Act, 1851 (14 & 15 Vict. c. 28), s. 13). It provides penalties for breaches of the Act and for their recovery (*ibid.*, ss. 14, 15). In proceedings the burden of proving that the inmates are members of the same family (see note (*m*), p. 510, *ante*) lies on the person making the allegation (Sanitary Act, 1866 (29 & 30 Vict. c. 90), s. 41). The Council may require that the common lodging-house is properly supplied with water, and cancel the registration if such supply is not provided within a time specified in the Council's written requisition (Common Lodging Houses Act, 1853 (16 & 17 Vict. c. 41), s. 6). Provision is made for the removal to hospitals of occupants of a common lodging-house who are suffering from fever or any infectious disease, and for the disinfection or destruction of infected clothes etc. (*ibid.*, s. 7; and see p. 513, *ante*), and the Council may require from the keeper reports of beggars or vagrants received the preceding day (Common Lodging Houses Act, 1853 (16 & 17 Vict. c. 41), s. 8). The penalties imposed by the Common Lodging Houses Act, 1851 (14 & 15 Vict. c. 28), for breaches of that Act may also be imposed for breaches of the Common Lodging Houses Act, 1853 (16 & 17 Vict. c. 41) (*ibid.*, s. 11). In default of payment of the penalty the person convicted may be imprisoned for any term not

A provision requiring the keeper and every other person in charge of a common lodging-house at any time to give free access to any police officer when required by him (*g*).

(iv.) *Seamen's Lodgings.*

Authority making bye-laws.

1030. Bye-laws (*h*) relating to seamen's lodgings (*i*) may (*k*) be made, in London, by the London County Council, in cities or boroughs which are seaports, by the town council, and in urban or rural districts which include seaports by the urban or rural council (*l*). In all cases the approval of the Board of Trade is required to validate such bye-laws (*m*).

Nature of bye-laws.

The bye-laws, if made, must provide for the licensing, inspection, and sanitation of the seamen's lodging-houses, for the publication of the fact of a house being licensed, for the due execution of the bye-laws, for the prevention of obstruction of officers engaged in securing such execution, for the prevention of unlicensed persons from holding themselves out as keepers of seamen's lodging-houses, and for excluding persons of improper character from such houses. The bye-laws must also impose sufficient fines, not exceeding £50, for breach of any bye-law (*n*).

Expenses of local authorities.

1031. The expenses of carrying out the above provisions may be defrayed by the London County Council and by borough and urban

exceeding three months (*ibid.*); and see, further, Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 5; title MAGISTRATES; Vol. XIX., p. 604. A keeper three times convicted of an offence against either Act may, on the third conviction, have his registration cancelled (*ibid.*, s. 12). It is understood that the London County Council regard the Common Lodging Houses Acts, 1851 (14 & 15 Vict. c. 28) and 1853 (16 & 17 Vict. c. 41), as to a great extent superseded by their more recent private Acts (see note (*m*), p. 513, *ante*). As to notices required to be affixed in common lodging-houses, see the Sanitary Law Amendment Act, 1874 (37 & 38 Vict. c. 89), s. 49.

(*g*) *I.e.*, by a proviso to the Order mentioned in note (*f*), p. 514, *ante*. The administration of the Common Lodging Houses Act, 1851 (14 & 15 Vict. c. 28), was formerly in the hands of the Commissioners of Metropolitan Police; and the proviso in effect saves a power that the police had under *ibid.*, s. 12; see note (*f*), p. 514, *ante*. As to the Commissioners, see title POLICE, Vol. XXII., pp. 469 *et seq.*

(*h*) As to bye-laws generally, see pp. 388 *et seq.*, *ante*.

(*i*) These are not defined in the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), but a definition is given by implication in the provision (*ibid.*, s. 214 (1)) that the bye-laws "shall be binding upon all persons keeping houses in which seamen are lodged and upon the owners thereof and persons employed therein." As to seamen generally, see title SHIPPING AND NAVIGATION.

(*k*) If the local authority does not make, revoke or alter a bye-law as required from time to time by the Board of Trade, the Board itself may do so (Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 214 (4)).

(*l*) As to these authorities, see pp. 372—374, *ante*.

(*m*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 214 (1).

(*n*) *Ibid.*, s. 214 (2). The bye-laws come into force on a date named in them, and must be published in the *London Gazette* and in at least one newspaper circulating in the district and designated by the Board of Trade. If by Order in Council it is directed that none but persons licensed under *ibid.*, s. 214, shall keep seamen's lodging-houses or let lodgings to seamen, any person contravening such Order is liable for each offence to a fine not exceeding £100 (*ibid.*, s. 214 (5)). As to the recovery of fines, see *ibid.*, ss. 680—684; title SHIPPING AND NAVIGATION.

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councils, out of the funds at their disposal as sanitary authorities; and fines for breach of the statutes are paid into such funds (*a*).

(v.) *Hop-pickers' and Fruit-pickers' Lodgings.*

Bye-laws for lodging and accommodation.

1032. Bye-laws for securing the decent lodging and accommodation of pickers of hops, fruit, or vegetables may be made by urban or rural councils (*b*).

(vi.) *Tents, Sheds, and Vans.*

Bye-laws for promoting cleanliness and habitable condition.

1033. City and borough councils and urban and rural councils (*c*) may make bye-laws for promoting cleanliness in, and the habitable condition of, tents, vans, and sheds, and similar structures, for preventing the spread of infectious disease by persons inhabiting them, and for preventing nuisances arising from them (*d*). Officers authorised by the local authorities may enter and inspect such tents, sheds and vans, between 6 a.m. and 9 p.m. (*e*), if they have reason to believe that any provision of the statute or any such bye-law is being contravened (*f*).

SUB-SECT. 4.—*Housing of the Working Classes.*

(i.) *Unhealthy Areas.*

Operation of statutes effected by representation.

1034. In order that the provisions of the Housing Acts (*g*) with

(*a*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 214 (6); and see pp. 380 *et seq.*, *ante*.

(*b*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 314; Public Health (Fruit Pickers' Lodgings) Act, 1882 (45 & 46 Vict. c. 23), s. 2. Model bye-laws have been issued by the Local Government Board. As to bye-laws generally, see pp. 388 *et seq.*, *ante*.

(*c*) Housing of the Working Classes Act, 1885 (48 & 49 Vict. c. 72), s. 7; and see pp. 372, 374, *ante*.

(*d*) Housing of the Working Classes Act, 1885 (48 & 49 Vict. c. 72), s. 9. This provision was repealed as to the Metropolis by the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 142, and similar provisions were made by *ibid.*, s. 95. As to such bye-laws generally, see Housing of the Working Classes Act, 1885 (48 & 49 Vict. c. 72), s. 10, which applies the provisions of the Public Health Act, 1875 (38 & 39 Vict. c. 55), as to bye-laws, and makes the penalties summarily recoverable; and see pp. 388 *et seq.*, *ante*. Model bye-laws have been issued by the Local Government Board. As to the circumstances under which such a tent, shed, van or similar structure becomes a nuisance summarily abatable, see title NUISANCE, Vol. XXI., pp. 537 *et seq.*

(*e*) Housing of the Working Classes Act, 1885 (48 & 49 Vict. c. 72), s. 9 (3), (4). The provision defining "day" in *ibid.*, s. 9 (4), is reproduced in the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 141; and see title TIME.

(*f*) Housing of the Working Classes Act, 1885 (48 & 49 Vict. c. 72), s. 9 (3). In London the entry may be made by any member of the local authority without authorisation (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 115), or by an authorised officer. Outside London the entry can only be made by a person duly authorised by the local authority (Housing of the Working Classes Act, 1885 (48 & 49 Vict. c. 72), s. 9 (3)). Obstruction of such person in the performance of his duty is an offence punishable summarily by a fine not exceeding 40*s.* (*ibid.*, s. 9 (5)). As to legal proceedings, see pp. 367 *et seq.*, *ante*; and as to procedure before courts of summary jurisdiction, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.* Nothing in the Housing of the Working Classes Act, 1885 (48 & 49 Vict. c. 72), s. 9, applies to any tent, van, shed or structure erected or used by His Majesty's naval or military forces (*ibid.*, s. 9 (7); see title ROYAL FORCES). As to the holding of local inquiries, see Housing of the Working Classes Act, 1885 (48 & 49 Vict. c. 72), s. 10 (2); and see pp. 375, 376, *ante*.

(*g*) The provisions of the statute law with regard to housing of the

regard to unhealthy areas may be put into operation in any urban district or in London (*h*), it is necessary that a representation in writing (*i*) should be made to the local authority by its medical officer of health (*k*).

working classes are contained in the Housing of the Working Classes Act, 1885 (48 & 49 Vict. c. 72) (ss. 7, 8, 9 of which are still operative; see note (*t*), p. 508, *ante*, notes (*c*)—(*f*), p. 516, *ante*); the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), referred to in this code of legislation and in this sub-section of this title as "the principal Act"; the Housing of the Working Classes Acts, 1894 (57 & 58 Vict. c. 55), 1900 (63 & 64 Vict. c. 59), and 1903 (3 Edw. 7, c. 39); and the Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), ss. 1—53. These enactments are collectively referred to in this sub-section of the title as "the Housing Acts." As to property which cannot be acquired for the purpose of the Housing Acts, see title OPEN SPACES AND RECREATION GROUNDS, Vol. XXI., pp. 580, 605; and note (*p*), p. 547, *post*.

(*h*) The local authorities charged with the execution of the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), Part I., are the councils of urban districts, the councils of municipal boroughs, the London County Council, in the County of London outside the City, and, within the City of London, the Common Council; see *ibid.*, s. 92, Sched. I.; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 6; Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 21; City of London Sewers Act, 1897 (60 & 61 Vict. c. cxxxiii.), s. 7; and see pp. 372—374, *ante*; titles LOCAL GOVERNMENT, Vol. XIX., pp. 262, 293; METROPOLIS, Vol. XX., pp. 395 *et seq.*, 428. All these authorities may appoint committees to execute the Housing Acts, but may not authorise such committees to borrow money, enter into a contract, or make a rate (Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 81). If an official representation made to the London County Council under *ibid.*, Part I.—which deals with "Unhealthy Areas"—relates to not more than ten houses, the London County Council must not deal with it, but send it to the borough council to whose area it relates, and that council must deal with it under the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), Part II.—which deals with "Unhealthy Dwelling-Houses"—(*ibid.*, s. 72). If, on receiving a representation under *ibid.*, Part I., the London County Council resolves that it is not of general importance to the County of London, and should be dealt with under *ibid.*, Part II., it may submit such resolution to the Local Government Board, and the Board may appoint an arbitrator to hold an inquiry. After such inquiry, the arbitrator may report on the importance of the case to the County of London, and as to what contribution, if any, the London County Council should make towards the cost of dealing with it, if it is dealt with under *ibid.*, Part II. The Local Government Board decides, on such report, which part of the Act should be used to deal with the case, and the proper medical officer must make the representation necessary for proceedings in accordance with such decision (*ibid.*, s. 73). As to inquiries, see pp. 375 *et seq.*, *ante*; and see p. 520, *post*. As to schemes under the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), Parts I. and II., see pp. 518 *et seq.*, *post*.

(*i*) An official representation for the purposes of the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), Part I., means a representation made to the local authority by its medical officer and, in London, by any medical officer of health appointed as such by the London County Council, or any qualified medical practitioner or practitioners appointed from time to time by the Council for carrying out the Act (*ibid.*, ss. 5 (1), 76).

(*k*) Persons may be authorised to act temporarily as medical officers of health for the purposes of *ibid.*, Parts I. or II. (*ibid.*, s. 79 (1)). All representations of medical officers of health under the Act must be in writing (*ibid.*, s. 79 (2)). A medical officer of health must make an official representation under the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), whenever he sees cause to do so (*ibid.*, s. 5 (2)). Any two justices of the peace acting within the district of the medical officer's authority or twelve or more ratepayers in his district, may complain to

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Nature of representation.

This representation must state (1) that within a certain area in the district of the authority either the houses, courts, or alleys are unfit for human habitation, or the streets and houses or groups of houses within the area are dangerous or injurious to the health of the inhabitants of the buildings in such area or of neighbouring buildings (*l*); (2) that the most satisfactory way of dealing with the evils specified is an improvement scheme (*m*) for rearranging or reconstructing some or all of the streets or houses in such area (*n*).

Resolution of local authority as to scheme.

1035. On receiving such a representation the local authority considers it, and, if satisfied of its truth and of its ability to deal with the evils specified, may (*o*) pass a resolution (*p*) declaring the area

him of the unhealthiness of any area within the district. On receiving such complaint the medical officer must at once inspect the area and make an official representation to his local authority, stating the facts of the case and whether or not he thinks the area unhealthy (Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 5 (2)). If the medical officer fails to inspect, or reports the area not unhealthy, twelve or more ratepayers may appeal to the Local Government Board, and the Board, if the complainants give security for costs, must order an independent inspection and report by a qualified medical practitioner, or by any other inspector, officer, or employee of the Board (*ibid.*, s. 16 (1); Housing of the Working Classes Act, 1903 (3 Edw. 7, c. 39), s. 4 (2); Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 26). The report must be sent by the Local Government Board to the local authority, and, if it states that the area inspected is an unhealthy area, the local authority must proceed as if it were an official representation coming from its own medical officer (Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 16 (1)). The costs of such an independent inspection or inquiry are in the discretion of the Local Government Board (*ibid.*, s. 16 (2)), and any order which the Board makes as to costs may be made a rule of a superior court and enforced as such (*ibid.*, s. 16 (3)). The Local Government Board may also order the local authority to make a scheme under *ibid.*, Parts I. and II., and such order is enforceable by mandamus (Housing of the Working Classes Act, 1903 (3 Edw. 7, c. 39), s. 4 (1)).

(*l*) The certificate may state that the danger is due to narrowness, closeness, bad arrangement of streets and houses or groups of houses, want of light, air, ventilation, or proper conveniences or other sanitary defects; see Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 4. The term "street" in *ibid.*, Part I., includes any street, court, alley, square, or row of houses (*ibid.*, s. 29; Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 48). As to sanitary accommodation, see pp. 596 *et seq.*, *post*.

(*m*) The words "that the most scheme" are in effect inserted in this provision by the Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 22.

(*n*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 4.

(*o*) If, when the local authority has received an official representation, it passes no resolution, or passes a resolution not to make a scheme, it must, as soon as possible, send the representation to the Local Government Board with its reasons for not acting on such representation. On receipt thereof the Local Government Board may direct a local inquiry to be held to examine into the correctness of the representation (*ibid.*, s. 10), and, if satisfied that a scheme should have been made, may order the local authority to make one. Such order may be enforced by mandamus (Housing of the Working Classes Act, 1903 (3 Edw. 7, c. 39), s. 4); as to inquiries generally, see pp. 375 *et seq.*, *ante*; and see p. 520, *post*.

(*p*) For form of resolution, see Encyclopædia of Forms and Precedents, Vol. X., p. 614. Persons beneficially interested in any land, dwelling-house or building may not vote on any resolution of a meeting or committee of a local authority if it relates to such property. If such a person votes he incurs a penalty not exceeding £50; but his vote does not invalidate

to be an unhealthy area and that an improvement scheme should be made for it. The local authority must then at once proceed to make a scheme (*q*).

The scheme.

1036. The scheme must be accompanied by maps, particulars, and estimates. It may exclude any part of the area in respect of which a representation has been made, it may apply to neighbouring lands, and may contain provisions for widening the existing approaches to the area, or opening out the area for the purposes of ventilation or health (*r*), unless the local authority is relieved from the duty to do so. The scheme must provide suitable accommodation for the working classes whom it will displace, either in the area dealt with or in the vicinity thereof (*s*), and must provide for proper sanitary arrangements (*t*). It may provide for any other matter, including the closing and diversion of highways, for which it seems expedient to make provision with a view to the improvement of the area or the general efficiency of the scheme (*u*). It must distinguish the lands proposed to be taken by compulsion (*a*). It may also contain arrangements for its being carried into effect in whole or in part by the person entitled to the first estate of freehold in any property contained within the area, under the superintendence and control of the local authority, and subject to such terms as may be agreed upon between the freeholder and the authority (*b*).

Publication of scheme and service of notice.

1037. When the scheme is complete, the local authority must publish notice of its completion in a local newspaper (*c*). The local authority must also serve notices (*d*) on the real or reputed owners

the resolution (Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 88).

(*q*) *Ibid.*, s. 4. For forms relating to such schemes, see Encyclopædia of Forms and Precedents, Vol. X., pp. 611—624.

(*r*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 6 (1) (a), (b).

(*s*) *Ibid.*, s. 6 (1) (c).

(*t*) *Ibid.*, s. 6 (1) (d).

(*u*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 23.

(*a*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 6 (2). Lands may (*ibid.*, s. 20) be taken by agreement under modified provisions of the Lands Clauses Acts; see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 163, 164. As to compensation, see p. 544, *post*. As to exemption from compulsory acquisition, see the Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 45; title OPEN SPACES AND RECREATION GROUNDS, Vol. XXI., p. 605.

(*b*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 6 (3).

(*c*) The notice must be published on three consecutive weeks in the same newspaper circulating in the district. It must state the limits of the area comprised in the scheme and name a place in or near the area where a copy of the scheme can be seen at all reasonable times (*ibid.*, s. 7 (a); Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 41; Local Government Board Order of 19th November, 1910 (Stat. R. & O., 1910, p. 212), prescribing and setting out the forms of the notices).

(*d*) These notices must be served during the thirty days next following the date of the last publication of the advertisement, according to the provisions of the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 7 (b), (c), (d), as amended by the Housing of the Working Classes Act, 1903 (3 Edw. 7, c. 39), s. 5 (1). As to service by post, see the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 26; compare pp. 370 *et seq.*,

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or lessee and occupier of any land which it is proposed to take compulsorily, stating that the authority is about to petition for confirmation of the scheme, and the local authority, after such publication and service, must present a petition (*e*) to the Local Government Board praying that an order (*f*) may be made confirming the scheme.

Inquiry.

1038. If the Local Government Board, on consideration of the petition and proof of the taking of the preliminary steps, decides to proceed with the scheme, it must direct a local inquiry to be held in or near the area of the proposed scheme for the purpose of ascertaining the correctness of the representations made as to its area and sufficiency and of hearing local objections to it (*g*).

Confirming order.

1039. A local inquiry having been held by an inspector of the Local Government Board, and a report on the inquiry having been made to it, the Board may make an order (*h*) declaring the limits of the area of the scheme and authorising its execution (*i*). Such order may make modifications or attach conditions to the scheme, but may not add to the lands which the scheme proposes to take compulsorily (*k*). The local authority must then serve a copy of the order on the persons whose lands are to be taken compulsorily (*l*), but not on tenants for one month or less. The Local Government Board may make an order allowing the costs incurred in opposing the scheme by any person whose lands it is proposed to take compulsorily, and such costs must be paid by the local authority (*m*).

ante. If the prepayment of postage of a letter containing a notice is not proved, the service is insufficient (*Walthamstow Urban District Council* v. *Henwood*, [1897] 1 Ch. 41).

(*e*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 8 (1). A copy of the scheme, a list of any persons who have objected to their lands being taken, and any evidence in support of the scheme which may from time to time be required by the Local Government Board, must accompany the petition (*ibid.*, s. 8 (2)).

(*f*) *Ibid.*, s. 8 (1). The Local Government Board issues annually instructions as to the manner of applying for confirmation of schemes.

(*g*) *Ibid.*, s. 8 (3). As to the powers of the Local Government Board to hold inquiries under the Housing of the Working Classes Acts and to make orders as to the costs of inquiries, see Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 85; Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 63, Scheds. II., VI. As to inquiries generally, see pp. 375 *et seq.*, *ante*.

(*h*) Formerly a provisional order, but see Housing of the Working Classes Act, 1903 (3 Edw. 7, c. 39), s. 5 (2); Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 24 (1); and see note (*i*), *infra*.

(*i*) No confirmation of the order by Act of Parliament is now necessary, even though it provides for taking lands compulsorily (Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 24 (1), amending Housing of the Working Classes Act, 1903 (3 Edw. 7, c. 39), s. 5 (2)).

(*k*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 8 (5).

(*l*) *Ibid.* These copies must be served in the manner prescribed by *ibid.*, s. 7, for serving the notices of intention to take land compulsorily; see note (*d*), p. 519, *ante*.

(*m*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 8 (7) (8); and see p. 522, *post*.

The Local Government Board may, after a scheme has been confirmed, allow the local authority to modify it in detail if it is proved to the satisfaction of the Board that such a modification would improve the scheme; but such modification, if it includes the provision of dwelling accommodation for persons of the working class, must be such as might have been inserted in the original scheme (*n*). Such modification may consist in the abandonment of part of the scheme, or in the addition to or amendment of the scheme in any way which the Board thinks expedient (*o*).

Steps to be taken by local authority.

1040. When the Local Government Board has confirmed a scheme, the local authority must as soon as practicable take steps, by purchase of the lands required and otherwise, for carrying the scheme into execution (*p*). The local authority may not itself rebuild any houses or execute any part of the scheme without the express approval of the Board (*q*), but it may take down buildings and lay out, pave, sewer, and complete streets in the area (*r*). The local authority may also sell or let any part of the land in the area of the scheme to purchasers or lessees on condition that the purchasers or lessees will carry the scheme into execution as regards those lands, and it may insert conditions in any grant or lease to secure that they shall do so and not subdivide, add to, or alter the character of the buildings without the consent of the local authority; and the lease or grant may also contain a condition for re-entry on breach of any covenant or condition contained in it (*s*). The local authority may also engage with any body of trustees, society, or person, for carrying out the whole or any part of the scheme on such terms as the authority thinks fit (*t*); and may, without itself acquiring the land, or after or

(*n*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 15 (1).

(*o*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 25.

(*p*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 12 (1). Thirteen weeks before taking any fifteen houses or more, the local authority must make known its intention to take them, by publishing notices in the locality of the houses, and must obtain a certificate from a justice of the peace to the effect that it has done so (*ibid.*, s. 14). The local authority may compensate persons whom it requires to give up possession of a building or part of it, if the building has not been closed by a closing order (as to which see p. 527, *post*), and if the person moved is a tenant for less than a year (Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 78). If within five years after removing buildings on land in the unhealthy area set aside by the scheme for workmen's dwellings, the local authority has failed to sell or let such land for the purposes prescribed by the scheme, or to make arrangements for the erection of the said dwellings, the Local Government Board may order the lands to be sold by auction, subject to a condition on the part of the purchaser to erect workmen's dwellings thereon in accordance with plans approved by the local authority. Other conditions may, if the Local Government Board thinks fit, be imposed on the purchaser (*ibid.*, s. 13).

(*q*) *Ibid.*, s. 12 (3).

(*r*) Such streets, when completed, become repairable by the highway authority (*ibid.*); see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 94.

(*s*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 12 (2).

(*t*) *Ibid.*, s. 12 (3). Where any part of the area which has been set aside

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subject to such acquisition, agree with any person entitled to the first estate of freehold in the land for carrying out the scheme in respect of such land (*u*).

Dwelling-house Improvement Fund.

1041. To meet the expenses incurred in carrying out its duties as to unhealthy areas the local authority forms a fund called the Dwelling-house Improvement Fund (*w*), to which the receipts of the local authority under Part I. of the principal Act (*a*) must (*b*), and money or produce of property legally applicable to purposes similar to those of that Part (*c*) may, be carried. Care must be taken by local authorities that, so far as practicable, such expenses are ultimately met out of property dealt with under Part I. of the principal Act (*d*), but if the proceeds of such property do not at any time suffice to meet such expenses, the deficit is made good out of the local rate or out of borrowed moneys (*e*).

Borrowing powers.

1042. For the purpose of executing Part I. of the principal Act (*d*), an urban council has the same powers of borrowing as it has under

for workmen's dwellings is granted or leased, the local authority must impose suitable conditions and restrictions as to elevation, size, and design of houses, and the accommodation to be afforded, and make provision for the maintenance of proper sanitary arrangements (Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 12 (4)). If, in an area outside the City or County of London, persons of the working classes are to be displaced by the scheme, the local authority must, if the Local Government Board requires it (but otherwise need not), provide for the accommodation of as many of the working classes as the Local Government Board, on a report made by its inspector who holds the local inquiry, may require, and must provide that accommodation in such places as the Local Government Board may prescribe (*ibid.*, s. 11 (2)). In the City or County of London the scheme must, as a general rule, provide suitable dwelling accommodation for all persons of the working classes displaced by the scheme; and, unless there is a special reason to the contrary, the accommodation must be in the area of the scheme or its vicinity (*ibid.*, s. 11 (1)); but, if it is proved to the satisfaction of the Local Government Board that such accommodation can be provided elsewhere, but still reasonably near the area of the scheme, and that it either has been, or is about to be, forthwith provided by the local authority, or some other person or persons, the Local Government Board may confirm the scheme, and so dispense with the obligation on the local authority to the extent to which such other accommodation is provided (*ibid.*, s. 11 (1) (a)). If satisfied by a report from its inspector that the local authority may receive a dispensation from the obligation to provide such accommodation, the Local Government Board may, in confirming the scheme, dispense with it to any extent not exceeding one-half of the whole number of working class persons who are displaced (*ibid.*, s. 11 (1) (b)).

(*u*) *Ibid.*, s. 12 (6).

(*w*) *Ibid.*, s. 24 (1).

(*a*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70); see note (*g*), p. 516, *ante*.

(*b*) Housing of the Working Classes Act, 1890 (53 & 54 Vict, c. 70), s. 24 (1).

(*c*) *Ibid.*, s. 24 (5). The decision of the Local Government Board as to what can be legally so carried is conclusive (*ibid.*).

(*d*) *Ibid.*, s. 24 (3); see note (*a*), *supra*.

(*e*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 24 (2). For the definition of "local rate" see *ibid.*, Sched. I., 3rd column. Any balance of profit is applicable to any purposes to which the "local rate" is applicable (*ibid.*, s. 25 (3)).

the Public Health Acts (*f*); the London County Council may, for the purposes of borrowings, create consolidated stock (*g*); and the Common Council of the City of London is also authorised to borrow, and to mortgage, its local rates for the purpose of such borrowing (*h*). On the recommendation of the Local Government Board, the Public Works Loan Commissioners may lend any local authority the sums required by it for such purpose on the security of the local rate (*i*).

(ii.) *Town Planning Schemes.*

Authorities.

1043. A town planning scheme may be made and executed by the council of any borough or urban or rural district, either within or, subject to certain conditions, partly within and partly without, its district (*k*). In London, such schemes can only be made by the London County Council, or by another authority with the consent of the London County Council (*l*).

Land in respect of which schemes may be made.

1044. Schemes may be made in respect of any land which is in course of development or appears likely to be used for building purposes (*m*), and also in respect of any land, either already built on

(*f*) See pp. 382 *et seq.*, *ante*; and see Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 25 (4). Loans under the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), need not now be repaid for eighty years, and such loans are not to be reckoned when estimating the amount which a local authority may borrow (Housing of the Working Classes Act, 1903 (3 Edw. 7, c. 39), s. 1).

(*g*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 25 (2); see title METROPOLIS, Vol. XX., pp. 444, 445.

(*h*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 25 (3); and see title METROPOLIS, Vol. XX., p. 447.

(*i*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 25 (5). As to loans by these Commissioners, see the Public Works Loans Act, 1875 (38 & 39 Vict. c. 89); title MONEY AND MONEY-LENDING, Vol. XXI., pp. 58 *et seq.*; and see p. 384, *ante*.

(*k*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 54 (1), (2). For the objects with which such a scheme is to be made, see *ibid.*, s. 54 (1). The authority which is to carry out the scheme is that authority which is named in the special provisions made by the Local Government Board as the "responsible authority" (*ibid.*, s. 55 (2)). Where land included in a scheme is in the area of more than one council, the responsible authority may be one or other of those councils, or one council for some purposes and another for others, or a joint body constituted specially for the purpose of the scheme. In the last case the scheme must provide for giving the joint body all necessary powers (*ibid.*, s. 55 (3)).

(*l*) *Ibid.*, ss. 55 (3), 66.

(*m*) "Land likely to be used for building purposes" includes land likely to be used for open spaces, roads, streets, parks, pleasure or recreation grounds, or for the purpose of executing any work upon or under the land incidental to a scheme (*ibid.*, s. 54 (7)). In disputed cases the Local Government Board decides finally whether any land does or does not fall within this definition (*ibid.*). Where any town planning scheme authorises the taking of land forming part of a common, open space or allotment, the restrictive provisions of *ibid.*, s. 73, apply; see title OPEN SPACES AND RECREATION GROUNDS, Vol. XXI., pp. 580, 581, 584. As to the definition of "common," "open space" (see title OPEN SPACES AND RECREATION GROUNDS, Vol. XXI., p. 581, note (*p*)), and "allotment," see Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 73 (4). Where it is proposed to take land near Royal parks the provisions of *ibid.*, s. 74, apply; see title OPEN SPACES AND RECREATION GROUNDS, Vol. XXI., p. 583.

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or not likely to be built upon, which is so situated with respect to land included in a scheme that it ought (*n*) also to be included therein (*o*).

Primâ facie case for scheme.

1045. In order to prepare a scheme the local authority must first satisfy the Local Government Board that there is a *primâ facie* case for making one (*p*). If satisfied on this point, the Board may authorise the local authority to make a scheme, or to accept, with or without modifications, any scheme suggested by the owners of any land with respect to which the local authority might itself have made a scheme (*q*).

Approval of scheme.

1046. The scheme, when prepared by the local authority, must be approved by the Local Government Board (*r*), and is inoperative till so approved, and the Board may annex conditions to its approval (*s*). When approved, the scheme has effect as if enacted by Parliament (*t*). Schemes which have been approved may be revoked or varied by subsequent schemes, or may be revoked altogether (*a*).

(*n*) The question whether such adjacent land ought to be included is to be decided by the Local Government Board, to whom the local authority must give evidence to show the desirability (Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 54 (3)).

(*o*) *Ibid.* When authorising the preparation or adoption of a scheme including such adjacent lands the Board may make provision for the demolition or alteration of buildings on the adjacent land so far as may be necessary for carrying out the scheme (*ibid.*).

(*p*) *Ibid.*, s. 54 (2). The Board is authorised to prescribe regulations for applications for its authority to prepare a scheme and for its final approval of it, for inquiries, reports, and notices in connection with it, for securing a preliminary hearing of objections and the co-operation between the applicant council and landowners concerned, and for various other matters incidental to the preparation, approval and execution of schemes. As to these, see *ibid.*, s. 56 (1), (2), Sched. V. The regulations prescribed under this authorisation are contained in the Town Planning Procedure Regulations (England and Wales), 1910 (Stat. R. & O., 1910, p. 799), arts. 3—11.

(*q*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 54 (3). The Local Government Board has power under *ibid.*, s. 56, to make regulations as to the procedure to be adopted with reference to the making, the carrying out, and the observance of schemes. Such regulations must provide for the matters specified in *ibid.*, s. 56 (2), Sched. V.

(*r*) The local authority must publish in the local newspapers the fact that it has submitted a scheme for approval of the Local Government Board, and the place at which a copy of the scheme can be seen, free of charge, by all persons affected (Town Planning Procedure Regulations (England and Wales), 1910), art. 23). This Order contains elaborate provisions as to the documents etc. which must accompany applications for approval of a scheme; see *ibid.*, arts. 19—22.

(*s*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 54 (4). As to the procedure where the Board proposes conditions objected to by the local authority, see Town Planning Procedure Regulations (England and Wales), 1910, art. 24.

(*t*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 54 (4). As to the notices which must be published by the Local Government Board before it approves a scheme, see *ibid.*, s. 54 (4); Town Planning Procedure Regulations (England and Wales), 1910, art. 25; see p. 370, *ante*.

(*a*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 54 (6). For total revocation, an application by the local authority, or by some person appearing to the Local Government Board to be interested, is necessary.

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1047. Schemes must contain such provisions, both of a general and of a special character, as may be prescribed for insertion therein by the Local Government Board (*b*).

Provisions of schemes:—

One or more sets of general provisions (*c*) may be made by the Board for carrying out the general objects of town planning schemes (*d*). Such general provisions must provide in particular for securing co-operation between the local authorities and owners of land affected for dealing with streets, roads, and their diversion, buildings, open spaces, sewerage, the preservation of objects of historical interest or natural beauty, lighting, water supply, demolition of obstructive works, agreements between local authorities and owners, and between owners and owners, and acceptance of money for furtherance of the objects of the scheme (*d*). All general provisions must be laid before Parliament, and they may from time to time be withdrawn and fresh general provisions substituted (*e*). The general provisions which are appropriate (*f*) to the area in which a scheme is made take effect as part of every scheme in that area, unless varied or excluded by the Board in approving the particular scheme (*g*).

(i.) general provisions;

(ii.) special provisions.

Special provisions must be inserted (*h*) in every town planning scheme (*i*) to define (*k*) the area of the scheme, and the authority responsible for carrying it out and enforcing it (*l*). They must provide for any matters which may be dealt with by general provisions, supplement or vary them, and deal with any special circumstances for which the general provisions do not make adequate provision (*l*). They must also provide for suspending, as far as may be necessary for the carrying out of the scheme, any statutory enactment or bye-law; but if any scheme contains provisions which suspends such an enactment or bye-law it must be laid before Parliament for forty days during a session, and must not be proceeded with if an address is presented against it by either House (*m*).

(*b*) Housing, Town Planning etc. Act, 1909 (9 Edw. 7, c. 44) s. 55 (1), (2). It seems from this provision that the Board in issuing general provisions must say to what areas they are appropriate.

(*c*) *Ibid.*, s. 55 (1).

(*d*) The contents, optional or compulsory, of these general provisions are set out in *ibid.*, Sched. IV.

(*e*) *Ibid.*, s. 64; and see the Rules Publication Act, 1893 (56 & 57 Vict. c. 66), which is made applicable to all general provisions under the Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), Part II.

(*f*) See note (*b*), *supra.*

(*g*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 55. If they are varied, the variance or exclusion is effected by a special provision, as to which see the text, *supra.*

(*h*) The Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), does not make it clear when or by whom they are to be inserted; but, apparently, general provisions made under *ibid.*, s. 56 (1), may be made prescribing the manner and time of insertion.

(*i*) *Ibid.*, s. 55 (2). This sub-section is directory.

(*k*) The definition must be made "in such manner as may be prescribed by regulations under *ibid.*, Part II." It is, again, not clear how these regulations are to prescribe the manner of definition, but apparently regulations may be made under *ibid.*, s. 56 (1), dealing with the matter.

(*l*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 55 (2).

(*m*) *Ibid.*; but a new scheme for the same area may afterwards be made (*ibid.*).

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Execution of necessary work and acquisition of land.

1048. After giving such notice as may be provided by a scheme (*n*), the responsible authority (*o*) may pull down, alter, or remove any building or work in the area of the scheme which is such as to contravene it (*p*), and execute any work which it is the duty of any person to execute under the scheme if it thinks that such person is delaying the execution of the work in such a way as to prejudice the scheme (*q*). A responsible authority may buy land for the purpose of a town planning scheme either by agreement or compulsorily (*r*).

Enforcement of duty of defaulting authority.

1049. If the Local Government Board is satisfied that a local authority has failed in a proper case to prepare a scheme, or to adopt a scheme proposed by local owners, or to consent to modifications or conditions imposed by the Board, or to enforce an approved scheme or to carry out works under it, the Board may order the local authority to prepare and submit a scheme, or consent to such modifications, or to enforce the approved schemes or execute the works in question. If the Board receives a complaint that the local authority has failed to adopt a proposed scheme, it may itself approve it, with or without modification, and, if so approved, it takes effect as if submitted by the local authority and approved in the ordinary course. The Board may also make an order compelling a local authority effectively to enforce the observance of a scheme (*s*). Such order may be enforced by mandamus (*t*).

Expenses of schemes.

1050. Expenses incurred by local authorities are met, in boroughs and urban and rural districts, as expenses under the Public Health Act, 1875 (*u*), and the respective local authorities may borrow to meet these expenses in the same way as they may borrow to meet

(*n*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 57 (1), Sched. IV. (2).

(*o*) As to the meaning of "responsible authority," see note (*k*), p. 523, *ante*.

(*p*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 57 (a).

(*q*) *Ibid.*, s. 57 (1) (b). Expenses incurred under this provision are recoverable from the person in default in the manner provided by the scheme (*ibid.*, s. 57 (2)); and see the text, *infra*.

(*r*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 60. In cases of compulsory purchase the course provided by the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), Part III., as amended by the Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), ss. 2, 45, is to be followed. In following this course the local authority must comply with the provisions of the Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), Sched. I., and of the Housing, etc. (Form of Compulsory Purchase Order, etc.) Order of the Local Government Board dated 14th June, 1911 (Stat. R. & O., 1911, p. 136). As to the protection afforded to owners by the provisions of the Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 45, see note (*p*), p. 547, *post*. If the council of A. is executing a scheme which includes land situate in the area of B., the council of B. may buy such land as if it was executing the scheme (Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 60 (2)); but apparently the council of A. may also buy such land under *ibid.*, s. 60 (1).

(*s*) *Ibid.*, s. 61. A representation by some person and an inquiry held by the Local Government Board consequent on such representation are conditions precedent to such an order (*ibid.*).

(*t*) *Ibid.*, s. 61 (3); and as to such enforcement generally, see p. 378, *ante*.

(*u*) 38 & 39 Vict. c. 55; see pp. 380 *et seq.*, *ante*.

expenses under the Public Health Acts (*v*). Expenses incurred by the London County Council are met out of the general county rate (*w*); and the Council may borrow as for general county purposes (*x*).

(iii.) *Unhealthy Dwelling-houses and Obstructive Buildings* (*a*).

(a) *Closing Orders.*

Duty of local authority and its officers.

1051. It is the duty of every local authority (*b*), under Part II. of the principal Act (*c*), to cause inspection to be made from time to time of its district in order to ascertain whether any dwelling-house therein is in a state so dangerous or injurious to health as to be unfit for human habitation, and for this purpose the local authority and its officers must comply with such regulations and keep such records as may be ordered by the Local Government Board (*d*). It is also the duty of the medical officer of health of every such district to make a representation to the local authority if he finds that any dwelling-house in the district is in such a condition (*e*).

(*v*) See pp. 382 *et seq.*, *ante*; and see Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 65 (2). Money borrowed for the purposes of the Act is not to be reckoned for the purposes of the limitations on the power of borrowing contained in the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 234 (2), (3) (Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 65 (3)).

(*w*) *I.e.*, as expenses for general county purposes; see title LOCAL GOVERNMENT, Vol. XIX., pp. 358 *et seq.*

(*x*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 66 (2). As to the mode of borrowing, see title METROPOLIS, Vol. XX., p. 444.

(*a*) The powers and duties of local authorities with regard to unhealthy dwelling-houses are given and imposed by the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), Part II., as amended by subsequent legislation, and especially by the Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44). These provisions as so amended are in force throughout England and Wales.

(*b*) The local authorities are, in municipal boroughs, the borough councils (Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 92, Sched. I.), in urban and rural districts, the district councils (*ibid.*; Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 21), in metropolitan boroughs, the borough councils (Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 92, Sched. I.; London Government Act, 1899 (62 & 63 Vict. c. 14), s. 4), and in the City of London, the Common Council (Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 92, Sched. I.; City of London Sewers Act, 1897 (60 & 61 Vict. c. cxxxiii.), s. 7; and see titles LOCAL GOVERNMENT, Vol. XIX., pp. 262, 293, 329; METROPOLIS, Vol. XX., pp. 395, 396, 428). If, however, a borough council in London, on receiving a representation under the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), Part II., resolves that it is of general importance to the County of London and should be dealt with under *ibid.*, Part I., it may submit its resolution to the Local Government Board, who, after inquiry, may decide which part of the Act is to be used (Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 73); and see note (*h*), p. 517, *ante*.

(*c*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70); see note (*g*), p. 516, *ante*.

(*d*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 17 (1). An elaborate set of regulations under this provision dealing with inspection and keeping of records is contained in the Housing (Inspection of District) Regulations, 1910 (Stat. R. & O., 1910, p. 216), issued by the Local Government Board on the 2nd September, 1910.

(*e*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 30

SECT. 7. Dwelling Places.

Closing order.

1052. A local authority receiving such a representation from any of its officers or any other source, must, if satisfied of the truth of the representation, make an order, called a "closing order," prohibiting the use of the house as a dwelling-house until, in the judgment of the local authority, it has been rendered fit for that purpose (*f*).

A temporary medical officer is authorised to make these representations (*ibid.*, s. 79 (1); and see note (*k*), p. 517, *ante*). Back to back houses may not be erected for working-class dwellings, but tenements may be placed back to back if the medical officer of health certifies all habitable rooms to be effectively ventilated (Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 43); see note (*d*), p. 419, *ante*. Any four householders living near or in a street in an urban district outside London may make a complaint, which must be in writing, to the medical officer of the district that a house is unfit to live in; the officer must forthwith inspect the house and send the complaint to the local authority with his opinion thereon, if he thinks that it is justified (Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 31). If the local authority does not, within three months after receiving such complaint and opinion, proceed to put *ibid.*, Part II., in force, the complainants may appeal to the Local Government Board, and the Board, after holding a public inquiry, may compel the local authority to enforce the Act (*ibid.*, s. 31). As to inquiries, see, generally, pp. 375 *et seq.*, *ante*. In London and in rural districts, if the local authorities fail to put the Act in force after receiving such a complaint and opinion, the county council may by resolution take powers to deal with the case under the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), Part II.; see *ibid.*, s. 45 (2)).

(*f*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 17 (2). As to the signature and sealing of orders by local authorities, see Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 86. As to the manner of compelling the performance of the duty, see note (*e*), *supra*; and see, further, p. 377, *ante*. As to appeals against such an order, see p. 542, *post*. Previous to the passing of the Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), the local authority could not itself make the closing order, but had to proceed for it under the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 32 (now repealed). The proceedings authorised by that provision for a closing order could be taken in respect of a house, even though it was already closed by virtue of a bye-law made by the local authority under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 157 (*Slight* v. *Portsmouth Corporation* (1906), 95 L. T. 356). It is submitted upon this decision that a local authority might make a closing order under the Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), even though the house had already been closed by virtue of such a bye-law. For forms relating to the procedure, see Encyclopædia of Forms and Precedents, Vol. X., pp. 644 *et seq.* A landlord served with a notice to do works under the Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 15 (3) (see title LANDLORD AND TENANT, Vol. XVIII., p. 504), may give the local authority notice in writing that he intends to close the house, and thereupon a closing order is deemed to have been made in respect thereof (Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 15 (4)); as to appeals in such a case, see *ibid.*, s. 15 (6). Should the landlord neither comply with the notice to do works nor give notice of closing, the local authority may do the work, and recover the expense summarily or may order payment within a period not exceeding the interest of the landlord (including his successors in title, *ibid.*, s. 15 (7)), or in any case not exceeding five years, by annual instalments with interest at 5 per cent., instalments and interest being recoverable summarily (*ibid.*, s. 15 (5)). As to the bearing upon a closing order under the Housing Acts (see note (*g*), p. 516, *ante*), of a local enactment providing for the demolition of unhealthy courts and premises, see *Merrick* v *Liverpool Corporation* (1910), 103 L. T. 399.

Notice of the closing order must forthwith be served on the owner of the dwelling-house, who has fourteen days after service within which he may give notice of appeal against the order to the Local Government Board (*g*).

Notice of closing order.

Notice to occupiers of premises affected.

1053. Where an order has become operative, the local authority must serve notice of it on the occupying tenants, and must mention a time within which they must evacuate the dwelling-house. If they do not remove within that time, they may be ordered to do so on summary conviction (*h*). Unless the tenant, or some person for whom, as between his landlord and himself, he is responsible, has by wilful act or default caused the dwelling-house to become unhealthy, he is entitled to reasonable compensation for removal, and, if the owner and the local authority cannot agree as to this sum, it may be fixed by a court of summary jurisdiction, and is then recoverable summarily as a civil debt (*i*).

Determination of closing order.

1054. Closing orders must be determined by the local authority if it is satisfied that the dwelling-house has been made fit for human habitation (*k*).

Closing of underground room.

1055. A room habitually used as a sleeping place, the floor of which is more than three feet below the level of the nearest part of the street, is *ipso facto* unfit for human habitation, and must be closed by order (*l*) of the local authority, unless it either is at least on the average seven feet high from floor to ceiling, or complies with regulations made by the local authority for ventilation, lighting, and protection against dampness, effluvia, or exhalation (*m*).

(*g*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 17 (3). The notice must strictly follow the form of closing order (No. 5) set out in the Order of the Local Government Board dated 11th January, 1910 (Stat. R. & O., 1910, p. 196); otherwise the local authority cannot proceed further upon it (*Rayner* v. *Stepney Corporation*, [1911] 2 Ch. 312). Appeals are dealt with at p. 542, *post*. As to service of notices under the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), Part II., see Housing of the Working Classes Act, 1903 (3 Edw. 7, c. 39), s. 13 (1); and compare pp. 370 *et seq.*, *ante*. As to information to owners who are not in receipt of rents and profits, see p. 545, *post*.

(*h*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 17 (4). Possession may also be recovered by the owner or the local authority, as if either were the landlord, under the provisions of the County Courts Act, 1888 (51 & 52 Vict. c. 43), ss. 138—145, or under the Small Tenements Recovery Act, 1838 (1 & 2 Vict. c. 74); see Housing of the Working Classes Act, 1903 (3 Edw. 7, c. 39), s. 10; and see titles COUNTY COURTS, Vol. VIII., pp. 436 *et seq.*, 568, 569; LANDLORD AND TENANT, Vol. XVIII., pp. 559, 560.

(*i*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 17 (5); and see title MAGISTRATES, Vol. XIX., pp. 609, 610.

(*k*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 17 (6). As to the right of appeal against a refusal to determine, see p. 545, *post*.

(*l*) The order may be enforced, on summary conviction, against any occupier of such a room who fails to comply with it. The room, though closed as a sleeping room, may be used for other purposes (Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 17 (7).

(*m*) *Ibid.* The local authority's regulations must receive the consent of the Local Government Board, and if the local authority, after being required to do so by the Board, fails to make such regulations, or such regulations as the Board approves, the Board may itself make them, and regulations so made take effect as if made by the local authority with the Board's consent (*ibid.*).

SECT. 7.

Dwelling Places.

(b) *Demolition Orders.*

When a demolition order may be made.

1056. Where a closing order in respect of any dwelling-house has been in operation for three months, the local authority must consider the question of the demolition of the house (*n*). Before doing so it must give the owner at least one month's notice, stating when and where it will consider the matter; and it must hear him on the question if he desires to be heard (*o*). At the hearing the local authority must order the demolition of the house if it is satisfied that the necessary steps have not been or are not being diligently taken to render the dwelling-house fit for human habitation, or that the continuance of the house, or a building which is part of it, is a nuisance, or dangerous or injurious to the health of the public or to the neighbouring dwelling-houses (*p*).

Postponement of order.

The operation of the order may be postponed for any time not exceeding six months if the owner undertakes forthwith to render the house fit for human habitation, and if the local authority thinks that it can be so rendered fit (*q*).

Notice of order.

1057. Notice of a demolition order must be served forthwith on every owner of a building in respect of which it is made, and any such owner may appeal to the Local Government Board against the order, by giving notice of appeal to the Board within twenty-one days after service of the order upon him (*r*).

Compliance with order.

1058. The owner of the building which is made the subject of a demolition order must take it down within three months. If he fails to do so the local authority may take it down (*s*), and the owner may not afterwards place on the site of the removed building any building or erection which will be dangerous or injurious to health (*t*).

Charge on property in favour of owners.

1059. An owner who executes on dwelling-houses works which have been required by a local authority is entitled, if he satisfies the local authority that the works have been carried out, to obtain from it an order charging on the dwelling-house an annuity (*u*) for the repayment of the cost of such works and of obtaining the

(*n*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 18 (1).

(*o*) *Ibid.* As to information to owners who are not in receipt of rents and profits, see p. 545, *post*.

(*p*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 18 (2). The wording of this provision renders unimportant a previous decision (*Vale* v. *Southall-Norwood Urban District Council* (1896), 60 J. P. 134) as to the conditions precedent to a demolition order under the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70).

(*q*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 18 (3)). As to the meaning of "forthwith," see note (*a*), p. 475, *ante*.

(*r*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 18 (4); and see note (*q*), *supra*. As to appeals, see pp. 542 *et seq.*, *post*.

(*s*) The local authority may sell the materials, and must pay over the balance, after deducting expenses, to the owner. If the proceeds of the sale do not cover the expenses of demolition, the balance may be recovered from the owner by summary proceedings (Housing of the Working Classes Act, 1903 (3 Edw. 7, c. 39), s. 9). As to proceedings before a court of summary jurisdiction, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*

(*t*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 34 (2).

(*u*) This annuity is redeemable on terms either agreed or, in default of agreement, determined by the Local Government Board (Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44). s. 19).

charging order (*v*). This annuity must be at the rate of 6 per cent. on the amount expended, and payable for thirty years to the owner named in the order or his executors, administrators, or assigns (*w*).

Nature of charge.

The charge so created is a charge on the house specified in the order (*a*), and takes priority over all existing and future estates, interests, and incumbrances except quit-rents or other charges incident to tenure, tithe commutation rentcharge, or charges imposed by virtue of any Act authorising the advance of public money, the Public Health Acts (*b*), or local Acts authorising a local authority to create a charge for the recovery of expenses (*c*).

Arrears.

If the annuity falls in arrear, its holder may distrain, or resort to any of the remedies (*d*) provided by the Conveyancing and Law of Property Act, 1881 (*e*), but distress may be barred if no payment has been made for the statutory period (*f*).

(c) *Removal of Obstructive Buildings.*

Meaning of "obstructive."

1060. A building is "obstructive" if, by its proximity or contact, it tends to make the neighbouring buildings unhealthy or prevents a remedy being applied to cure nuisance or unhealthiness in the neighbouring buildings (*g*).

(*v*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 36 (1). For form of order, see *ibid.*, Sched. V., Form 1. The dwelling-house being charged and liability placed on no particular person, the amount may (*semble*) be recovered from an occupier during continuance of his estate; see *Hyde* v. *Berners* (1889), 53 J. P. 453, decided under the Artizans and Labourers Dwellings Act, 1868 (31 & 32 Vict. c. 130), s. 27, which is repealed by the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70).

(*w*) Such an order is conclusive evidence (1) that all proceedings relating to the order and the charge have been duly performed; (2) that the charge has been duly created; and (3) that it is a valid charge on the house declared to be subject to it (*ibid.*, s. 37 (2)).

(*a*) *Ibid.*, s. 36 (2).

(*b*) For a list of the Public Health Acts, see note (*a*), p. 361, *ante*.

(*c*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 37 (1); Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 20. If more than one charge is imposed on a dwelling-house, the charges rank in order of time (Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 37 (1)). The charging order, if it relates to a dwelling-house in Middlesex or Yorkshire, must be registered (*ibid.*, s. 37 (3); and see title MORTGAGE, Vol. XXI., pp. 334 *et seq.*). Copies of the order and of the certificate of the surveyor or engineer on which it is made, and of the accounts, in respect of the work executed, as passed by the local authority, must be filed with the clerk of the peace for the county; see Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 37 (4). As to the transfer of the benefit of the charge, see *ibid.*, s. 37 (5); Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 41 (1).

(*d*) As to the remedy by action, see *Thomas* v. *Sylvester* (1873), L. R. 8 Q. B. 368; *Searle* v. *Cooke* (1890), 62 L. T. 211, C. A.; and as to the amount recoverable, see title LIMITATION OF ACTIONS, Vol. XIX., pp. 99, 115, 116.

(*e*) 44 & 45 Vict. c. 41, s. 44; see Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 36 (3); and see titles DISTRESS, Vol. XI., pp. 120, 121; RENTCHARGES AND ANNUITIES.

(*f*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27); *Jones* v. *Withers* (1896), 74 L. T. 572, C. A.; and see title LIMITATION OF ACTIONS, Vol. XIX., pp. 97, 98.

(*g*) For the precise definition of an "obstructive" building, see Housing

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Representation to local authority.

1061. A representation to the effect that this state of affairs exists in regard to any building must be made by the medical officer of health whenever he finds that it exists (*h*), and, if he finds that it exists and makes his representation accordingly, he must state it as his opinion that the obstructive building should be pulled down (*i*). A similar representation may be made by any four householders in the district, or by a parish council (*k*).

Report to local authority and order thereon.

1062. On receiving the representation, the local authority must cause a report (*l*) to be made to it on the circumstances of the building and the cost of pulling it down and of acquiring the land. If, on receiving such a report, the local authority decides to proceed, it must send the representation and report to the owner of the land on which the building stands, and appoint a time and place at which it will consider his objections, if he has any. After hearing such objections, the local authority may decide to proceed no further or to have the building pulled down (*m*).

Acquisition of land.

1063. If the local authority makes an order to pull down and no appeal is prosecuted against it (*n*), the local authority may proceed to buy the lands on which the obstructive building stands as if they had been authorised by a special Act to do so. For the purpose of such purchase the provisions (with certain modifications (*o*)) of the

of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 38 (1), as amended by the Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), Sched. II.

(*h*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 38 (1). For forms relating to removal of obstructive buildings, see Encyclopædia of Forms and Precedents, Vol. X., pp. 639—643.

(*i*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 38 (1). The representation must give particulars (*ibid.*) and must be in writing (*ibid.*, s. 79 (2)). The representation may be made by a temporary medical officer (*ibid.*, s. 79 (1)); see note (*k*), p. 517, *ante*.

(*k*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 38 (2); Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 6 (2).

(*l*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 38 (3). The Act does not state who is to make the report.

(*m*) *Ibid.*, s. 38 (3). As to objections, see pp. 539, 542 *et seq.*, *post*. As to information to owners not in receipt of rents and profits, see p. 545, *post*.

(*n*) As to appeals, see pp. 542 *et seq.*, *post*.

(*o*) For the modifications, see Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), ss. 38, 41. Provision is made for the settlement of compensation by arbitration in case of difference (*ibid.*). The arbitrator apportions compensation money among interested parties (Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 28). Where the arbitrator is of opinion that the demolition of an obstructive building adds to the value of neighbouring buildings, such a proportionate part of the compensation money as represents the increased value may be charged on each such building as private improvement expenses for which a rate (see pp. 381, 382, *ante*) may be levied (Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 38 (8)). It must be observed that a local authority may tender evidence before the compensation tribunal to prove the facts under the headings (1), (2) and (3) in the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), ss. 21 (2), 41 (3) (see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 164, 166), notwithstanding that the local authority has not taken any steps to remedy the defects or evils disclosed by such evidence (Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 29).

Lands Clauses Acts (*p*) with regard to the purchase of lands otherwise than by agreement apply (*q*).

Dealings with site.

1064. Within one month after serving notice to purchase the site the owner may elect to retain the site and himself remove the building; and, if he does so, he must receive compensation from the local authority for the work of pulling down (*r*).

If the owner retains the site, he may not build on it any house, building, or erection which is dangerous or injurious to health, or obstructive (*s*), and, if he does so, he may be ordered at any time by the local authority to alter or abate it; and the local authority may itself abate or alter it if the owner fails to do so (*t*). When the local authority acquires the site, it must pull down the building or the obstructive part of it, and may keep the whole or part of the site as an open space, and may, with the assent of, and on terms approved by, the Local Government Board, sell such part of the site as is not required to be kept open for the purpose of preventing obstruction (*a*). Any land acquired for the removal of an obstruction may be dedicated by the local authority as a highway or other public place (*b*).

(iv.) *Reconstruction Schemes* (*c*).

When reconstruction schemes may be made.

1065. Reconstruction schemes may be made—(1) where the order has been made under Part II. of the principal Act (*d*) for demolishing a building (*e*), and the local authority thinks that it would be beneficial to the health of the neighbourhood if the area of the dwelling-house of which such building forms part were dedicated as a highway or open space, or used for workmen's dwellings, or exchanged for neighbouring land which, when received in exchange, will be used for workmen's dwellings (*f*); (2) where the local

(*p*) See note (*i*), p. 544, *post*; title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 12 *et seq.*

(*q*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 38 (4). For the purpose of such purchase the local authority is deemed to be the promoters of an undertaking and *ibid.*, Part II., to be the special Act (*ibid.*). The purchase may be made within a year of the date of the order or of its confirmation on appeal (*ibid.*).

(*r*) As to the settlement of such compensation, see note (*o*), p. 532, *ante*; title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 165, 166.

(*s*) As to the meaning of "obstructive," see p. 531, *ante*.

(*t*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 38 (10).

(*a*) *Ibid.*, s. 38 (11).

(*b*) *Ibid.*, s. 38 (12); and as to the lawful purposes of such dedication, see *Robinson* v. *Cowpen Local Board* (1893), 63 L. J. (Q. B.) 235, C. A.

(*c*) The powers of local authorities to prepare and carry out schemes for reconstruction are contained in the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 39, as amended by the Housing of the Working Classes Act, 1903 (3 Edw. 7, c. 39), and the Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44). Such schemes are more extensive in their character than the operations of the local authority in connection with individual unhealthy buildings (see pp. 527 *et seq.*, *ante*), but less extensive than those which are carried out for improvement of unhealthy areas (see pp. 516 *et seq.*, *ante*).

(*d*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70); see note (*g*), p. 516, *ante*.

(*e*) See p. 532, *ante*.

(*f*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 39 (1) (a).

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authority thinks that buildings are unhealthy by reason of narrowness, want of light or air, or some other sanitary defect, and that, to remedy these defects, reconstruction or rearrangement is necessary, and that the area of the buildings in question is too small to be dealt with as an unhealthy area under Part I. of the principal Act (*g*).

Resolution for scheme and notice of scheme.

1066. In either of the cases in which reconstruction schemes may be made the local authority must pass a resolution to the effect of its opinion, and direct a scheme to be made for the reconstruction of the area (*h*). Actual or reputed owners or lessees must, so far as they can be ascertained, be given notice of the scheme (*i*).

Order of Local Government Board.

1067. After giving the proper notices, the local authority petitions the Local Government Board for an order sanctioning the scheme; and the Board may cause a local inquiry to be held, and sanction the scheme, with or without any conditions which may be suggested as a result of the inquiry as beneficial to the inhabitants of the buildings affected or of the neighbouring dwelling-houses (*k*).

Acquisition of lands.

1068. Having obtained the order sanctioning the scheme, the local authority may purchase the area comprised in the scheme. The order may incorporate the provisions of the Lands Clauses Acts (*l*), and the compensation is settled by an arbitration under

(*g*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 39 (1) (b). As to unhealthy areas, see pp. 516 *et seq.*, *ante*.

(*h*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 39. The Act does not say who is to prepare the scheme. Under *ibid.*, Part I. (see *ibid.*, s. 4; and see p. 519, *ante*), the local authority is to prepare it. The local authority may include neighbouring lands in the scheme if necessary for its efficiency (Housing of the Working Classes Act, 1903 (3 Edw. 7, c. 39), s. 7), but if it does so it may be compelled to pay the owner a sum, in addition to the market value of the premises taken, in respect of the compulsory purchase thereof (*ibid.*).

(*i*) In the manner provided by the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), Part I., in respect of lands proposed to be taken compulsorily; see pp. 519, 520, *ante*. As to the duty of clerks to local authorities in the matter of giving notices, see the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), ss. 49, 50; and see Housing of the Working Classes Act, 1903 (3 Edw. 7, c. 39), s. 13. As to notices generally, compare pp. 370 *et seq.*, *ante*. As to the rights of superior landlords to claim to retain the site and, in certain cases, to execute the works required for a closed dwelling-house, see Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 47; and see p. 546, *post*.

(*k*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 39 (3). The scheme, after having been sanctioned, may, if an order to this effect is obtained from the Local Government Board, be modified in detail, and the modification may amount to abandonment of a part of it or to amendment or extension in matters of detail (*ibid.*, s. 39 (9); Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 25). In the case of orders sanctioning a modified scheme, the procedure as to publication and giving notice which is required for an original scheme must be followed (Housing of the Working Classes Act, 1903 (3 Edw. 7, c. 39), s. 6 (2)). In an order sanctioning a scheme of this kind the Local Government Board must insert such provisions as they deem requisite, in the circumstances of the case, for re-housing persons of the working class who are displaced by the scheme (Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 40); compare pp. 520, 521, *ante*.

(*l*) See title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 12 *et seq.* The site of an ancient monument or other object of archæological interest may not be acquired (Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 45); see title OPEN SPACES AND RECREATION GROUNDS, Vol. XXI., p. 605.

those Acts (*m*); but the arbitrator must be a person appointed and removable by the Local Government Board (*n*).

SECT. 7. Dwelling Places.

(v.) *General Provisions Relating to Unhealthy Dwelling-houses, Obstructive Buildings, and Reconstruction Schemes.*

Expenses of local authorities in London.

1069. In London, the provisions of the Public Health Acts (*o*), with regard to private improvement rates and private improvement expenses, apply for the purposes of Part II. of the principal Act (*p*). The metropolitan borough councils and the Common Council of the City are the urban authorities for the purposes of this application (*q*). The Common Council, the London County Council, and the metropolitan borough councils may borrow purchase money or compensation money, and the London County Council may lend the money borrowed to a borough council (*r*). The London County Council may also, under its power to make schemes under Part II. of the principal Act (*s*), obtain an order from the Local Government Board compelling a metropolitan borough council to contribute to the expenses of and incidental to making and carrying out a scheme (*t*). A metropolitan borough council may obtain a similar order against the London County Council (*a*).

Expenses of local authorities outside London.

1070. Outside London, all expenses incurred by a local authority under Part II. of the principal Act (*b*) must be defrayed by them out of the local rate (*c*), and such rate may be levied or increased for the purposes of Part II. (*d*). A local authority may, to raise sums for

(*m*) See title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 12 *et seq.*

(*n*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 41; and see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 165, 166; see also Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 29; and see note (*o*), p. 532, *ante*. As to the procedure in these arbitrations, see Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 41; title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 166.

(*o*) For a list of the Public Health Acts, see note (*a*), p. 361, *ante*. As to the provisions, see pp. 381, 382, *ante*.

(*p*) *I.e.*, Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 46 (1); see note (*g*), p. 516, *ante*. As to the charging of such expenses under the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), Part II., see note (*o*), p. 532, *ante*. The general expenses, however, of a local authority under the Act in London, as elsewhere, are paid out of the "local rate" (see the text, *infra*). For both the City Corporation and a metropolitan borough council that rate is the general rate; see title METROPOLIS, Vol. XX., pp. 439, 440.

(*q*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 46 (1).

(*r*) *Ibid.*, s. 46 (2), (3). As to borrowing, see p. 541, *post*, and note (*e*) p. 536, *post*.

(*s*) *I.e.*, Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70) s. 46 (5); see note (*g*), p. 516, *ante*.

(*t*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 46 (6).

(*a*) *Ibid.*, s. 46 (7). As to Woolwich, see *ibid.*, s. 46 (8).

(*b*) *I.e.*, Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70): see note (*g*), p. 516, *ante*.

(*c*) "Local rate" is defined in the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), Sched. I., col. 3. The expenses of a rural district council are special (*ibid.*, s. 42 (2); see p. 381, *ante*); those of an urban district council are general expenses (see p. 380, *ante*). As to expenses in London, see note (*p*), *supra*.

(*d*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 42.

SECT. 7. Dwelling Places.

purchase-money or compensation, borrow (*e*) as if it were borrowing for the purpose of executing its powers under the Public Health Acts (*f*), and must present every year an account of what it has done under Part II. of the principal Act (*g*) and of all moneys received and paid by it in execution of its powers thereunder (*h*).

Obstruction of officers or persons charged with the execution of the Act.

1071. If the occupier of a dwelling-house prevents the owner, or the owner or occupier of a dwelling-house prevents the medical officer of health (*i*), or the officers, agents, servants or workmen of such owner or officer, from executing the provisions of Part II. of the principal Act (*k*), a court of summary jurisdiction (*l*) may order the person causing such prevention to permit the execution of such provisions (*m*). Default in compliance with an order is an offence punishable on summary conviction by a fine not exceeding £20; but the owner is not liable unless he assents to the default of the occupier (*n*).

(vi.) *Working-Class Dwellings.*

Statutory power for provision of dwellings.

1072. The provision of lodging-houses for the working classes (*o*) is the subject of Part III. of the principal Act (*k*), which Part, as amended by subsequent Acts, is in force in every city, borough, and urban or rural district in England and Wales (*p*). The exercise by a local authority of its powers thereunder is optional; but if an authority does not exercise its powers it may in certain cases be compelled to do so.

Local authorities having power to execute the Act.

1073. The local authorities to carry out Part III. of the principal Act (*k*) are—in the County of London, the County Council; in the City of London, the Corporation; in urban and rural districts, the district councils; and, in municipal boroughs, the borough councils (*q*). These several authorities have in their respective areas the same power to contract or give orders for carrying out Part III. of the principal Act (*k*) as they have for the execution of their duties under

(*e*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 43 (1). The Public Works Loans Commissioners may lend money required by a local authority for the purposes of Part II. of the Act (*ibid.*, s. 43 (2)). As to repayment etc. of loans, see note (*f*), p. 523, *ante*.

(*f*) For a list of the Public Health Acts, see note (*a*), p. 361, *ante*. As to powers of borrowing, see pp. 382 *et seq.*, *ante*; p. 541, *post*.

(*g*) *I.e.*, Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 46 (5); see note (*g*), p. 516, *ante*.

(*h*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 44.

(*i*) As to this officer, see p. 517, *ante*.

(*k*) *I.e.*, Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70); see note (*g*), p. 516, *ante*.

(*l*) See title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*

(*m*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 51 (1).

(*n*) *Ibid.*, s. 51 (2).

(*o*) For the definition of these lodging-houses, which is not exhaustive, see *ibid.*, s. 53 (1).

(*p*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), ss. 1, 75. and Sched. VI.

(*q*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 92, Sched. I.; City of London Sewers Act, 1897 (60 & 61 Vict. c. cxxxiii.), s. 7; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 6. As to these authorities, see titles LOCAL GOVERNMENT, Vol. XIX., pp. 262,

the Metropolis Management Act, 1855 (*r*), as amended by later Acts, or the Public Health Act, 1875 (*a*).

1074. The process of compelling a local authority to perform its duty is initiated by a complaint made to the Local Government Board.

Complaint to Local Government Board as to default of local authority.

In the case of failure on the part of an urban district council to exercise its powers, the complaint may be made by the council of the county in which the urban district is situate, or by any four inhabitant householders of the district (*b*). In the case of such failure on the part of a borough council, the complaint may be made by four inhabitant householders of the borough, but not by the county council (*c*). In the case of such failure on the part of a rural district council, it may be made by the four inhabitant householders, by the parish meeting or parish council of any parish in the district, or by the county council (*d*).

Local inquiry.

Where such a complaint is made, the Board may hold a public local inquiry and, after holding it, may declare the local authority to be in default, and make an order setting out works which the authority must carry out and limiting a time within which they must be carried out (*e*). If the local authority does not obey the order, the Local Government Board may, by a subsequent order, direct the county council to carry out the works (*f*).

1075. In the case of failure on the part of a rural district council to exercise its powers, a similar complaint may be made to the council of the county in which the rural district lies (*g*).

Complaint to county council.

Inquiry.

The county council may then hold a public local inquiry, and if, after such inquiry, the county council is satisfied that the rural district council has failed to exercise its powers, where they ought to have been exercised, may resolve that these powers of the district council be transferred, as to the whole, or any parish, of the rural council's area, to the county council (*h*); and, apart from any

302, 329; METROPOLIS, Vol. XX., pp. 418, 422; and see pp. 372—374, *ante*.

(*r*) 18 & 19 Vict. c. 120; see title METROPOLIS, Vol. XX., p. 464.

(*a*) 38 & 39 Vict. c. 55; see Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 56; see title LOCAL GOVERNMENT, Vol. XIX., pp. 268 *et seq.*, 313, 332.

(*b*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 10 (1) (b).

(*c*) *Ibid.*, s. 10 (1) (c).

(*d*) *Ibid.*, s. 10 (1) (a).

(*e*) *Ibid.*, s. 10 (1). This order, if it relates to the execution of works under the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), Part III., can only be made after full consideration of certain specified matters, as to which see Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 10 (2).

(*f*) *Ibid.*, s. 10 (3). Such subsequent order may apply, with any necessary modifications, the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 63 (see title LOCAL GOVERNMENT, Vol. XIX., p. 376), or any provisions of the Housing Acts (see note (*g*), p. 516, *ante*), for the purpose of enabling the county council to carry out the order (Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 10 (4)). Orders made under *ibid.*, s. 10, must be laid before Parliament, and are enforceable by mandamus (*ibid.*, s. 10 (5), (6)); see note (*g*), p. 378, *ante*.

(*g*) As to the parties to the complaint, see title LOCAL GOVERNMENT, Vol. XIX., p. 376; and see the text, *supra*.

(*h*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 12. When this is done the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 63, applies as if the powers had been transferred under that Act: and see

SECT. 7. **Dwelling Places.**

Powers of county council.

complaint, a county council may at any time apply to the Local Government Board to invest it with such powers as are vested in a rural district council in its area, and may, by proper procedure, obtain an order conferring such powers upon it (*i*). If the order is made, the provisions of the Housing Acts (*k*) relating to such powers, including those provisions which enable the Public Works Loans Commissioners to lend money for works to the council, apply (*l*) to the county council as if it were the local authority under Part III. of the principal Act (*m*).

Acquisition of land.

1076. For the execution of Part III. of the principal Act (*m*) the local authority may purchase land (*n*), and may contract for the purchase or lease of any lodging-houses for the working classes built before or after the 18th August, 1890 (*o*), and may, subject to certain conditions, appropriate such lodging-houses and any other land at their disposal for the purpose of working-class lodgings (*o*); and the trustees of any existing lodging-houses for the working classes may, with the consent of a majority of the committee or other persons by whom they were appointed trustees, sell or lease, or make over the management of the lodging-houses to the local authority (*p*).

Settled land, or land held by corporate bodies, may be sold, exchanged, or leased for the erection of dwellings for the working classes at less than the market price, if such price is the best that can be obtained for it as a site for such dwellings (*q*).

title LOCAL GOVERNMENT, Vol. XIX., p. 376. For forms of complaint and resolution, see Encyclopædia of Forms and Precedents, Vol. X., p. 659.

(*i*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 13 (1), (2).

(*k*) For a list of the Housing Acts, see note (*g*), p. 516, *ante*.

(*l*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 13 (2). As to the county council's expenses in carrying out the works, see *ibid.*; and as to the transfer of completed works to the rural district council, see *ibid.*, s. 13 (3).

(*m*) *I.e.*, the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70); see note (*g*), p. 516, *ante*.

(*n*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 57. As to property which cannot be acquired for the purpose of *ibid.*, Part III., see note (*p*), p. 547, *post*. The Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 175—178, relating to the purchase of land by agreement, apply to such purchases, whether within or without London (Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 57 (1)); but not to purchase otherwise than by agreement (Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 2 (2)). Land not immediately required may, with the consent of the Local Government Board, be acquired (*ibid.* s. 2 (3)). Urban and borough authorities may establish or acquire lodging-houses outside their districts (Housing of the Working Classes Act, 1900 (63 & 64 Vict. c. 59), s. 1).

(*o*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 57 (3). A rural district council must for this purpose obtain the consent of the county council; other authorities must obtain the consent of the Local Government Board (*ibid.*).

(*p*) *Ibid.*, s. 58.

(*q*) *Ibid.*, s. 74 (1), (2). For the purpose of *ibid.* and of the Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 7 (see *infra*), "working classes" includes all classes of persons who earn their living by wages or salaries (Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 18); but this wide definition does not apply in the case of buildings of rateable value of over £100 a year (Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 74 (1), (2)). As to the provision of cottages for labourers and farm servants and workmen's dwellings out of capital

If the local authority desires to purchase such land compulsorily it can do so by means of an order submitted to the Local Government Board and confirmed by the Board (*r*); but if any person interested in the land proposed to be taken presents an objection (*s*), the Board may not confirm the order until after a public inquiry has been held (*t*).

Order for compulsory purchase.

1077. The local authority may erect, on land acquired for the purpose of Part III. of the principal Act (*a*), lodging-houses for the working classes, and may convert existing buildings so as to make them suitable for that purpose, and may fit up all such buildings with the requisite furniture and conveniences (*b*).

Erection of lodging-houses.

1078. The management and control of lodging-houses established or acquired by the local authority under Part III. of the principal Act (*a*) is vested in the local authority (*c*), unless the lodging-houses have been leased. The local authority may charge reasonable rents for the use of the lodging-houses (*d*), and must make bye-laws as to their use (*e*).

Management and control of lodging-houses.

1079. The local authority may at all times inspect any such lodging-houses itself, or by officers authorised by it from time to time for the purpose (*f*).

Inspection of lodging-houses.

1080. Land vested in a local authority for the purposes of Part III. of the principal Act (*a*) may be sold, and the proceeds of the sale applied in or towards the purchase of more suitable land, or for any other purpose approved by the Local Government Board, or it

Sale or lease of land acquired.

money subject to the trusts of a settlement, see Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 7; and see title LAND IMPROVEMENT, Vol. XVIII., p. 286.

(*r*) As to the form of and procedure for this order, see the Housing, etc. (Form of Compulsory Purchase Order, etc.) Order, 1911 (Stat. R. & O. 1911, p. 136).

(*s*) This must be presented within "the prescribed period" (Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 6, Sched. I.), *i.e.*, within a calendar month of the second advertisement required by the Housing etc. (Form of Compulsory Purchase Order, etc.) Order, 1911, arts. 1, 2, 4.

(*t*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 2 (1), Sched. I., as to which see p. 547, *post*.

(*a*) *I.e.*, the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70); see note (*g*), p. 516, *ante*.

(*b*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 59.

(*c*) *Ibid.*, s. 61.

(*d*) *Ibid.*, s. 62. As to implied conditions on letting of small houses, see title LANDLORD AND TENANT, Vol. XVIII., p. 503.

(*e*) A printed copy or sufficient abstract of the bye-laws must be put up in every room in the lodging-houses and always kept there (Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 62 (2)). As to the matters for which these bye-laws must provide, see *ibid.*, Sched. VI. The Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 202, 203, apply to such bye-laws, if made by the London County Council, and the provisions of the Public Health Act, 1875 (38 & 39 Vict. c. 55) (see pp. 388 *et seq.*, *ante*), apply to them if made outside London (Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 84). Penalties for breach of the bye-laws go to the fund out of which the expenses of executing *ibid.*, Part III., are defrayed (*ibid.*, s. 84); and see pp. 385 *et seq.*, *ante*.

(*f*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 70.

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may be exchanged for more suitable land, with or without payment or receipt of money for equality of exchange (*g*).

The local authority may also lease the land to any lessee for the purpose of his carrying out works thereon in execution of Part III. of the principal Act (*h*).

Additional accommodation.

1081. A local authority may, in the exercise of its power, provide and maintain, in connection with any dwelling accommodation or lodging-houses provided by it—(1) a building adapted for use as a shop; (2) recreation grounds; (3) buildings or land which, in the opinion of the Local Government Board, will serve a beneficial purpose in connection with the requirements of the persons for whom the dwelling accommodation or lodging-houses are provided; and the local authority may raise money for the purpose, if need be, by borrowing (*i*). The local authority may also lay out public streets or roads on land acquired by it and contribute towards the costs incurred by any other person in laying out such roads (*k*).

Provision of working class dwellings by railway and other companies.

1082. Any railway, dock, or harbour company, or any other company, society or association, established for trading or manufacturing purposes, in the course of whose business or in the discharge of whose duties persons of the working class are employed, may erect on its own or other land dwellings for any such persons employed by them, and may purchase such other land out of any funds at its disposal and hold it notwithstanding any Act or charter or rule of law or equity to the contrary (*l*).

Supply of gas and water.

1083. Any corporation, authorities, or persons who have control of water or of supplies of water or gas may supply water or gas to lodging-houses erected under Part. III. of the principal Act (*m*), either free or on favourable terms (*n*).

(*g*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 60; Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 32. In the case of urban or rural district councils the consents set out in note (*h*), *infra*, are required (Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 60).

(*h*) Housing of the Working Classes Act, 1900 (63 & 64 Vict. c. 59), s. 5 (1). If such leases are made by an urban district council the consent of the Local Government Board, and if by a rural district council the consent of the county council, is necessary. As to the conditions which must be inserted in such leases, see *ibid.*, s. 5. For form of lease, see Encyclopædia of Forms and Precedents, Vol. X., pp. 660, 664.

(*i*) Housing of the Working Classes Act, 1903 (3 Edw. 7, c. 39), s. 11. The consent of the Local Government Board is necessary to such laying out (*ibid.*, s. 11 (1)), and the Board, in consenting, may by order apply certain statutory provisions to such land or building (*ibid.*, s. 11 (2)).

(*k*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 6.

(*l*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 68. Houses erected by railway companies for their workmen must comply with the local bye-laws as to new buildings (*Manchester, Sheffield, and Lincolnshire Rail. Co.* v. *Barnsley Union Guardians* (1892), 67 L. T. 119). As to such bye-laws, see pp. 415 *et seq.*, *ante*.

(*m*) *I.e.*, Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70); see note (*g*), p. 516, *ante*.

(*n*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 69.

Expenses of execution of the Act.

1084. In London, expenses under Part III. of the principal Act (*o*) are met by the London County Council and Common Council of the City of London out of the dwelling-house improvement fund (*p*) created for the purposes of Part I. of the principal Act (*q*), and in a metropolitan borough out of the general rate (*r*).

Outside London, these expenses are met in boroughs and urban districts out of the borough rate or general district rate, as the case may be (*s*); and, in rural districts, these expenses are defrayed as general expenses of the rural district council (*t*), except so far as the Local Government Board may, on application by the rural district council, declare that they are to be charged on specified contributory places in the rural district in the proportions determined by the council of the district (*u*).

Borrowing powers.

1085. Money for the purpose of Part III. of the principal Act (*o*) may be borrowed by the following authorities in the following manner:—(1) by the London County Council and the Common Council of the City of London, in the same way (*w*) as for Part I. of the principal Act (*o*); (2) by metropolitan borough councils, in the same way as under the Metropolis Management Act, 1855 (*x*); (3) by borough councils outside London, and by urban district councils, in the same way as money borrowed to meet general expenses (*a*) under the Public Health Act, 1875 (*b*); and (4) by rural district councils, in the same way as money borrowed to meet general or special expenses (*c*) under the Public Health Acts (*d*).

Loans by Public Works Loans Board.

1086. For the purpose of constructing or improving or facilitating or encouraging the construction or improvement of dwellings for the working classes, the Public Works Loans Commissioners may

(*o*) *I.e.*, Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70); see note (*g*), p. 516, *ante*.

(*p*) See p. 522, *ante*.

(*q*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 65 (i).

(*r*) Housing of the Working Classes Act, 1900 (63 & 64 Vict. c. 59), s. 3 (1); and see title METROPOLIS, Vol. XX., pp. 440, 441.

(*s*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 65 (ii); and see title LOCAL GOVERNMENT, Vol. XIX., pp. 280, 320.

(*t*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 31 (1).

(*u*) *Ibid.* As to the right of overseers of a contributory place to appeal on this matter, see *ibid.*, s. 31 (2); and see title LOCAL GOVERNMENT, Vol. XIX., p. 335.

(*w*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 66. As to this method, see pp. 522, 523, *ante*.

(*x*) 18 & 19 Vict. c. 120; see Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 46 (2); Housing of the Working Classes Act, 1900 (63 & 64 Vict. c. 59), s. 3 (2); and see title METROPOLIS, Vol. XX., p. 447.

(*a*) See title LOCAL GOVERNMENT, Vol. XIX., pp. 282, 317; and see pp. 382 *et seq.*, *ante*.

(*b*) 38 & 39 Vict. c. 55; see Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 66, amended by the Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 75, Sched. VI.

(*c*) *Ibid.*, s. 31 (1); see pp. 380 *et seq.*, *ante*.

(*d*) For a list of the Public Health Acts, see note (*a*), p. 361, *ante*.

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advance money (*e*), to—(1) any railway, dock, or harbour company, or any other company, society, or association established for the purpose of constructing or improving, or facilitating or encouraging the construction or improvement of dwellings for the working classes, or for trading or manufacturing purposes in the course of whose business or in the discharge of whose duties persons of the working class are employed; (2) any person entitled to any land for an estate in fee simple, or for any term of years absolute, whereof fifty years or more is at the time unexpired (*f*).

(vii.) *Appeals, Compensation, and Rights of Owners.*

(a) *Town Planning Schemes.*

Objection addressed to local authority.

1087. When authority has been given by the Local Government Board to prepare a town planning scheme (*g*), the local authority must give notice of this fact to all owners and lessees and occupiers and councils affected, and in certain cases (*h*) to the county council and must advertise a notice to the same effect (*i*); and while the scheme is in preparation any of these parties may object to it, and the local authority must carefully consider the objections (*k*).

Inspection of draft scheme by parties interested.

After the draft scheme has been prepared, or when an owner's scheme has been submitted, and at least a month before deciding to submit either to the Local Government Board for approval, the draft scheme must be deposited in some convenient place and kept there for at least twenty-one days, and the local authority must advertise this fact and give notice to all persons and councils particularly interested that a scheme has been prepared by it or, as the case may be, that an owner's scheme is about to be adopted, and that written objections to the scheme will be considered (*l*). During the twenty-one days, any persons affected may inspect the draft scheme and maps, and may make objections in writing to the scheme (*l*).

(*e*) Under the Public Works Loans Act, 1875 (38 & 39 Vict. c. 89); see title MONEY AND MONEY-LENDING, Vol. XXI., pp. 58 *et seq.*

(*f*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 67 (1). The loans so made must be made in the manner provided by the Public Works Loans Act, 1875 (38 & 39 Vict. c. 89), subject to certain provisions and restrictions, as to which see Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 67 (2). The restriction limiting the advance to one-half of the value of the property mortgaged (*ibid.*, s. 67 (2) (d)) is abated so as to allow an advance up to two-thirds of such value in the case of advances to any society registered under the Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), the rules whereof forbid the payment of interest at a higher rate than 5 per cent. per annum; see Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 3; and see title INDUSTRIAL, PROVIDENT, AND SIMILAR SOCIETIES, Vol. XVII., pp. 5, 6.

(*g*) As to town planning schemes generally, see pp. 523 *et seq.*, *ante*.

(*h*) If any main road is, or may be, affected (Town Planning Procedure Regulations (England and Wales), 1910 (Stat. R. & O., 1910, p. 799), art. 12).

(*i*) *Ibid.* As to the details of this notice, see *ibid.*

(*k*) *Ibid.*, art. 13.

(*l*) *Ibid.*, art. 16; for the persons entitled to receive notice, see *ibid.*

Objection addressed to Local Government Board.

1088. Any person or authority interested (*m*) may object to a scheme in the prescribed manner (*n*), provided he enters his objection within twenty-one days of the publication in the *London Gazette* of the intention of the Local Government Board to approve the scheme. If such an objection is lodged, the draft of the approving order must be laid before Parliament for thirty days during session; and if either House presents an address against it no further proceedings can be taken on it (*o*).

Compensation for injurious affection.

1089. Any person whose property is injuriously affected (*p*) by a scheme, or who incurs expenditure on account of a scheme which is afterwards rendered abortive because of its revocation, is entitled to compensation from the responsible authority (*q*) if he makes a claim for it within the time limited by the scheme (*r*), but he is not entitled to compensation in respect of any building erected on or any contract made, or any other thing done in regard to land included in a scheme, after the application by the local authority for power to make the scheme, or after such other time as the Local Government Board may prescribe for the purpose (*s*).

Increase in value.

1090. Where any property is increased in value by the making of a scheme, the responsible authority (*q*) is entitled to recover half the amount of such increase if a claim is made for it within the time limited by the scheme (*t*).

(*m*) As to these parties, see Town Planning Procedure Regulations (England and Wales), 1910, art. 27.

(*n*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 54 (4). Objection may be made by letter posted or delivered to the Board. It must state clearly how the objector is interested and the ground of his objection (Town Planning Procedure Regulations (England and Wales), 1910, art. 26). Application may not be made for authority to prepare a scheme or adopt an owners' scheme unless the persons or councils affected have had at least two months' notice of the intended application (*ibid.*, arts. 1, 2).

(*o*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 54 (4). But a new scheme may be prepared dealing with the same area.

(*p*) The injury on which a claim may be based is limited by the operation of the Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 59. Provisions in a scheme which might have been enforced by a local bye-law, or limit the number of buildings, or prescribe an open space about a building for the purpose of amenity, cannot form a cause for compensation (*ibid.*, s. 59 (2)). As to matters which might form a subject for compensation under some other Act as well as this, see *ibid.*, s. 59 (3).

(*q*) As to the meaning of "responsible authority," see note (*k*), p. 523, *ante*.

(*r*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 58 (1), (6). The time (if limited) must not be less than three calendar months (see Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 3; title TIME; Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 58 (1)) after the date when notice of the approval of the scheme is published (*ibid.*, s. 58 (1)).

(*s*) *Ibid.*, s. 58. This provision does not, however, apply to work done before the approval of the scheme for the purpose of finishing a building begun, or of carrying out a contract entered into, before the making of the application (*ibid.*).

(*t*) *Ibid.*, s. 58 (3). As to the time (if limited), see Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 58 (3); compare *ibid.*, s. 58 (1), and see note (*r*), *supra*. Such moiety of the increased value is a

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Arbitration and recovery of amount of award.

1091. All questions as to injurious affection or increase in value, and as to the amounts payable in respect thereof, must be determined by a single arbitrator appointed by the Local Government Board, unless the parties agree to some other method of determination (*a*); and any sum fixed by such arbitrator may be recovered summarily, by the party entitled thereto, as a civil debt (*b*).

Decision as to contravention of scheme.

1092. The Local Government Board has power to decide, without appeal, any question which may arise as to the contravention of a scheme by any building or work, or by the erection or carrying out of such building or work (*c*).

Determination of matters by Local Government Board.

1093. Where the Local Government Board is authorised to determine any matter in relation to a scheme it has an option, except in certain cases (*d*), to determine the matter as an arbitrator or otherwise, and if it elects or is required (*e*) to determine the matter as arbitrator, the provisions of the Regulation of Railways Act, 1868 (*f*), respecting arbitrations by the Board of Trade, and the amending enactments, apply (*g*).

(b) *Unhealthy Areas Schemes.*

Compensation.

1094. When land is taken by agreement or compulsorily under Part I. of the principal Act (*h*), the owner is entitled to compensation, which is fixed in the manner and by the procedure provided by the Lands Clauses Acts (*i*), as amended by the principal Act (*k*).

deduction for the purpose of assessing increment value duty, undeveloped land duty, and reversion duty; see title REVENUE.

(*a*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 58 (4).

(*b*) *Ibid.*, s. 58 (5). A magistrate may therefore make an order for payment of the sum on complaint pursuant to the Summary Jurisdiction Acts; see the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), ss. 6, 35, and title MAGISTRATES, Vol. XIX., p. 609. It is, moreover, a debt in respect of which the local authority could claim in a bankruptcy.

(*c*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 57 (3).

(*d*) *I.e*, under *ibid.*, ss. 57 (3), 58 (4); see the text, *supra*. Under the Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 57 (3), the question referred to the Local Government Board is determined by the Board as arbitrator (see the text, *infra*), unless the parties otherwise agree.

(*e*) *I.e.*, under the Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 57 (3); see note (*d*), *supra*.

(*f*) 31 & 32 Vict. c. 119; see title RAILWAYS AND CANALS, p. 739, *post*.

(*g*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 62.

(*h*) *I.e.*, the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70); see note (*g*), p. 516, *ante*. Ancient monuments etc. may not be acquired; see note (*l*), p. 534, *ante*. As to service of notices to parties affected and as to the inquiry held to hear objectors, see pp. 519, 520, *ante*.

(*i*) 1845 (8 & 9 Vict. c. 18); 1860 (23 & 24 Vict. c. 106); 1869 (32 & 33 Vict. c. 18); 1883 (46 & 47 Vict. c. 15); 1895 (58 & 59 Vict. c. 11). For the effect of these statutes and modifications, see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 163 *et seq.* As to extinction of easements and compensation therefor, see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 165.

(*k*) The Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), ss. 20, 21. As to the effect of the Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 29 (dealing with evidence as to use, condition

(c) *Unhealthy Dwelling-houses and Obstructive Dwellings.*

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1095. Any owner (*l*) aggrieved by a closing order (*m*) may appeal to the Local Government Board within fourteen days after the order is served (*n*), and the Local Government Board may not dismiss the appeal without first holding a public inquiry (*n*).

An appeal by an owner (*l*) also lies to the Local Government Board against the refusal of the local authority to determine a closing order (*o*); and against a demolition order (*p*).

Appeals against:— closing order; refusal to determine closing order; and demolition order;

1096. Any owner (*l*) aggrieved by an order made by a local authority for the pulling down of an obstructive building may appeal to the Local Government Board as in the case of a demolition order (*a*).

order for pulling down obstructive building.

1097. An owner of a dwelling-house who is not in receipt of the rents and profits thereof may give notice of his ownership to the local authority, and the local authority must then or thereafter

Notice to parties interested.

and repair of buildings) upon the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), ss. 21 (2), 41 (3), see note (*o*), p. 532, *ante*.

(*l*) "Owner," for the purpose of the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), Part II., means any person or corporation who, under the provisions of the Lands Clauses Acts (see note (*i*), p. 544, *ante*) or the special Act, would be enabled to sell or convey lands to the promoter of the undertaking, and includes all lessees or mortgagees of any premises required to be dealt with under Part II. of the Act, except persons holding or entitled to the rents and profits of such premises under a lease the original term whereof is less than twenty-one years (Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 49 (2)).

(*m*) As to closing orders, see Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 17. This provision supersedes the substantive provisions of the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), ss. 32, 33, these being repealed by the Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 75, Sched. VI. As to closing orders, see, further, pp. 527 *et seq.*, *ante*.

(*n*) *Ibid.*, ss. 17 (3), 39 (1) (b). The Local Government Board is authorised to prescribe the procedure for appeals and inquiries (*ibid.*, s. 39), and has prescribed it by a set of Rules dated 11th January, 1910 (Stat. R. & O., 1910, p. 193). These rules provide for signature of and statement of grounds of appeal and a compulsory public inquiry, and authorise the Local Government Board to make an order for costs against the local authority or the appellant.

(*o*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 17 (6). An owner must appeal within fourteen days of the refusal to determine a closing order (*ibid.*); and see p. 529, *ante*. The rules, referred to in note (*n*), *supra*, govern procedure on these appeals.

(*p*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 18 (4); see p. 530, *ante*.

(*a*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 38 (3); Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), ss. 18 (3), 47. As to orders for pulling down "obstructive" buildings, see p. 531, *ante*. As to the rights of owners to compensation, see Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 38 (5)—(7). As to this, and the increase to the value of neighbouring buildings, see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 165; and see p. 543, *ante*; and, as to the apportionment of the betterment charge, Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 38 (8), (9); see note (*o*), p. 532, *ante*. Whenever under any of the sub-divisions of the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), Part II.,

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inform him of any proceedings taken by it under Part II. of the principal Act (*b*) in respect of such dwelling-house (*c*).

Entry by owners on default in compliance with order.

1098. Where owners prove to a court of summary jurisdiction that default is being made in executing work on a dwelling-house as to which a closing order has been made, or in the demolition of any building, or in claiming to retain the site, the court may make an order authorising them to enter and do the works or to claim to retain the site. Such orders may be made in favour of more than one owner; but before obtaining an order of this kind the applicant must give notice to the local authority of his application (*d*).

Appeal by persons other than owners.

1099. Any person aggrieved by an order (*e*) of a local authority under Part II. of the principal Act (*b*) may, if he is not entitled to appeal against the order to the Local Government Board (*f*), appeal to quarter sessions (*g*), and no work may be done nor proceedings taken under such order until the appeal is determined (*h*).

(d) *Working-Class Dwellings.*

Order for compulsory purchase.

1100. The provisions affecting appeals and rights of owners in connection with the compulsory acquisition of land for the purposes of Part III. of the principal Act (*b*) were substantially modified in 1909 (*i*). If for the execution of that Part the local authority finds it necessary to acquire lands compulsorily (*j*), it must submit to the Local Government Board an order putting the compulsory purchase provisions of the Lands Clauses Acts (*k*) in force with

compensation is to be fixed by arbitration, the provisions of *ibid.*, s. 41, as explained by the Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 29, have effect. As to these, see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 166; and see pp. 534, 535, *ante*.

(*b*) *I.e.*, Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70); see note (*g*), p. 516, *ante*.

(*c*) Housing of the Working Classes Act, 1890 (53 & 54 Vict c. 70), s. 47 (1). As to such proceedings, see pp. 529—533, *ante*.

(*d*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 47 (2), (4). The court may enlarge the time within which a claim to retain the site may be made (*ibid.*, s. 47 (3)).

(*e*) See, *e.g.*, *ibid.*, ss. 34 (2), 35 (1), 36 (1), 38 (10); see pp. 530, 531, 533, *ante*; note (*h*), *infra*.

(*f*) As to the circumstances giving a right of appeal to the Local Government Board, see p. 545, *ante*; and see Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 46, Sched. II.

(*g*) The Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 31, applies to these appeals, except that the appellant has one month within which to appeal after he receives notice of the order (Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 35 (2) (a)). The court must state a case if so required by either party (*ibid.*, s. 35 (2) (b)); and, generally, as to such procedure, see title MAGISTRATES, Vol. XIX., pp. 642 *et seq.*

(*h*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 35 (1); Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 39 (2).

(*i*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 2 (2), Sched. I.

(*j*) See p. 539, *ante*. As to the local authority, see p. 536, *ante*.

(*k*) See note (*i*), p. 544, *ante*; title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 12.

respect to the lands proposed to be taken. The order submitted may be confirmed with or without modifications (*l*).

Form of order.

The Board may prescribe a form (*m*) for such orders, and must insert in the order provisions for protecting the owner and the local authority and incorporate the Lands Clauses Acts (*n*) and other statutory provisions (*o*), subject to necessary adaptations (*p*). Any dispute as to the amount of compensation for lands taken must be settled by a single arbitrator appointed by the Local Government Board (*q*). The arbitrator may not allow any additional amount on account of the purchase being compulsory (*r*).

Publication of order.

1101. The local authority must publish the order and give notice of it in the district (*s*), and to the owners, lessees, and occupiers of the land proposed to be taken (*a*).

Confirmation of order.

1102. If no objection is made, or if every objection has been withdrawn, the Local Government Board must, subject, of course, to such modifications as it may make in it (*b*), confirm the order, but if any objection has not been withdrawn, the Board must order a public local inquiry (*c*).

Inquiry.

At the inquiry the person who holds it must hear the local authority and all persons interested in the land, and may hear other persons (*d*). If the land proposed to be taken is in London or in a borough or an urban district the person appointed to hold the inquiry must be an impartial person not in the employment of any Government department (*e*). He has large powers of considering whether

(*l*) If confirmed its confirmation is proof that it has been duly made and is *intra vires* (Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), Sched. I. (2)).

(*m*) The Housing, etc. (Form of Compulsory Purchase Order, etc.) Order, 1911, prescribes the form set out in the schedule thereto, and this form must be followed by the local authority.

(*n*) See note (*k*), p. 546, *ante*.

(*o*) *I.e.*, the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 77—85; see title RAILWAYS AND CANALS, p. 685, *post*.

(*p*) The Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 127, must not be incorporated in the order (Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), Sched. I. (4)). Nothing in the Housing Acts (see note (*g*), p. 516, *ante*) authorises the acquisition for the purposes of the Acts of the site of an ancient monument or other object of archæological interest or the compulsory acquisition for the purposes of the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), Part III., of any land belonging to a local authority or which has been acquired by any corporation or company for the purposes of a railway, dock, canal, water, or other public undertaking, or which, at the date of the order, forms part of any park, garden, or pleasure ground, or is otherwise required for the amenity or convenience of a dwelling-house (Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 45); and see titles OPEN SPACES AND RECREATION GROUNDS, Vol. XXI., pp. 580, 605; RAILWAYS AND CANALS, p. 623, *post*; WATER SUPPLY; WATERS AND WATERCOURSES.

(*q*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), Sched. I. (4).

(*r*) *Ibid.*, Sched. I. (3).

(*s*) The Local Government Board Order referred to in note (*m*), *supra*, prescribes in its second schedule how the order must be published.

(*a*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), Sched. I. (5).

(*b*) *Ibid.*, Sched. I. (2).

(*c*) *Ibid.*, Sched. I. (6). As to inquiries generally, see pp. 375 *et seq.*, *ante*.

(*d*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), Sched. I. (6).

(*e*) *Ibid.*, Sched. I. (7).

SECT. 7. Dwelling Places.

the land proposed to be acquired is suitable for the purposes for which it is sought to be acquired; and, if he reports that the land or part thereof is not suitable or cannot be acquired without undue detriment to the persons interested or owners of neighbouring land or ought not to be acquired except subject to certain conditions specified by him, then the order, if confirmed by the Board in respect of that land or part or, as the case may require, without imposing the conditions, has no effect unless it is confirmed by Parliament (*f*).

Hearing.

1103. The arbitrator or person holding the inquiry must hear by themselves or their agents any authorities or persons authorised to appear and witnesses, but he must not hear counsel or expert witnesses, except in such cases as the Local Government Board directs otherwise (*g*).

Costs and expenses.

1104. The Local Government Board must fix the payment to be made to arbitrators, and may, with the consent of the Lord Chancellor, make a scale of costs applicable to the arbitration (*h*).

General control of Local Government Board with regard to restrictive bye-laws.

1105. If, by local inquiry or otherwise, the Local Government Board is satisfied that the erection of working-class dwellings in any borough or urban or rural district is unreasonably impeded in consequence of any bye-laws (*i*) with respect to new streets (*k*) or buildings (*l*), the Board may require the local authority to revoke such bye-laws or make new bye-laws so as to remove the impediment (*m*). If such a requisition is not complied with within three months (*n*) from the making thereof, the Board may itself revoke the bye-laws and make new bye-laws so as to remove the impediment (*o*).

SECT. 8.—*Protection against Fire* (*p*).

SUB-SECT. 1.—*In Urban Districts and Boroughs* (*q*).

Provision of fire plugs and appliances for supplying water.

1106. The council of an urban district or borough must (*r*) cause fire plugs, and all necessary works, machinery, and appliances for

(*f*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), Sched. I. (7).

(*g*) *Ibid.*, Sched. I. (8).

(*h*) *Ibid.*, Sched. I. (9), (10); see Housing, etc. (Costs of Arbitration) Rules, 1912, which came into force on the 9th September, 1912; see Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 54), Sched. I. (9), as to the disallowance of the costs of needless witnesses. *Ibid.*, Sched. I. (12) makes provision for the payment of compensation for glebe lands to the Ecclesiastical Commissioners.

(*i*) As to bye-laws generally, see pp. 388 *et seq.*, *ante*.

(*k*) See title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 208, 237 *et seq.*

(*l*) See pp. 414 *et seq.*, *ante*.

(*m*) As to the general control of the Local Government Board, see pp. 374 *et seq.*, *ante*, and see note (*m*), p. 375, *ante*.

(*n*) *I.e.*, calendar months (Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 3); see title TIME.

(*o*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 44.

(*p*) In some places the provisions of local and private Acts of Parliament, which are beyond the scope of this work, authorise the constitution of fire brigades by municipal authorities and other bodies such as railway and dock companies. For fire protection in London, see title METROPOLIS, Vol. XX., pp. 417, 418, 488 *et seq.*

(*q*) As to these areas, see title LOCAL GOVERNMENT, Vol. XIX., pp. 262 *et seq.*

(*r*) See Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 66, which is compulsory; and see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI.,

securing a sufficient supply of water (*s*) in case of fire, to be provided and maintained, and must paint, on the buildings and walls within the streets, words or marks near to the fire plugs to denote their situation (*t*).

Provision of fire escapes, firemen, and horses.

1107. The council of an urban district or borough may (1) provide or purchase engines for extinguishing fires, water buckets, pipes, and other appliances for such engines, fire escapes, and other implements for use in case of fire; (2) purchase, keep, or hire horses for drawing engines; (3) build, provide or hire places for keeping engines and their appurtenances; (4) appoint and pay men to act as firemen; (5) make rules for their regulation; and (6) give to firemen and other persons rewards for exertion in cases of fire (*u*).

Operations of fire brigade outside local area.

1108. A local authority may send its fire brigade outside its district upon certain terms (*a*), but may not make terms nor demand payment for the use of the fire brigade within its district (*b*).

p. 259. As to the repair of fire plugs, see *Grand Junction Waterworks Co.* v. *Brentford Local Board*, [1894] 2 Q. B. 735, C. A.; and see title NEGLIGENCE, Vol. XXI., pp. 422 *et seq.*

(*s*) As to the powers and duty of local authorities and waterworks companies to fix hydrants and supply water for extinguishing fires, see title WATER SUPPLY.

(*t*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 66. An owner (see note (*o*), p. 427, *ante*) or occupier cannot object to a mark being put on his wall. If the council places a mark on a building which does not correctly indicate the *locus* of a plug, and, by reason of such inaccuracy, operations for extinguishing a fire are retarded, a person who suffers loss by such delay may sue the council for damages (*Dawson & Co.* v. *Bingley Urban Council*, [1911] 2 K. B. 149, C. A.).

(*u*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 32; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 171. The purchase of land for the purposes of a fire-engine station may be made under *ibid.*, ss. 175—178; see titles COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 163 *et seq.*; SALE OF LAND. A fire brigade of the local authority has control over premises where a fire takes place, and may exclude other persons, such as volunteer firemen, from them (*Carter* v. *Thomas*, [1893] 1 Q. B. 673). The superintendent of the brigade has a general authority to call in the services of another brigade when necessary; and such other fire brigades, unless it is proved that they acted gratuitously, are entitled to reasonable remuneration (*Janes and Egham Fire Brigade* v. *Staines Urban District Council* (1900), 83 L. T. 426).

(*a*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 33. The owner of the lands or buildings must pay to the authority whose brigade comes to his assistance from outside the district the actual expenses incurred by the brigade on the occasion, and also a reasonable sum for use of the appliances and attendance of the firemen (*ibid.*). Disputes as to the propriety of sending a brigade from outside, and as to the amount of expenses and general charges for use, are to be settled finally by two justices (*ibid.*). In a case where a fire brigade attended outside its district to extinguish a burning haystack, the owner of the land on which the haystack stood was held liable to pay for the attendance, though he did not own the haystack (*Sale* v. *Phillips*, [1894] 1 Q. B. 349, overruling *Lewis* v. *Arnold* (1875), L. R. 10 Q. B. 254). Proceedings for the recovery of expenses under the Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 33, must be commenced within six months after the demand for payment of the amount determined by justices (*R.* v. *Part* (1906) 70 J. P. 398). The London County Council may send all or part of its brigade outside its area, or allow it to perform special services, on terms which the Council think fit; see title METROPOLIS, Vol. XX., p. 417.

(*b*) *Bridlington Local Board of Health* v. *Bower* (1873), 38 J. P. 73.

SECT. 8. **Protection against Fire.**

Expenses.

1109. The expenses of borough or urban district councils for providing means of extinguishing fire are met out of the borough or general district rate (*c*).

Arrangements between local authorities.

1110. In urban districts where the enactment (*d*) is in force the local authorities may make and execute agreements for the common use of any firemen and fire engines with their appurtenances, or for mutual assistance in case of fire (*e*).

Powers of firemen and police.

1111. In urban districts where the enactment (*d*) is in force the firemen and police and officers of the local authority have special powers of breaking into a building which is reasonably supposed to be on fire, and of entering land or buildings adjoining or near thereto, for the purpose of extinguishing the fire (*f*). The officer in charge of the police has also power to stop or control street traffic whenever he thinks it necessary to do so for the purpose of extinguishing the fire or for the safety or protection of life and property, and anyone who disobeys his orders is liable to a penalty not exceeding £5 (*g*). The captain or other responsible officer of a fire brigade who is in charge of the engine and attending at any fire is vested with sole control over the brigade and every other brigade which is present, and may direct all operations of these brigades for the extinction of the fire (*h*).

SUB-SECT. 2—*In Rural Parishes and Districts* (*i*).

Provision by inspectors.

1112. In rural parishes in which the Lighting and Watching Act, 1833 (*j*), has been adopted and inspectors have been elected under

As to the London Fire Brigade, see title METROPOLIS, Vol. XX., p. 417. As to the employment of policemen at fires, see title POLICE, Vol. XXII., p. 489.

(*c*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 207. Capital expenses may be raised by loan, with the consent of the Local Government Board, under *ibid.*, ss. 233, 234; see pp. 382 *et seq.*, *ante*. As to expenses of the London Fire Brigade, see title METROPOLIS, Vol. XX., p. 418.

(*d*) *I.e.*, where the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 90, is in force; see pp. 364, 365, *ante*.

(*e*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 90. The existence of this provision makes it reasonable to suppose that, without it, combination for the maintenance and use of fire brigades could not have been legally effected under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 285, which allows authorities to combine together for the purpose of executing and maintaining any work that may be for the benefit of their respective districts or any part thereof. As to rural districts, see the text, *infra*.

(*f*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 87.

(*g*) *Ibid.*, s. 88; and as to street traffic, see title STREET AND AERIAL TRAFFIC.

(*h*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 89. As to the duty of urban and rural councils with respect to the provision of means of escape from factories, see title FACTORIES AND SHOPS, Vol. XIV., pp. 467, 468; and, as to the provisions as to escape from buildings in London, see title METROPOLIS, Vol. XX., pp. 488 *et seq.*

(*i*) As to these areas, see title LOCAL GOVERNMENT, Vol. XIX., pp. 236 *et seq.*, 329 *et seq.*

(*j*) 3 & 4 Will. 4, c. 90. In rural parishes this Act can be adopted only by a resolution of the parish meeting (Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 7); and see titles GAS, Vol. XV., p. 308; LOCAL GOVERNMENT, Vol. XIX., p. 257; note (*e*), p. 552, *post*.

that Act, the inspectors may provide fire engines and other proper utensils for putting out fires, and may provide places for keeping them, and appoint and pay persons to keep them (*k*). Expenses so incurred are payable by the inspectors, who may demand from the overseers, on precept, the moneys they require (*l*).

Provision by parish council.

1113. In rural parishes the parish council (*m*) may resolve to provide a fire engine, ladder, or fire escape for general use in the parish. The council may thereupon provide such fire engine, ladder or fire escape, and, out of the poor rate, pay the cost of it and of maintaining it and for a place to keep it, and the charges of such persons as may be necessary for the use of it, and the cost of suitable implements and accoutrements (*n*).

Provision by overseers.

In a rural parish without a separate parish council the overseers must provide such appliances, if the parish meeting resolve that they shall do so (*o*).

Provision by rural district council.

A rural district council, if invested with urban powers by the Local Government Board (*p*), has all the powers of an urban council for providing means of extinguishing fires (*q*).

Agreements between parish and other local councils.

1114. Parish councils may agree with the councils of neighbouring districts or boroughs that the fire engines, apparatus, and firemen of the neighbouring council or borough shall be used for extinguishing fires in their parish (*r*). If in pursuance of such an agreement a borough or district fire engine is sent beyond its area, no charge can be made on the owners of the land or buildings where the fire occurred (*s*). Where the enactment (*t*) is in force a rural district council may agree with the council of any other borough or urban or rural district, or with the parish council of any parish, for the common use of any firemen and fire engines with their appurtenances, or for mutual assistance in case of fire (*u*).

(*k*) Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90), s. 44. The Act does not say that the inspectors may direct such persons to attend at fires and serve the engine, but they may, no doubt, do so.

(*l*) *Ibid.*, ss. 32, 44.

(*m*) Poor Law Amendment Act, 1867 (30 & 31 Vict. c. 106), s. 29; Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 6.

(*n*) Poor Law Amendment Act, 1867 (30 & 31 Vict. c. 106), s. 29.

(*o*) *Ibid.*; Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 19.

(*p*) By an order under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 276; and see title LOCAL GOVERNMENT, Vol. XIX., p. 332.

(*q*) See pp. 548—550, *ante*. The expenses of a rural district council are general expenses, and are met as such; see Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 229; and p. 381, *ante*.

(*r*) Parish Fire-engines Act, 1898 (61 & 62 Vict. c. 38), s. 1. For form of agreement, see Encyclopædia of Forms and Precedents, Vol. XI., p. 131.

(*s*) Parish Fire-engines Act, 1898 (61 & 62 Vict. c. 38), s. 1 (2). But for this provision such a charge might have been leviable under the Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 33.

(*t*) *I.e.*, where the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 90, is in force; see pp. 364, 365, *ante*.

(*u*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 90. It seems from the wording of the section that if it is in force in the area of one of the parties it need not, in order to make such an agreement lawful, be in force in the area of the other or others if each contracting party has otherwise power to provide fire appliances etc. For the provision of

SECT. 8. Protection against Fire.

SUB-SECT. 3.—*Miscellaneous.*

False fire alarm.

1115. It is an offence, punishable summarily, to give a false alarm of fire to any town or parish fire brigade outside the Metropolis or to any officer thereof (*v*).

Setting chimney on fire.

1116. In boroughs and urban districts every person who wilfully sets or causes to be set on fire any chimney is liable to a penalty not exceeding £5, recoverable summarily; and if any chimney is accidentally on fire the occupier of the premises is liable to a penalty not exceeding 10*s.*, unless he satisfies the justice before whom the case is heard that the fire was not owing to the omission, neglect, or carelessness of himself or his servant (*a*).

SECT. 9.—*Lighting.*

For boroughs and urban districts.

1117. The councils of boroughs and urban districts have powers of lighting streets, markets, and public buildings in their districts (*b*); and city and borough councils in the Metropolis have similar powers which they are required to exercise (*c*) in their several areas.

In rural districts.

1118. In rural districts the councils of which have not urban powers (*d*) the lighting of streets may be carried out under the Lighting and Watching Act, 1833 (*e*). The Local Government Board may give power to rural district councils to contract for a supply of gas or other light, and to provide lamps and other apparatus; but such councils, in the absence of urban powers, have no statutory power to apply for a provisional order enabling them to make and supply gas themselves (*f*).

means of escape from fire in factories in rural districts, see title FACTORIES AND SHOPS, Vol. XIV., pp. 467, 468.

(*v*) False Alarms of Fire Act, 1895 (58 & 59 Vict. c. 28), s. 1. The penalty is a fine not exceeding £20. Any intimation, whether given by a street fire alarm, message, statement, or otherwise, is within the Act. In any proceedings the wife of the person charged may be called on to attend, and is a competent, but not a compellable, witness (*ibid.*, s. 2). As to legal proceedings, see pp. 367 *et seq.*, *ante*. As to London, see title METROPOLIS, Vol. XX., p. 418.

(*a*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), ss. 30, 31; Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 171, 251—254; and see title NUISANCE, Vol. XXI., p. 541. As to who may take proceedings, see Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 253; *Kyle* v. *Barber* (1888), 52 J. P. 725; p. 369, *ante*; title POLICE, Vol. XXII., p. 505.

(*b*) Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 161—163; see title GAS, Vol. XV., p. 309.

(*c*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 130; see titles ELECTRIC LIGHTING AND POWER, Vol. XII., p. 642; GAS, Vol. XV., pp. 307, 309, 312, 313, 314, 320, 321, 324, 325; HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 118, 124.

(*d*) As to those which have urban powers, see title GAS, Vol. XV., p. 307, note (*g*); LOCAL GOVERNMENT, Vol. XIX., p. 332.

(*e*) 3 & 4 Will. 4, c. 90; see title GAS, Vol. XV., p. 307. This is an adoptive Act, and is adopted in all rural parishes by the parish meeting and executed by inspectors where there is no parish council. If there is a parish council, then, when adopted by the meeting, the Act is executed by the council; see Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 7 (1), (7); title GAS, Vol. XV., p. 308.

(*f*) See title GAS, Vol. XV., pp. 309, 312. As to this difficulty and the

SECT. 10.—*Offensive Trades* (*g*).

SUB-SECT. 1.—*Outside London.*

(i). *Slaughter-houses, Knackers' Yards, and Knackers* (*h*).

(a) *In General.*

1119. Slaughter-houses may be either public, that is, provided and managed by a local or other authority (*i*), or private, that is, occupied and managed by private persons. They include places commonly called knackers' yards, where the killing of horses and cattle is not for butcher's meat (*k*). Provision and management.

Slaughter-houses and knackers' yards may be required to be registered or licensed (*l*), and bye-laws for their regulation may be made; but the business of a knacker is subject to further statutory provisions, and he must not carry it on without a personal licence (*m*). Registration and licence.

(b) *Slaughter-houses* (*a*).

1120. Any urban authority (*b*) may provide slaughter-houses (*c*), Provision and regulation.

view of the Local Government Board upon it, see 1 Glen, Public Health, 1906 ed., p. 610.

(*g*) As to the common law liability for nuisance arising from the carrying on of an offensive trade, see title NUISANCE, Vol. XXI., pp. 503 *et seq.*, 534, 535.

(*h*) In London the Knackers Acts, 1786 (26 Geo. 3, c. 71) and 1844 (7 & 8 Vict. c. 87), are not in force (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 142, Sched. IV.), and slaughter-houses and knackers' yards are dealt with among other "offensive trades" (*ibid.*, ss. 19, 20); see pp. 565 *et seq.*, *post;* but the Protection of Animals Act, 1911 (1 & 2 Geo. 5, c. 27), ss. 5, 6, Sched. I., which deals with knackers, applies both to London and the provinces; see note (*s*), p. 561, *post.*

(*i*) Public slaughter-houses may be provided under various enactments, namely, the Public Health Acts (for a list of which see note (*a*), p. 361, *ante*); the Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 32 (for which see title ANIMALS, Vol. I., p. 430); special Acts incorporating the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), ss. 17—20; and special Acts incorporating the necessary provisions of the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34). The commissioners (see note (*m*), p. 554, *post*) may under the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 134, with the concurrence of the inspector, and by special order in pursuance of *ibid.*, ss. 132, 133, but not otherwise, purchase, rent, build, or otherwise provide slaughter-houses and knackers' yards. For forms relating to the registration and licensing of slaughter-houses, see Encyclopædia of Forms and Precedents, Vol. X., pp. 383 *et seq.*

(*k*) See pp. 558 *et seq.*, *post.*

(*l*) See pp. 554 *et seq.*, *post.*

(*m*) See p. 558, *post.*

(*a*) As to nuisances from slaughter-houses, see p. 563, *post.*

(*b*) Or a rural authority, if the provision has been declared to be in force in its district or any contributory place by an order of the Local Government Board under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 276; see title LOCAL GOVERNMENT, Vol. XIX., p. 332. As to these authorities, see also pp. 372, 373, *ante.*

(*c*) This is defined to include the buildings and places commonly called slaughter-houses and knackers' yards, and any building or place used for slaughtering cattle, horses, or animals of any description, for sale (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 4); see *Hides* v. *Littlejohn* (1896),

SECT. 10. Offensive Trades.

and must make bye-laws (*d*) with respect to the management and the charges for the use of slaughter-houses so provided (*e*).

For the purpose of enabling any urban authority (*f*) to regulate slaughter-houses (*g*), the provisions of the Towns Improvement Clauses Act, 1847 (*h*), with respect to slaughter-houses (*g*) are incorporated with the Public Health Acts (*i*).

Registration.

1121. Every place used as a slaughter-house or knacker's yard is required within three calendar (*k*) months after the passing of the special Act (*l*) to be registered by the owner or occupier at the office of the authority (*m*) in a book to be kept by the authority for the purpose (*n*).

60 J. P. 101; *Elias* v. *Nightingale* (1858), 22 J. P. 131; *Nicklinson* v. *Newman* (1869), 33 J. P. 644; and see note (*s*), p. 566, *post*.

(*d*) As to the making, confirmation etc. of bye-laws, see pp. 388 *et seq.*, *ante*.

(*e*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 169, which contains a saving for the rights of any persons incorporated by any local Act passed before the passing of the Public Health Act, 1848 (11 & 12 Vict. c. 63), namely, 31st August, 1848, for the purpose of making and maintaining slaughter-houses. Profits on public slaughter-houses are assessable to income tax; see title INCOME TAX, Vol. XVI., p. 625.

(*f*) See note (*b*), p. 553, *ante*.

(*g*) See note (*c*), p. 553, *ante*.

(*h*) 10 & 11 Vict. c. 34. The incorporated provisions (*ibid.*, ss. 125—131) are dealt with in the text, *infra*. They are also incorporated by many local Acts, and were incorporated with the Local Government Act, 1858 (21 & 22 Vict. c. 98), by *ibid.*, s. 44, which Act was wholly repealed and superseded by the Public Health Act, 1875 (38 & 39 Vict. c. 55).

(*i*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 169.

(*k*) Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 3.

(*l*) That is, the incorporating Act (*ibid.*, s. 2), including, in an urban district, the Public Health Act, 1875 (38 & 39 Vict. c. 55), as provided by *ibid.*, s. 316. The 11th August, 1875, was the date of the passing of the Public Health Act, 1875 (38 & 39 Vict. c. 55). But in many instances some earlier date would have to be substituted in pursuance of the repealed provisions of the Local Government Act, 1858 (21 & 22 Vict. c. 98), s. 44; see note (*h*), *supra*. The date of the passing of that Act, namely, 2nd August, 1858, would have to be substituted in places referred to in *ibid.*, s. 5, and in other places in which the Act subsequently came into force the date of the constitution of the district (*ibid.*, s. 20). Slaughter-houses had been required to be registered within three months after the Public Health Act, 1848 (11 & 12 Vict. c. 63), was applied to a district (*ibid.*, s. 61); the provision was repealed by the Local Government Act, 1858 (21 & 22 Vict. c. 98), s. 48; *ibid.*, s. 44 (see note (*h*), *supra*), having been enacted in its place.

(*m*) The words are "the commissioners," which is defined to mean the commissioners, trustees, or other persons or body corporate entrusted by the special Act with powers for executing the purposes thereof (Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 2). The authority under the Public Health Act, 1875 (38 & 39 Vict. c. 55), is the urban authority or a rural authority with the necessary urban powers in that behalf; see note (*b*), p. 553, *ante*.

(*n*) Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 127. Every person who after the expiration of the three months mentioned in the text, *supra*, and after one week's notice from the authority, uses or suffers the premises to be used without registration is liable to penalties not exceeding £5 for the first day and not exceeding 10*s*. for every subsequent day (*ibid.*).

Licence by local authority.

1122. A local authority (*o*) may license (*p*) such slaughter-houses and knackers' yards for slaughtering cattle (*q*) as it from time to time thinks proper; and no place may, under a penalty not exceeding £5 and a like penalty for every day after conviction, be used or occupied as a slaughter-house or knacker's yard within the district of the authority (*r*) which was not in such use and occupation at the time of the passing of the special Act (*s*), and has so continued ever since (*t*), unless and until a licence for the erection thereof, or for the use and occupation thereof (*u*) as a slaughter-house or knacker's yard, has been obtained (*v*).

Duration of licence.

1123. Licences granted, where the enactment in that behalf is in force (*a*), for the use and occupation of places as slaughter-houses

(*o*) *I.e.*, an urban or rural authority, as the case may be; see note (*b*), p. 553, *ante*, and see note (*m*), p. 554, *ante*.

(*p*) A formal document is not necessary, although convenient. A resolution of a committee authorising the erection of a slaughter-house which was communicated to the applicant and subsequently confirmed by a town council was held sufficient (*Howarth* v. *Manchester Corporation* (1862), 6 L. T. 683); and a consent under a local Act by the authority to a slaughter-house being provided and maintained was held to operate as a licence (*Anthony* v. *Brecon Markets Co.* (1872), L. R. 7 Exch. 399, Ex. Ch.); but a consent to erect does not cover a subsequent re-erection on another site to which the business has been removed (*Hughes* v. *Trew* (1877), 36 L. T. 585). A person licensed to slaughter horses must not be a dealer in horses at the same time (Protection of Animals Act, 1911 (1 & 2 Geo. 5, c. 27), s. 6); and see title ANIMALS, Vol. I., p. 413.

(*q*) The term "cattle" is defined to include horses, asses, mules, sheep, goats, and swine (Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 3); compare notes (*d*), (*e*), p. 558, *post*. A licence expressed to be granted for pigs only does not prevent the premises being used under the same licence for the slaughtering of other "cattle" (*Brighton Local Board of Health* v. *Stenning* (1867), 15 L. T. 567).

(*r*) The words are "within the limits of the special Act." They mean the limits of the district (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 316).

(*s*) As to the meaning of "the passing of the special Act," see note (*l*), p. 554, *ante*. The exemption is not lost by a partial rebuilding and slight enlargement of premises (*Hanman* v. *Adkins* (1876), 40 J. P. 744).

(*t*) "Pining" cattle is part of the business of a slaughter-house, and the use of premises for that purpose only whilst slaughtering is done elsewhere is a continuance of use as a slaughter-house (*Hides* v. *Littlejohn* (1896), 74 L. T. 24).

(*u*) A licence for erection covers use and occupation (*Anthony* v. *Brecon Markets Co.*, *supra*). A market company which erected a slaughter-house and permitted persons to slaughter therein was held to carry on the business of a slaughterer of cattle (*Liverpool New Market Co.* v. *Hodson* (1867), 15 L. T. 534); and see note (*l*), p. 565, *post*; but a person who pays the owner of premises for permission to slaughter does not use the premises so as to require a licence (*R.* v. *Heyworth* (1866), 14 L. T. 600).

(*v*) Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), ss. 125, 126. A number of persons may use the same slaughter-house, but each requires a licence (*Goodwin* v. *Sale*, [1907] 2 K. B. 278).

(*a*) *I.e.*, where the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), Part III., has been adopted by an urban authority, or where *ibid.*, s. 29, has been, by an order of the Local Government Board, put in force in a rural district or any part of such district; see pp. 363, 364, *ante*. Any person aggrieved by the withholding of a licence may under the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 7,

SECT. 10. Offensive Trades.

and knackers' yards (*b*) are in force for such time or times only, not being less than twelve calendar months (*c*), as the authority thinks fit to specify in the licences (*d*).

Nature of bye-laws.

1124. A local authority (*e*) must, from time to time, by bye-laws (*f*) make regulations for the licensing, registering, and inspection of slaughter-houses and knackers' yards and preventing cruelty therein (*g*), for keeping the same in a cleanly and proper state, for removing filth at least once in every twenty-four hours, and for requiring them to be provided with a sufficient supply of water (*h*).

Notice to be affixed on premises.

1125. The owner or occupier of a slaughter-house (*i*) is, under a penalty (*k*) not exceeding £5 and of 10*s.* for every day during which the offence continues after conviction, required within one month after the licensing or registration of the premises (*l*) to affix and keep legible on some conspicuous place on the premises a notice with the words "Licensed [*or* Registered] Slaughter-house" (*m*).

Notice of change of occupier.

1126. Where the enactment is in force (*n*), upon any change of occupation of a registered or licensed slaughter-house (*i*) the new occupier or joint occupier must give written notice of the change to

appeal to quarter sessions. As to such appeals, see title MAGISTRATES, Vol. XIX., pp. 642 *et seq.*

(*b*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 4.

(*c*) A licence granted on the 22nd August, 1906, until the 31st December, 1906, was held, notwithstanding its terms, to continue in force until the 22nd August, 1907 (*Taylor* v. *Winsford Urban Council*, [1907] 2 K. B. 396).

(*d*) Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 29.

(*e*) The words are "the commissioners"; see note (*m*), p. 554, *ante*.

(*f*) When bye-laws are made under this provision by virtue of its incorporation with a local Act the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), ss. 200—208, are applicable to the making, confirmation, publication etc. of the bye-laws. But when bye-laws are made under the provision as incorporated with the Public Health Act, 1875 (38 & 39 Vict. c. 55), the provisions as to bye-laws of the Public Health Acts only apply; see pp. 388 *et seq.*, *ante*. Penalties not exceeding £5 and, for a continuing offence, 10*s.* a day after conviction may be imposed (Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 128). Model bye-laws as to slaughter-houses have been issued by the Local Government Board. As to the liability of an occupier of a slaughter-house for breach of a bye-law by his servant, see *Collman* v. *Mills*, [1897] 1 Q. B. 396; and, as to the premises to which the bye-laws apply, see *Nicklinson* v. *Newman* (1869), 33 J. P. 644, and note (*c*), p. 553, *ante*. As to legal proceedings, see pp. 367 *et seq.*, *ante*.

(*g*) See *Collman* v. *Mills*, *supra*; and see note (*c*), p. 553, *ante*.

(*h*) Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 128.

(*i*) For definition of "slaughter-house," see note (*c*), p. 553, *ante*.

(*k*) Recoverable summarily (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 251) or in the county court (*ibid.*, s. 261); see p. 368, *ante*.

(*l*) Where the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 169, is put in force in a rural district or portion of such district (see p. 554, *ante*), the provision in the text, *supra*, is also usually put in force.

(*m*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 170.

(*n*) *I.e.*, where the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 30, is in force in an urban district or in a rural district or part thereof; see note (*a*), p. 555, *ante*: and see pp. 363, 364, *ante*.

the inspector of nuisances. A penalty (*o*) not exceeding £5 is incurred by neglect to give the notice within one calendar month after the change (*p*).

Suspension or revocation of licence by justices.

1127. When any person is convicted of killing or dressing any cattle contrary to the statutory provisions (*q*), or of the non-observance of any of the bye-laws or regulations, the justices may, in addition to the penalty imposed on him, suspend, for any period not exceeding two calendar (*r*) months, the licence granted to such person, or in case such person is the owner or proprietor of any registered slaughter-house or knacker's yard may forbid, for any period not exceeding two calendar (*r*) months, the slaughtering of cattle therein; and, upon his conviction for a second or other subsequent like offence, may, in addition to the penalty imposed, declare the licence granted to be revoked, or, if such person is the owner or proprietor of any registered slaughter-house, may forbid absolutely the slaughtering of cattle therein (*s*).

Revocation of licence by justices.

1128. If the occupier of any building, where the enactment is in force (*t*), licensed to be used as a slaughter-house for the killing of animals intended as human food, is summarily convicted of selling or exposing for sale, or of having in his possession, or on his premises, the carcase of any animal, or any piece of meat or flesh diseased, or unsound, or unwholesome, or unfit for the use of man as food (*u*), the court may revoke the licence (*a*).

Refusal by local authority of licence to persons convicted.

1129. The local authority (*b*) may refuse to grant any licence whatever to a person whose licence has been revoked, or on account of whose default the slaughtering of cattle in any registered slaughter-house or knacker's yard has been forbidden by the justices (*c*).

(*o*) Recoverable as under the Public Health Acts (Public Health Act, 1890 (53 & 54 Vict. c. 59), s. 6); see pp. 367 *et seq.*, *ante*.

(*p*) Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 30.

(*q*) *I.e.*, the provisions of the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), or the special Act (*ibid.*, s. 129). As to the special Act, see note (*l*), p. 554, *ante*.

(*r*) Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 3.

(*s*) *Ibid.*, s. 129. For slaughtering cattle in or otherwise using the premises or allowing them to be used as a slaughter-house or knacker's yard during the suspension of the licence, or after its revocation, or after slaughtering has been absolutely forbidden therein, a penalty not exceeding £5, and a further similar penalty for every day after conviction, is incurred (*ibid.*, s. 130). As to legal proceedings, see pp. 367 *et seq.*, *ante*.

(*t*) *I.e.*, where the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 31, is in force in an urban district or rural district or part thereof; see note (*a*), p. 555, *ante*, and pp. 363, 364, *ante*.

(*u*) See Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 117; Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 131; and the bye-laws which may be made under certain enactments referred to in title FOOD AND DRUGS, Vol. XV., p. 40.

(*a*) Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 31. An appeal against such revocation lies to quarter sessions (*ibid.*, s. 7); see title MAGISTRATES, Vol. XIX., pp. 642 *et seq.*

(*b*) The words are "the commissioners"; see note (*m*), p. 554, *ante*.

(*c*) Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 129. A

SECT. 10. **Offensive Trades.**

(c) *Knackers' Yards and Knackers*

Keeping of knacker's yard without licence prohibited.

1130. No person may keep or use any house or place (hereafter referred to as a knacker's yard) for the purpose of slaughtering or killing horses (*d*) or cattle (*e*) which are not killed for butcher's meat without first obtaining a licence from the district council (*f*).

Grant and duration of licence.

1131. A licence is granted upon a certificate under the hands and seals of the minister and churchwardens (*g*) or overseers, or of the minister and two or more substantial householders of the parish in which the applicant dwells, that he is a fit and proper person to be trusted with the management and carrying on of such business (*h*); but a person to whom a licence has been previously granted need not produce a certificate on its renewal (*i*). A licence remains in force for a period not exceeding one year from the date of its grant (*i*), and on the death of the licensee passes to his widow or personal representative (*h*).

Register of licences.

1132. Licences must be copied in a book which any person may, on any week day between 10 a.m. and 12 noon, search and make extracts from, paying for every search 6*d.* (*k*).

Cancellation of licence.

1133. A licence may be cancelled by quarter sessions (*l*), upon written application and complaint, and upon proof that the complainant has given fourteen days' written notice to the clerk of the

licensee must not be a dealer in horses at the same time (Protection of Animals Act, 1911 (1 & 2 Geo. 5, c. 27), s. 6; and see title ANIMALS, Vol. I., p. 413.

(*d*) The words are "horse, mare, gelding, colt, filly, ass, mule" (Knackers Act, 1786 (26 Geo. 3, c. 71), s. 1).

(*e*) The words are "bull, ox, cow, heifer, calf, sheep, hog, goat or other cattle" (*ibid.*).

(*f*) *Ibid.* "District council" means the council of any borough, and of any other urban or rural district (Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 27 (2), 32) in which the premises are situated. As to these local authorities, see title LOCAL GOVERNMENT, Vol. XIX., pp. 262 *et seq.*, 302 *et seq.*, 329 *et seq.* Any person who occasionally lends any house, barn, stable, or other place for slaughtering any horse (see note (*d*), *supra*) or other cattle (see note (*e*), *supra*) not killed for butcher's meat without taking out a licence is liable upon conviction before a justice upon the oath of two credible witnesses to a penalty not exceeding £20, or to be imprisoned in default of payment, one-half the penalty to go to the informer and one-half to the poor of the parish (Knackers Act, 1786 (26 Geo. 3, c. 71), s. 13; Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), s. 4). As to offences against the Act for which no express punishment is provided, see note (*d*), p. 561, *post.*

(*g*) Knackers Act, 1786 (26 Geo. 3, c. 71), s. 1. It would seem that, as to this, in an urban parish the churchwardens can be replaced by the urban district council, if an order transferring the power to it is in force under the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 33. As to a rural parish, see *ibid.*, ss. 5 (2) (b), 6 (1) (b); and see title LOCAL GOVERNMENT, Vol. XIX., pp. 247 *et seq.*, 267.

(*h*) Knackers Act, 1786 (26 Geo. 3, c. 71), s. 1.

(*i*) Knackers Act, 1844 (7 & 8 Vict. c. 87), s. 1.

(*k*) Knackers Act, 1786 (26 Geo. 3, c. 71), s. 2.

(*l*) For the county, division, city, or borough (Knackers Act, 1844 (7 & 8 Vict. c. 87), ss. 2, 10).

peace and to the licensee, and that the licensee has been guilty of a breach of the statutes (*m*).

Name to be affixed on premises.

1134. A licensee must paint or fix over the door or gate of his business premises in large legible characters his name, with the words "Licensed for slaughtering horses, pursuant to an Act passed in the twenty-sixth year of His Majesty King George the Third" (*n*).

Inspection of knacker's yard.

1135. The local authority (*o*) of every parish in which there is a knacker's yard must annually, or oftener as occasion requires, appoint an inspector or inspectors (*p*), who are empowered at all times, but if in the night only in the presence of a constable, to enter and inspect any knacker's yard kept by a licensed person, and any stable, buildings, shed, yard, or place belonging thereto, and to search for, and take an account of, any horse (*q*) or cattle (*r*) deposited or brought there (*s*).

Attendance of inspector at yard and entry of particulars of horses and cattle brought to the yard.

1136. An inspector, either in person or by his servant, must, upon receiving notice (*t*) from the occupier, attend at the knacker's yard, and before any horse (*a*) or cattle (*b*) is or are slaughtered, killed, or flayed, take an exact account and description of the height, age (as near as may be), colour, and particular marks of every horse (*a*) brought alive for the purpose of being slaughtered or killed, or brought dead for the purpose of being flayed, and of the colour and particular marks of cattle (*b*) brought alive or dead for either of such purposes, and enter such particulars in a book (*c*), and for every such entry the occupier must pay the inspector 6*d*. The

(*m*) Knackers Act, 1844 (7 & 8 Vict. c. 87), s. 2.

(*n*) Knackers Act, 1786 (26 Geo. 3, c. 71), s. 2. The word "knacker" must also be painted or affixed (Protection of Animals Act, 1911 (1 & 2 Geo. 5, c. 27), s. 5, Sched. 1 (1)); see title ANIMALS, Vol. I., p. 413.

(*o*) That is, in a rural parish, the parish council (Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 6 (1) (a)), or parish meeting (*ibid.*, s. 19 (4)), and, in an urban parish, the urban district council where the necessary order is in force (*ibid.*, s. 33); see title LOCAL GOVERNMENT, Vol. XIX., pp. 246, 258, 267.

(*p*) Knackers Act, 1786 (26 Geo. 3, c. 71), s. 5. An inspector must paint or affix over the door of his residence his name and the words "Inspector of houses and places for slaughtering horses" (*ibid.*).

(*q*) See note (*d*), p. 558, *ante*.

(*r*) See note (*e*), p. 558, *ante*.

(*s*) Knackers Act, 1786 (26 Geo. 3, c. 71), s. 6. A licensee or other person obstructing or assaulting an inspector is liable to a penalty not exceeding £10 (Knackers Act, 1844 (7 & 8 Vict. c. 87), s. 5). For neglect of duty an inspector is liable to a similar penalty (*ibid.*, s. 6). Offences may be heard before two justices, and part of any penalty may be awarded to the informer (*ibid.*, s. 7). The prosecution must be commenced within three calendar months next after the offence (*ibid.*, s. 8). An appeal lies to quarter sessions (*ibid.*, s. 9). As to procedure before courts of summary jurisdiction, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*; and as to appeals to quarter sessions, see *ibid.*, pp. 642 *et seq.*

(*t*) See p. 561, *post*.

(*a*) This includes mare, gelding, mule, pony, colt or filly (Knackers Act, 1844 (7 & 8 Vict. c. 87), s. 10).

(*b*) This includes bull, ox, cow, steer, heifer, calf, ass, sheep, lamb, goat, pig, or any other domestic animal (*ibid.*).

(*c*) As to the book to be kept by the licensee, see p. 561, *post*.

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book may be inspected by any person between 8 a.m. and 5 p.m. from October to March inclusive, and between 6 a.m. and 8 p.m during the remainder of the year, on payment to the inspector of 6*d.* (*d*).

Examination of animals suspected of having been stolen.

1137. If upon examination of any horse (*e*) or cattle (*f*) the inspector is of opinion that the animal is free from disease and in a sound and serviceable state, or that it has been stolen or unlawfully come by, he must prohibit its slaughter for a period not exceeding eight days (*g*), and in the meantime must insert, twice or oftener, an advertisement in a public newspaper circulated in the county, unless the owner sooner claims the animal or certifies under his hand or otherwise satisfactorily informs the inspector that he sent the animal to the licensee to be slaughtered. The expense of the advertisement must be paid by the occupier of the knacker's yard, and if he refuses he is liable, on being convicted upon the oath of the inspector before one justice, to forfeit double the charge of such advertisement (*h*).

Inspection by constable.

1138. A constable (*i*) may at all reasonable times in the day, either alone or with an inspector, enter and inspect any part of premises licensed as a knacker's yard, and inspect and take account of any horses (*k*) or cattle (*l*) therein (*m*).

Arrest of suspected persons and seizure of animals.

1139. If any person offers to sell or brings any horse (*n*) or cattle (*o*) to the keeper of a knacker's yard to be slaughtered or, being dead, to be flayed or skinned, and is not able or refuses to give a satisfactory account of himself or the means by which the animal came into his possession, or if there is any reason to suspect that the animal has been stolen or unlawfully obtained, the keeper or his employees, and any inspector, may seize and detain the person and animal, and deliver him into the custody of a constable, to be immediately brought before a justice. The person may be remanded in custody for a term not exceeding six days for further examination, and, on the justice being satisfied or having reason to believe that the animal was stolen or illegally obtained, the person must be committed to prison (*p*).

(*d*) Knackers Act, 1844 (7 & 8 Vict. c. 87), s. 5. The book must be produced at every general quarter sessions for examination by the justices (Knackers Act, 1786 (26 Geo. 3, c. 71), s. 12).

(*e*) See note (*d*), p. 558, *ante*.

(*f*) See note (*e*), p. 558, *ante*.

(*g*) It is felony to disobey the prohibition; see p. 561, *post*.

(*h*) Knackers Act, 1786 (26 Geo. 3, c. 71), s. 5; Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), s. 4. As to procedure before courts of summary jurisdiction, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*; and, as to appeals to quarter sessions, see *ibid.*, pp. 642 *et seq.*

(*i*) This includes headborough, peace officer, or police officer (Knackers Act, 1844 (7 & 8 Vict. c. 87), s. 10); see title POLICE, Vol. XXII., pp. 462 *et seq.*

(*k*) See note (*a*), p. 559, *ante*.

(*l*) See note (*b*), p. 559, *ante*.

(*m*) Knackers Act, 1844 (7 & 8 Vict. c. 87), s. 4.

(*n*) See note (*d*), p. 558, *ante*.

(*o*) See note (*e*), p. 558, *ante*.

(*p*) Knackers Act, 1786 (26 Geo. 3, c. 71), s. 7.

Register of animals to be kept by knacker.

1140. A knacker (*q*) must enter in a book kept for the purpose such a full and correct description of the colour, marks, and gender of every animal (*r*) delivered to him as may clearly distinguish and identify the same, and the name and address of its owner. The book must be produced by him before any justice upon the requirement of such justice, and he must allow such book to be inspected and extracts to be made therefrom at all reasonable times by any police constable or by any other person authorised by a justice (*s*).

Time for killing or flaying.

1141. No horse (*t*) or cattle (*u*), not killed for the purpose of butcher's meat, may be slaughtered, killed, or flayed, except between 8 a.m. and 4 p.m. from October to March inclusive, and between 6 a.m. and 8 p.m. during the rest of the year, and six hours previous to the slaughtering or killing and to the flaying of any such animal brought dead to the premises the occupier of a licensed slaughter-house or place must give written notice to the inspector (*v*).

Offences which are felonies.

1142. Any person keeping or using any knacker's yard who slaughters any horse (*t*) or cattle (*u*) for any other purpose than for butcher's meat, or flays any such animal brought dead to such yard, without taking out a licence, or giving the required notice to the inspector, or does so at any times other than those limited, or who does not delay slaughtering or killing the same according to the direction of an inspector, is, on conviction, guilty of felony, and is punishable by fine and imprisonment for not exceeding seven years (*a*).

Destruction or concealment of hides.

1143. Any person keeping or using a knacker's yard who immerses in lime, or any preparation of lime, or rubs therewith or with any other corrosive matter, or destroys or buries the hide or skin of any horse (*b*) or other cattle (*c*) slaughtered or flayed by him, is guilty of a misdemeanour, and is punishable by fine and imprisonment (*d*).

Killing sound horses.

1144. Any collar-maker, currier, felt-maker, tanner, or dealer in hides, or farrier or other person, who under colour of his trade or occupation knowingly or willingly kills any sound or useful horse, gelding, mare, foal, or filly, or boils or otherwise cures the flesh

(*q*) "Knacker" means a person whose trade or business it is to kill any cattle not killed for the purpose of the flesh being used as butcher's meat; and "cattle" includes any horse, ass, mule, bull, sheep, goat, or pig (Protection of Animals Act, 1911 (1 & 2 Geo. 5, c. 27), s. 15).

(*r*) Defined in the widest terms (*ibid.*).

(*s*) Protection of Animals Act, 1911 (1 & 2 Geo. 5, c. 27), s. 5, Sched. I. (6). This and other provisions of the Act to be observed by knackers apply in London as well as the provinces; see title ANIMALS, Vol. I., p. 413.

(*t*) See note (*d*), p. 558, *ante*.

(*u*) See note (*e*), p. 558, *ante*.

(*v*) Knackers Act, 1786 (26 Geo. 3, c. 71), s. 5.

(*a*) *Ibid.*, s. 8. As to felonies, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 246 *et seq.*

(*b*) See note (*d*), p. 558, *ante*.

(*c*) See note (*e*), p. 558, *ante*.

(*d*) Knackers Act, 1786 (26 Geo. 3, c. 71), s. 9. Offences against the Act for which no punishment or penalty is expressly provided are similarly punishable as misdemeanours (*ibid.*). As to misdemeanours, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 246 *et seq.*

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thereof for the purpose of selling the same, is liable for every such offence to a penalty not exceeding £20 (*e*).

(ii.) *Other Trades.*

Restrictions on offensive trades.

1145. Any person who (*f*) establishes within the district of an urban authority (*g*), without its consent in writing (*h*), any offensive trade—that is to say, the trade of blood-boiler, bone-boiler (*i*), fell-monger, soap-boiler, tallow-melter, or tripe-boiler, or [any other noxious or offensive (*k*) trade, business, or manufacture] (*l*)—is

(*e*) Knackers Act, 1786 (26 Geo. 3, c. 71), s. 15; Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), s. 4. The Knackers Act, 1786 (26 Geo. 3, c. 71), does not apply to any currier, felt-maker, tanner or dealer in hides who kills any distempered or aged horse (see note (*d*), p. 558, *ante*), or other cattle (see note (*e*), p. 558, *ante*), or purchases any dead animal for the *bonâ fide* purpose of selling, using, or curing the hide in the course of his trade, or to any farrier employed to kill aged and distempered cattle, or to persons killing any animal of their own or other cattle, or purchasing any dead horse or other cattle to feed their own hounds or dogs or giving away the flesh for the like purpose (Knackers Act, 1786 (26 Geo. 3, c. 70), s. 14). As to procedure before courts of summary jurisdiction, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*

(*f*) The words are "who after the passing of this Act," but it is to be observed that, where the Public Health Act, 1848 (11 & 12 Vict. c. 63), had been applied to a district, a similar provision requiring the consent of the local board (*ibid.*, s. 64) was in force; and see note (*l*), p. 554, *ante*.

(*g*) Or a rural authority, if the provision has been declared to be in force in its district or any contributory place by an order of the Local Government Board under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 276 see title LOCAL GOVERNMENT, Vol. XIX., p. 332. As to these authorities, see also pp. 372, 373, *ante*. The date of the operation of any such order would apparently be, for the purpose of the provision in the text, *supra*, "the passing of this Act"; see note (*f*), *supra*.

(*h*) This consent simply enables the trade to be established and carried on without incurring the penalties imposed, but does not legalise any act or default which would be a nuisance or unlawful; see title NUISANCE, Vol. XXI., pp. 534, 535. For form of consent, see Encyclopædia of Forms and Precedents, Vol. X., p. 478.

(*i*) This does not include a business where bones are steamed, without offensive smell, in hermetically sealed cylinders (*Cardiff Manure Co.* v. *Cardiff Union* (1890), 54 J. P. 661).

(*k*) The trade must necessarily be of a noxious or offensive nature analogous to those specified (*Wanstead Local Board of Health* v. *Hill* (1863), 13 C. B. (N. S.) 479). "The substances dealt with in the trades which are specified are substances which, without anything being done to them, must be, or by progress of time must necessarily become, a nuisance and annoyance to the neighbourhood" (*ibid.*, *per* WILLES, J., at p. 484). The trade of a rag and bone dealer has been held to be within the provision (*Passey* v. *Oxford Local Board* (1879), 43 J. P. 622); but not the trade of a brickmaker (*Wanstead Local Board of Health* v. *Hill*, *supra*); or a fried-fish shop (*Braintree Local Board of Health* v. *Boyton* (1885), 52 L. T. 99); or the manufacture of manure (*Cardell* v. *Newquay Local Board* (1875), 39 J. P. 742); and the carrying on of a small-pox hospital has been held not to be an "other noxious or offensive trade or business" (*Withington Local Board of Health* v. *Manchester Corporation*, [1893] 2 Ch. 19, C. A.); and see title NUISANCE, Vol. XXI., p. 534; see also, as to offensive trades, *Devonshire (Duke)* v. *Brookshaw* (1899), 63 J. P. 569; *A.-G.* v. *Plymouth Fish Guano and Oil Co., Ltd.* (1911), 76 J. P. 19.

(*l*) Where the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 51, is in force (see pp. 364, 365, *ante*), for the words in brackets in the text, *supra*, are substituted the words "any other trade, business, or manufacture, which the local authority declare, by order confirmed by

liable to a penalty not exceeding £50 in respect of its establishment, and any person carrying on a business so established is liable to a penalty not exceeding 40*s.* for every day during which the offence is continued, whether there has or has not been a conviction in respect of its establishment (*m*).

Bye-laws for preventing injurious effects.

1146. Any urban authority (*n*) may from time to time make bye-laws with respect to any offensive trades established with its consent (*o*), in order to prevent or diminish the noxious or injurious effects thereof (*p*).

Nuisance from business causing effluvia.

1147. Where any candle-house, melting-house, melting-place, or soap-house, or any slaughter-house, or any building or place for boiling offal, or for boiling, burning, or crushing bones, or any manufactory, building, or place used for any trade, business, process, or manufacture causing effluvia, is certified to any urban authority (*n*) by its medical officer of health, or by any two legally qualified medical practitioners (*q*), or by any ten inhabitants of the district, to be a nuisance or injurious to the health (*r*) of any of the

the Local Government Board, and published in such manner as the Board direct, to be an offensive trade." Any person aggrieved by an order or the withholding of consent (see p. 562, *ante*) in respect of the establishment of a trade to which an order applies may appeal to quarter sessions (Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 7 (1)); as to such appeals, see title MAGISTRATES, Vol. XIX., pp. 642 *et seq.* Among trades so declared by local authorities are those of fish-frier, fish-skin scraper, dealer in rags, bones, hides, skins, carcases, fat, blood, offal and other like articles or matters in an offensive condition. The mode of publication is directed by the confirming order. Compare the similar wording of the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 19 (1), see p. 566, *post*, and note (*m*), *ibid.*; and as to trades regulated under the Alkali, etc. Works Regulation Act, 1906 (6 Edw. 7, c. 14), see pp. 404 *et seq.*, *ante*.

(*m*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 112. As to legal proceedings, see pp. 367 *et seq.*, *ante*.

(*n*) Or rural authority, if the provision has been declared to be in force; see note (*g*), p. 562, *ante*.

(*o*) The words are, "consent either before or after the passing of this Act"; see notes (*f*), (*h*), p. 562, *ante*. Where the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 51, is in force (see pp. 364, 365, *ante*), the bye-laws may be made with respect to any offensive trade under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 112, as amended by the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 51, by a local authority, without any limitation to trades established with its consent. As to bye-laws generally, see pp. 388 *et seq.*, *ante*.

(*p*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 113. Model bye-laws have been issued by the Local Government Board. They relate, in addition to the trades named in *ibid.*, s. 112 (see the text, *supra*), to the trades of blood-drier, tanner, leather-dresser, fat-melter or fat-extractor, glue-maker, size-maker, gut-scraper, dealer in rags and bones, and fish-frier. As to the making, confirmation etc. of bye-laws, see pp. 388 *et seq.*, *ante*. Bye-laws made under the repealed provision in the Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 64, similar to that in the text, were saved by the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 326; see note (*f*), p. 389, *ante*.

(*q*) That is, practitioners who are registered under the Medical Acts; see title MEDICINE AND PHARMACY, Vol. XX., p. 318.

(*r*) It is sufficient to prove that the effluvia are a nuisance in that they cause annoyance or discomfort, without proving injury to health (*Malton Board of Health* v. *Malton Manure Co.* (1879), 4 Ex. D. 302; followed in *Bishop Auckland Local Board* v. *Bishop Auckland Iron Co.* (1882), 10

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inhabitants, the authority must take summary proceedings (*s*) against the person carrying on the trade (*t*).

Penalty for offence.

If it appears to the court that the business is a nuisance, or causes any effluvia which is a nuisance or injurious to the health of any of the inhabitants, unless it is shown (*a*) that the person carrying it on has used the best practicable means for abating such nuisance or preventing or counteracting such effluvia, the offender, that is the owner or occupier of the premises or a foreman or other person employed by him, is liable to a penalty not exceeding £5 nor less than 40*s*. (*b*), and on a second and any subsequent conviction to a penalty double that imposed for the last preceding conviction, but not in any case exceeding £200. The court may, however, suspend its final determination on condition that the person undertakes to adopt within a reasonable time such practicable means as the court may order for abating the nuisance, or mitigating or preventing the injurious effects of such effluvia, or if he gives notice of appeal to quarter sessions (*c*).

Rag flock.

1148. Flock manufactured from rags may not be sold or kept for sale, or used to make any article of upholstery, cushions, or bedding or kept for such use, unless it conforms to the standard of purity (*d*) laid down by regulations made by the Local Government Board (*e*), and persons offending against this provision may be fined on

Q. B. D. 138). A certificate simply stating that a fried-fish shop was a nuisance was held sufficient (*Houldershaw* v. *Martin* (1885), 49 J. P. 179).

(*s*) Under the Summary Jurisdiction Acts (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 251); see p. 368, *ante*. The authority may take proceedings in the High Court, *e.g.*, for an injunction, against any person in respect of the matters alleged in the certificate (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 114). Where the house, building, manufactory, or place certified to be a nuisance or injurious to the health of the inhabitants is without the district (and whether or not within the Metropolis), summary proceedings by the council of the district must be taken before a court having jurisdiction in the district where the offending premises are situated (*ibid.*, s. 115). Notice under *ibid.*, s. 94, is not necessary before proceedings are taken (*Bird* v. *St. Mary Abbott's, Kensington, Vestry*, [1895] 1 Q. B. 912). As to such notice, see title NUISANCE, Vol. XXI., pp. 567, 568.

(*t*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 114.

(*a*) The burden of doing so lies upon the defendant. As to this, see the Summary Jurisdiction Acts, 1848 (11 & 12 Vict. c. 43), s. 14; 1879 (42 & 43 Vict. c. 49), s. 39 (2); and see title MAGISTRATES, Vol. XIX., p. 597.

(*b*) It may be less on a first conviction (Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 4); see title MAGISTRATES, Vol. XIX., p. 603.

(*c*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 114. The appeal must be made to the next court of quarter sessions (*ibid.*, s. 269); see title MAGISTRATES, Vol. XIX., p. 642.

(*d*) Flock is deemed to conform to the standard of cleanliness when the amount of soluble chlorine, in the form of chlorides, removed by thorough washing with distilled water at a temperature not exceeding 25 degrees Centigrade, from not less than 40 grammes of a well-mixed sample of flock, does not exceed 30 parts of chlorine in 100,000 parts of the flock (Rag Flock Regulations, dated the 8th June, 1912 (operating as from the 1st July, 1912)).

(*e*) Rag Flock Act, 1911 (1 & 2 Geo. 5, c. 52), s. 1 (1). The issue of one set of regulations does not prevent the Board from issuing a fresh set; see *ibid.*, s. 1 (2).

summary conviction (*f*). The expenses of enforcing the statutory provisions are defrayed as public health expenses (*g*).

SUB-SECT. 2.—*In London.*

Restriction on establishment.

1149. If any person (1) establishes anew (*h*) any of the following businesses, that is to say, the business of blood-boiler, bone-boiler, manure manufacturer, soap-boiler (other than a business as hereinafter described), tallow-melter, or knacker (*i*); or (2) establishes anew (*h*), without the sanction of the London County Council (*k*), any of the following businesses, that is to say, the business of fellmonger, soap-boiler (except a business in which tallow or any animal fat or oil other than olein is not used by admixture with alkali for the production of soap), tripe-boiler, slaughterer of cattle or horses (*l*),

(*f*) Rag Flock Act, 1911 (1 & 2 Geo. 5, c. 52), s. 1 (1). The penalty in the case of a first offence is a fine not exceeding £10, or, in the case of a second or subsequent offence, not exceeding £50 (*ibid.*). As to legal proceedings, compare pp. 367 *et seq.*, *ante*. Persons charged may plead a warranty if they prove (1) that they have purchased the flock from a person resident in the United Kingdom, and got it with a warranty that it complied with the prescribed standard of cleanliness, and (2) that they took steps to ascertain the truth of the warranty and believed in it (Rag Flock Act, 1911 (1 & 2 Geo. 5, c. 52), s. 1 (3) (a)). The offender first charged may, on proving these facts, have the vendor brought before the court and fined. If impure flock is found in a person's possession, the burden is on him to prove that it was not intended for sale (*ibid.*, s. 1 (4)). Sanitary authorities are compelled to enforce the Act, and have powers of inspection and taking samples, and must not be obstructed in the performance of their duties (*ibid.*, s. 1 (5)).

(*g*) *Ibid.*, s. 1 (6). Fines imposed go to the sanitary authority, and must be credited to the fund which is charged for carrying out the Act (*ibid.*, s. 1 (7)). As to such expenses, see pp. 380—382, *ante*.

(*h*) A business is to be deemed to be established anew not only if it is established newly, but also if it is removed from one set of premises to another, or if it is renewed on the same premises after discontinuance for not less than nine calendar months, or if the premises are enlarged without the sanction of the London County Council or of the City Corporation (see note (*k*), *infra*); but it is not to be deemed to be established anew by reason only of change of ownership of the premises or their reconstruction without extension of area (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 19 (8)). "Premises" is defined in the widest terms (*ibid.*, s. 141). As to the general application of this Act, see title METROPOLIS, Vol. XX., pp. 465 *et seq.*

(*i*) The term "knacker" means a person whose business it is to kill any horse, ass, mule, or cattle (including sheep, goats, and swine) which is not killed for the purpose of the flesh being used as butcher's meat (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 141); compare p. 561, *ante*; note (*l*), *infra*.

(*k*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 141). In the City of London the Corporation is substituted for the London County Council (*ibid.*, s. 19 (10)); City of London Sewers Act, 1897 (60 & 61 Vict. c. cxxxiii.), ss. 3, 5, 7); and see title METROPOLIS, Vol. XX., pp. 459, 469. The sanction is given by an order (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 19 (3)), for which a fee not exceeding 40*s.* is chargeable (*ibid.*, s. 19 (7)). At least fourteen days before making such order the London County Council or Corporation must give certain notices and hear and consider any objections (*ibid.*, s. 19 (3)).

(*l*) The expression "slaughterer of cattle or horses" means a person whose business it is to kill animals (as in note (*i*), *supra*) for butcher's meat (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 19 (3)). A market company which provided the necessary tackle and allowed others to slaughter on its premises for a charge was held to carry on the business

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or any other business which the London County Council may declare by order, confirmed by the Local Government Board and published in the *London Gazette*, to be an offensive business (*m*), he is liable to a fine (*n*) not exceeding £50 in respect of its establishment, and any person carrying on the business when established is liable to a fine (*n*) not exceeding £50 for every day during which he so carries it on (*o*).

Regulations as to business and business premises.

1150. The London County Council (*p*) may make bye-laws (*q*) for regulating the conduct of any specified businesses (*r*), which are for the time being lawfully carried on, the structure of the premises on which any such business is being carried on, and the mode in which the application for sanction to establish a business must be made (*s*). Any such bye-law may empower a petty sessional court (*t*) by summary order (*t*) to deprive an offender of

of slaughterers (*Liverpool Cattle Market Co.* v. *Hodson* (1867), L. R. 2 Q. B. 131); and see note (*u*), p. 555, *ante*.

(*m*) Under the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 19 (1), and the Slaughterhouses, etc. (Metropolis) Act, 1874 (37 & 38 Vict. c. 67), s. 3, which was repealed by the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 142, and re-enacted as in the text, *supra*, the following businesses have been declared to be offensive businesses:— animal charcoal manufacturer, blood-drier, catgut-maker, dresser of fish skins, fat melter or extractor, glue and size manufacturer, and gut-scraper, *i.e.*, a business in which gut is cleansed, scraped or dealt with otherwise than for the manufacture of catgut. In *London County Council* v. *Hirsch & Co.* (1899), 81 L. T. 447, the sorting, repacking and selling of gut skins was held not to come within the description of a gut-scraper. The Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 142, contains a saving for orders and bye-laws made under any repealed enactment.

(*n*) The recovery of fines is provided for by the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 117; see title METROPOLIS, Vol. XX., pp. 467, 468; and see pp. 367 *et seq.*, *ante*.

(*o*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 19 (1), (2).

(*p*) In the City of London the Corporation is substituted for the London County Council (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 19 (10); City of London Sewers Act, 1897 (60 & 61 Vict. c. cxxxiii.), ss. 3, 5, 7); and see title METROPOLIS, Vol. XX., pp. 459, 469.

(*q*) As to the making, confirmation etc. of bye-laws, see pp. 388 *et seq.*, *ante*. Any sanitary authority or person aggrieved by the proposed bye-law may object to the Local Government Board (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 19 (6)).

(*r*) As to the specified businesses, see the text, *supra*, and note (*m*), *supra*. Bye-laws are in force in respect of all the trades specified in the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 19 (1). As to saving for bye-laws made before the commencement of the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), see *ibid.*, s. 142, and Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 123.

(*s*) Bye-laws under the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 19 (4), prohibiting the occupier of a slaughter-house from slaughtering elsewhere than in the slaughter-house, or slaughtering within public view or the view of any other animal, were upheld, and the occupier was held to be liable for an offence committed by a servant without his knowledge and against his express orders (*Collman* v. *Mills*, [1897] 1 Q. B. 396); and see title MASTER AND SERVANT, Vol. XX., pp. 258, 259. A rule purporting to apply to a pound, separate from and not in the same street as the slaughter-house, was held *ultra vires* of a local Act which authorised the making of rules for the management of any place used as a slaughter-house (*Nicklinson* v. *Newman* (1869), 33 J. P. 644).

(*t*) See title MAGISTRATES, Vol. XIX., p. 565.

the right of carrying on his business, and any person disobeying such order is liable to a fine not exceeding £50 for every day of such disobedience (*u*).

Vendors of fried fish, fish-curers, and rag and bone dealers.

1151. The London County Council (*v*) and the Corporation (*a*) of the City of London may make bye-laws (*b*) for regulating the conduct of the businesses of a vendor of fried fish, a fish-curer, and a rag and bone dealer, and with respect to the business premises, apparatus, utensils, and appliances (*c*).

Business causing effluvia.

1152. Where any manufactory, building (*d*), or premises (*e*) used for any trade, business, process, or manufacture causing effluvia is certified to the sanitary authority (*f*) by its medical

(*u*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 19 (4), (5). The recovery of fines is provided for by *ibid.*, ss. 117—119; see title METROPOLIS, Vol. XX., p. 468; and see pp. 367 *et seq.*, *ante*. It is the duty of each metropolitan borough council to enforce within its borough the bye-laws in force with respect to slaughter-houses, knackers' yards, and offensive businesses, and for the performance of the duty it has a right of entry (see *infra*), and if it makes default in performing its duty the provisions of the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), apply as if it were a default under that Act (London Government Act, 1899 (62 & 63 Vict. c. 14), s. 6 (4)); and see title METROPOLIS, Vol. XX., pp. 409, 469. The entry may be made at any hour by day (6 a.m. to 9 p.m.), or when business is in progress or is usually carried on (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 20 (7), 141).

(*v*) London County Council (General Powers) Act, 1908 (8 Edw. 7, c. cvii.), s. 3. The bye-laws made by the London County Council apply to the administrative county of London, exclusive of the City and so much of the Customs Port of London as is within the County; but they may be made to extend to so much of the Port as is within the County by an order of the Local Government Board (*ibid.*, s. 11).

(*a*) Defined in terms to signify the "Common Council" (*ibid.*, s. 3).

(*b*) When made by the London County Council the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 114, applies (London County Council (General Powers) Act, 1908 (8 Edw. 7, c. cvii.), s. 9 (2)); see title METROPOLIS, Vol. XX., p. 467. When made by the Corporation, the City of London (Public Health) Act, 1902 (2 Edw. 7, c. cxvi.), ss. 7—12, apply (London County Council (General Powers) Act, 1908 (8 Edw. 7, c. cvii.), s. 9 (4)). The bye-laws are confirmed by the Local Government Board; but bye-laws made as regards any business carried on in a factory or workshop must be confirmed by the Secretary of State as well as the Local Government Board (*ibid.*, s. 9 (5)).

(*c*) *Ibid.*, s. 9 (1). There is a saving in the case of vendors of fried fish and curers of fried fish by which they are not required to alter existing premises, or alter or provide new fittings or apparatus, but, if they effect such alterations or make such new provision, then the bye-laws must be complied with (*ibid.*, s. 9 (6)). The bye-laws are enforced by the sanitary authorities (*ibid.*, s. 10), namely, the Corporation in the City and so much of the Customs Port of London as is within the County, the overseers of the Middle and Inner Temples, and the metropolitan borough councils (*ibid.*, s. 3). Power of entry is conferred on the sanitary authority and its officers (*ibid.*, s. 12). Penalties go to the prosecuting authority (*ibid.*, s. 75); and see title METROPOLIS, Vol XX., p. 409.

(*d*) The term "building" includes the curtilage of a building and a building wholly or partly erected under statutory authority (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 141); and see note (*l*), p. 415, *ante*.

(*e*) Defined in the widest terms (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 141).

(*f*) See note (*p*), p. 567, *ante*. As to such businesses carried on outside London, see p. 563, *ante*.

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officer of health, or by any two legally qualified medical practitioners (*g*), or by any ten inhabitants of the district, to be a nuisance or injurious or dangerous to the health (*h*) of any of the inhabitants, the authority must take proceedings (*i*) against the person carrying on the trade (*k*).

Removal of house and street refuse.

The removal of house refuse (*l*) and street refuse (*m*) by a sanitary authority (*n*) when collected or deposited by it is deemed to be a business carried on by the sanitary authority within the above provision, and proceedings in relation to such business may be taken by the London County Council (*o*).

Licences for cow-houses and slaughter-houses.

1153. A person carrying on the business of a slaughterer of cattle or horses (*p*), knacker (*q*), or dairyman (*r*), who uses any

(*g*) See note (*q*), p. 563, *ante*.

(*h*) It is sufficient to prove that the effluvia are a nuisance; see note (*r*), p. 563, *ante*, and the cases therein cited.

(*i*) Either under the Summary Jurisdiction Acts or in the county court (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 117); see titles COUNTY COURTS, Vol. VIII., pp. 677 *et seq.*; MAGISTRATES, Vol. XIX., pp. 589 *et seq.*; METROPOLIS, Vol. XX., p. 468; and see pp. 367 *et seq.*, *ante*. Proceedings may also be taken in the High Court (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 21 (3)). Where the certified manufactory, building or premises is outside the district (and whether or not within the Metropolis), proceedings may be taken by the sanitary authority, but, if summary, must be before a court having jurisdiction where the premises are situate (*ibid.*, s. 21 (4), (5)). Service of a notice under *ibid.*, s. 4 (see title NUISANCE, Vol. XXI., pp. 567, 568), is not required (*Bird* v. *St. Mary Abbott's, Kensington, Vestry*, [1895] 1 Q. B. 912). If the sanitary authority, on receipt of a certificate, makes default in taking proceedings, the London County Council may institute them (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 100).

(*k*) *Ibid.*, s. 21 (1), (2); and, for the similar terms of the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 114, see pp. 563, 564, *ante*.

(*l*) The term "house refuse" means ashes, cinders, breeze, rubbish, night-soil, and filth, but does not include trade refuse (*i.e.*, the refuse of any trade, manufacture, or business, or of any building materials) (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 141); see pp. 605, 606, *post*.

(*m*) The term "street refuse" means dust, dirt, rubbish, mud, road-scrapings, ice, snow, and filth (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 141); see p. 609, *post*.

(*n*) As to sanitary authorities in London, see title METROPOLIS, Vol. XX., pp. 408, 428, 466, 469. As to scavenging, see pp. 605 *et seq.*, *post*.

(*o*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 22 (1).

(*p*) See note (*l*), p. 565, *ante*. A licensed slaughterer must not be a dealer in horses at the same time (Protection of Animals Act, 1911 (1 & 2 Geo. 5, c. 27), s. 6); see title ANIMALS, Vol. I., p. 413.

(*q*) See note (*i*), p. 565, *ante*. A knacker in London must comply with the provisions of the Protection of Animals Act, 1911 (1 & 2 Geo. 5, c. 27), ss. 5, 6, Sched. I; see note (*p*), *supra*, and, as to knackers, see p. 565, *ante*.

(*r*) The term "dairyman" includes any cowkeeper, purveyor of milk, or occupier of a dairy, and "dairy" includes any farm, farmhouse, cowshed, milk-store, milk-shop, or other place from which milk is supplied, or in which milk is kept for purposes of sale (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 141). A farmer who kept cows and used their milk solely to fatten calves was held not to be a "cowkeeper" or "dairyman" so as to require his cowhouse to be licensed (*Umfreville* v. *London County Council* (1896), 66 L. J. (Q. B.) 177); and see title FOOD AND DRUGS, Vol. XV., p. 64, note (*g*).

premises (*s*) in London (outside the City of London) as a slaughter-house (*t*), or knacker's yard (*t*), or a cowhouse or place for the keeping of cows, without a licence from the London County Council (*u*), is liable for each offence to a fine not exceeding £5 (*v*), and the fact that cattle have been taken into unlicensed premises is *primâ facie* evidence that an offence has been committed.

A licence expires on such day in every year as the London County Council fixes, and when first granted expires on the day so fixed which secondly occurs after the grant of the licence (*a*). A fee not exceeding 5*s*., to be carried to the county fund, may be charged for the licence (*b*).

Premises for receiving horses for slaughter and dead horses.

1154. No person may, under a penalty not exceeding £50, and a like penalty for every day after conviction, use any yard, building, or other premises (*c*) for receiving or keeping horses for slaughter, or dead horses, without a licence from the London County Council to use such premises (*c*).

(*s*) Defined in the widest terms by the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 141.

(*t*) The terms "slaughter-house" and "knacker's yard" are respectively defined to mean any building or place used for the purpose of the business of a slaughterer of cattle or horses, or the business of a knacker, as the case may be (*ibid.*). As to knackers, see, further, pp. 565 *et seq.*, *ante*.

(*u*) An occupier of a licensed slaughter-house may, on conviction for certain offences as to unsound food, have his licence cancelled by the court (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 47 (5)); see title FOOD AND DRUGS, Vol. XV., pp. 42, 43.

(*v*) The recovery of fines is provided for by the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 117—119; see title METROPOLIS, Vol. XX., p. 468. As to legal proceedings, see also pp. 367 *et seq.*, *ante*.

(*a*) London County Council (General Powers) Act, 1903 (3 Edw. 7, c. clxxxvii.), s. 53. A licence is subject to the same provisions as licences for slaughter-houses and knackers' yards (see note (*b*), *infra*). It does not entitle the owner to carry on those businesses, and licensed slaughterers or knackers may use their premises without a licence under this enactment (London County Council (General Powers) Act, 1903 (3 Edw. 7, c. clxxxvii.), s. 53 (2)).

(*b*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 20 (1), (2). Not less than fourteen days before a licence is granted or renewed, notice of the intention to apply for it must be served on the sanitary authority (see title METROPOLIS, Vol. XX., pp. 408, 409), and the sanitary authority may show cause against the grant or renewal. Seven days' previous notice of the objection to a renewal must be served on the applicant; but where it has not been so served the London County Council may direct notice to be served, and adjourn the question of the renewal to a future day. Where a committee of the London County Council refuse the renewal of any licence, the London County Council must, on written application made within seven days after such determination is made known to the applicant, hear the applicant against such refusal (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 20 (3)—(6)). The provisions of *ibid.*, s. 20, do not apply to slaughter-houses erected in the Metropolitan Cattle Market (*ibid.*, s. 20 (8)).

(*c*) Within the administrative county of London (London County Council (General Powers) Act, 1903 (3 Edw. 7, c. clxxxvii.), ss. 3, 53 (1)), exclusive of the City of London (*ibid.*, s. 56). The provision applies only to places over which a proprietary or *quasi*-proprietary right is exercised, and not to public places (*Bailey* v. *Lowman*, [1910] 2 K. B. 39).

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Rag flock.

1155. The provisions of the Rag Flock Act, 1911 (*d*), apply in the Metropolis.

SECT. 11.—*Petroleum and Certain Other Inflammable Substances.*

SUB-SECT. 1.—*In General.*

The Petroleum Acts.

1156. The transit, storage, and sale of petroleum and certain other inflammable substances (*e*), including carbide of calcium, are regulated by the Petroleum Acts, 1871 to 1881 (*f*) (frequently referred to in this section of the title as "the Petroleum Acts"), the execution of which is entrusted to "the harbour authority" in any harbour (*g*), to the Court of Aldermen in the City of London (*h*), to the London County Council in the County of London (*i*), and in other places to the corporation or urban or rural district council, as the case may be (*k*).

Meaning of "petroleum."

1157. Petroleum as used in the Petroleum Acts (*f*) means any rock oil, Rangoon oil, Burmah oil, oil made from petroleum, coal, schist, shale, peat, or other bituminous substance, and any products of petroleum or any of the above-mentioned oils (*l*), which, when tested in the prescribed manner (*m*), give off an inflammable vapour at a temperature of less than 73° of Fahrenheit's thermometer (*n*).

Extended application of statutory provisions.

The Petroleum Acts (*f*) or any part thereof may be applied with certain modifications to any other substance by Order in Council, and thereupon such substances are deemed to be included in the definition of petroleum given above (*o*). In exercise of this power,

(*d*) 1 & 2 Geo. 5, c. 52; see p. 564, *ante*.

(*e*) As to nuisances from the storage of inflammable substances generally, see *R.* v. *Lister* (1857), Dears. & B. 209; *Hepburn* v. *Lordan* (1865), 2 Hem. & M. 345; *St. Helens Corporation* v. *United Alkali Co.* (1901), *Times*, 19th June; title NUISANCE, Vol. XXI., p. 530. As to the manufacture and keeping of explosive substances, see title EXPLOSIVES, Vol. XIV., pp. 364 *et seq.*

(*f*) These Acts are the Petroleum Act, 1871 (34 & 35 Vict. c. 105), which was originally a temporary enactment, but has been continued indefinitely by the Petroleum Act, 1879 (42 & 43 Vict. c. 47), s. 4; the Petroleum Act, 1879 (42 & 43 Vict. c. 47); and the Petroleum (Hawkers) Act, 1881 (44 & 45 Vict. c. 67). The powers given by these Acts are in addition to and not in derogation of any other powers conferred on any local or harbour authority, and nothing in the Acts exempts any person from any penalty to which he would otherwise be subject in respect of a nuisance (Petroleum Act, 1871 (34 & 35 Vict. c. 105), s. 16).

(*g*) See p. 571, *post*.

(*h*) See title METROPOLIS, Vol. XX., p. 424.

(*i*) *Ibid.*, pp. 393, 401.

(*k*) Petroleum Act, 1871 (34 & 35 Vict. c. 105), s. 8; Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 6, 10, 313; Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 40; Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 21, 27, 32; and see title LOCAL GOVERNMENT, Vol. XIX., pp. 262, 302, 329.

(*l*) Petroleum Act, 1871 (34 & 35 Vict. c. 105), s. 3.

(*m*) See p. 577, *post*.

(*n*) Petroleum Act, 1879 (42 & 43 Vict. c. 47), s. 2, overruling the decision in *Jones* v. *Cook* (1871), L. R. 6 Q. B. 505.

(*o*) Petroleum Act, 1871 (34 & 35 Vict. c. 105), s. 14.

the Petroleum Acts (*p*) have been applied to carbide of calcium (*q*) and to mixtures of petroleum (*r*).

SUB-SECT. 2.—*Petroleum in Harbours.*

Meaning of "harbour."

1158. The expression "harbour" (*s*) means any harbour properly so called, whether natural or artificial, and any port, haven, estuary, tidal river or other river, canal (*t*) or inland navigation navigated by sea-going ships (*u*), and any dock (*v*), pier, jetty, or other works in or at which ships do or can ship or unship goods (*a*) or passengers; and the expression "harbour authority" includes any persons or person being or claiming to be proprietors or proprietor of or entrusted with the duty or invested with the power of improving, maintaining, or managing any harbour (*b*).

Meaning of "harbour authority."

Notice to harbour authority of ship carrying petroleum.

1159. The owner or master of every ship (*c*) carrying a cargo any part of which consists of petroleum (*d*) must on entering a harbour give notice of the nature of such cargo to the harbour authority. If such notice is not given, the owner and master of the ship each incur a penalty not exceeding the sum of £500, unless it is shown to the satisfaction of the court that neither the owner nor the master knew the nature of the goods to which the proceedings

(*p*) See note (*f*), p. 570, *ante*.

(*q*) Order in Council, 8th August, 1911.

(*r*) Order in Council, 7th May, 1907. The Petroleum Acts (see note (*f*), p. 570, *ante*) generally apply to any mixture of petroleum with any other substance which, when tested, gives off an inflammable vapour at a temperature of less than 73° Fahr., whether such mixture be liquid, viscous, or solid, in the same manner as if such mixture were petroleum to which the Petroleum Acts apply (*ibid.*; see *London County Council* v. *Holzapfels Compositions Co.* (1899), 68 L. J. (Q. B.) 886). Wherever in the Petroleum Acts, or in any order, bye-laws, or licence issued thereunder, a quantity is specified in gallons or pints, such quantity must, in the case of a solid petroleum mixture, be read as though the weight of ten pounds were substituted for a gallon and of one pound for a pint (Order in Council, 7th May, 1907).

(*s*) For the purposes of the Petroleum Acts (see note (*f*), p. 570, *ante*). For other definitions of "harbour," see titles FACTORIES AND SHOPS, Vol. XIV., p. 484, note (*k*); SHIPPING AND NAVIGATION; WATERS AND WATERCOURSES.

(*t*) As to canals, see titles RAILWAYS AND CANALS, pp. 799 *et seq.*, *post*; WATERS AND WATERCOURSES.

(*u*) As to sea-going ships generally, and the duty of the master of the ship in respect of safety of the cargo and passengers, see title SHIPPING AND NAVIGATION.

(*v*) For definitions of "dock," compare titles FACTORIES AND SHOPS, Vol. XIV., pp. 483, note (*c*), 484 note (*i*); WATERS AND WATERCOURSES.

(*a*) For definitions of "wharf," compare titles FACTORIES AND SHOPS, Vol. XIV., p. 483, note (*d*); WATERS AND WATERCOURSES.

(*b*) Petroleum Act, 1871 (34 & 35 Vict. c. 105), s. 2. As to harbour authorities generally, see titles SHIPPING AND NAVIGATION; WATERS AND WATERCOURSES.

(*c*) "Ship" includes every description of vessel used in navigation, whether propelled by oars or otherwise (Petroleum Act, 1871 (34 & 35 Vict. c. 105), s. 2). For other definitions of "ships," compare titles EXPLOSIVES, Vol. XIV., p. 359; FACTORIES AND SHOPS, Vol. XIV., p. 484, note (*h*); FERRIES, Vol. XIV., p. 564; SHIPPING AND NAVIGATION.

(*d*) For definition of "petroleum," see p. 570, *ante*.

SECT. 11. **Petroleum and Certain Other Inflammable Substances.**

relate, nor could with reasonable diligence have obtained such knowledge (*e*).

Bye-laws as to ships carrying petroleum.

1160. Every harbour authority must frame and submit for confirmation to the Board of Trade bye-laws for regulating the place or places at which ships carrying petroleum are to be moored in the harbour and are to land their cargo, and for regulating the time and mode of, and the precautions to be taken on, such landing (*f*). The authority must publish the bye-laws so framed with a notice of their intention to apply for confirmation (*g*). The Board of Trade may confirm such bye-laws with or without any omission, addition, or alteration, or may disallow them (*g*). Confirmed bye-laws must be published by the authority in such manner as the Board directs, and may be altered or repealed by bye-laws made in like manner. The Board may itself make bye-laws in default of a harbour authority (*g*).

Penalty for breach of bye-laws.

1161. Where any ship or cargo is moored, landed, or otherwise dealt with in contravention of any bye-law, the owner and master of such ship, or the owner of such cargo, as the case may be, each incur a penalty not exceeding £50 for each day of contravention; and the harbour master or any other person acting under the orders of the harbour authority may cause such ship or cargo to be removed, at the owner's expense (*h*), to such place as may be in conformity with the bye-law (*g*).

SUB-SECT. 3.—*Transit and Storage.*

Label to be attached to vessels containing petroleum.

1162. Where any petroleum (*i*) is (1) kept at any place except during the seven days next after it has been imported, or (2) is sent or conveyed by land or water between any two places in the United Kingdom, or (3) is sold or exposed for sale (*k*), the vessel containing such petroleum must have attached thereto (*l*) a label in conspicuous characters, stating the description of the petroleum, with the addition of the words "highly inflammable," and with the addition,

(*e*) Petroleum Act, 1871 (34 & 35 Vict. c. 105), s. 5. This provision applies to mixtures of petroleum and to carbide of calcium. For form of notice, see Encyclopædia of Forms and Precedents, Vol. VI., p. 354. As to legal proceedings, see p. 580, *post*.

(*f*) The Board of Trade has framed a model code of such bye-laws; and see Encyclopædia of Forms and Precedents, Vol. VI., pp. 336—338. As to bye-laws generally, see pp. 388 *et seq.*, *ante*.

(*g*) Petroleum Act, 1871 (34 & 35 Vict. c. 105), s. 4.

(*h*) The expenses of removal are recoverable in the same manner as penalties (Petroleum Act, 1871 (34 & 35 Vict. c. 105), s. 4); see p. 580, *post*.

(*i*) For definition of "petroleum," see p. 570, *ante*. This provision, with a modification as to the words on the label, applies to mixtures of petroleum which must be labelled with the name of the mixture and the words "Petroleum mixture giving off an inflammable heavy vapour," and "Not to be exposed near a flame" (Order in Council, 7th May, 1907), and to carbide of calcium, which must be labelled "Carbide of calcium. Dangerous if not kept dry. The contents of this package are liable if brought into contact with moisture to give off a highly inflammable gas" (Order in Council, 8th August, 1911). In both cases the additional matter stated in the text, *infra*, must appear.

(*k*) As to the meaning of "exposed for sale," compare title FOOD AND DRUGS, Vol. XV., p. 57, note (*c*).

(*l*) Compare title FOOD AND DRUGS, Vol. XVI., p. 56, note (*b*).

in the case of (1) a vessel kept, of the name and address of the consignee or owner; (2) a vessel sent or conveyed, of the name and address of the sender; (3) a vessel sold or exposed for sale, of the name and address of the vendor (*m*).

All petroleum kept, sent, conveyed, sold, or exposed for sale in contravention of this requirement is liable, together with the vessel containing it, to be forfeited, and in addition the person keeping, sending, selling, or exposing for sale the same is, for each offence, liable to a penalty not exceeding £5 (*m*).

Penalty for offence.

1163. Petroleum, as a rule (*n*), must not be kept unless in pursuance of a licence from the local authority (*o*), and all petroleum kept in contravention of this provision, together with the vessel containing it, is liable to be forfeited, and the occupier of the place in which such petroleum is so kept is liable to a penalty not exceeding £20 a day (*p*).

Licence for storage of petroleum.

This provision does not apply to any petroleum kept either for private use or for sale, if it is kept in separate glass, earthenware, or metal vessels, each containing not more than a pint, and securely stopped, and the aggregate amount kept, supposing the whole contents of the vessels to be in bulk, does not exceed three gallons (*p*).

Petroleum which may be kept without a licence.

1164. The quantity of carbide of calcium which may be kept without a licence is (1) where the carbide is kept in separate hermetically-closed metal vessels containing not more than 1 lb. each, 5 lbs.; (2) where certain prescribed conditions (*q*) are observed, 28 lbs. (*r*); (3) where the carbide is kept by a general light-

Conditions of keeping carbide of calcium without licence.

(*m*) Petroleum Act, 1871 (34 & 35 Vict. c. 105), s. 6.

(*n*) For the exceptions to the rule, see the text, *infra*.

(*o*) As to the local authority, see p. 570, *ante*. As to licences, see pp. 574, 575, *post*.

(*p*) Petroleum Act, 1871 (34 & 35 Vict. c. 105), s. 7. A person licensed to keep petroleum may hawk it, and conditions in a licence inconsistent with the statutory provisions as to hawking are void; see pp. 575 *et seq.*, *post*. For a further exception in favour of petroleum kept for use in motor cars, see p. 574, *post*. The London County Council and City Corporation have further powers as to registration of petroleum oil depôts (London County Council (General Powers) Act, 1912 (2 & 3 Geo. 5, c. civ.), Part II. The Act relates to petroleum with a flash point between 73° and 150° (*ibid.*, s. 4).

(*q*) The conditions are as follows:—(1) The carbide must be kept only in a metal vessel or vessels hermetically closed at all times when the carbide is not actually being placed in or withdrawn from such vessel or vessels; (2) the vessels containing carbide must be kept in a dry and well-ventilated place; (3) due precautions must be taken to prevent unauthorised persons from having access to the carbide; (4) notice must be given of such keeping to the local authority, and free access must be afforded to its duly authorised inspector to inspect the portion of the premises where the carbide is kept and the generator is situated. Where a fixed generator is used on the premises (5) there must be exhibited near the generator a certificate signed by the maker or supplier of the generator that the generator complies with the regulations as to acetylene generators issued by the British Acetylene Association; (6) full and detailed instructions as to the care and use of the generator must be kept constantly posted up in such place as to be conveniently referred to by the generator attendant (Order in Council, 8th August, 1911).

(*r*) Order in Council, 8th August, 1911.

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house authority (*s*), such quantity as may be required for its purposes (*t*).

Conditions of keeping petroleum mixture without licence.

1165. The quantity of any petroleum mixture which may be kept without licence, and the conditions of such keeping, are as follows:—(1) Where it is sufficiently liquid to be measured by liquid measure, the quantity and the conditions of keeping are those specified for petroleum to which the Petroleum Acts (*u*) apply (*v*); (2) where it is solid or otherwise unsuitable to be measured by liquid measure, the quantity which may be kept without licence must not exceed 30 lbs., which may only be so kept if it is enclosed in hermetically-sealed packages or vessels containing each not more than 1 lb. (*w*).

Exemption of petrol for motor cars.

1166. Petroleum spirit for light locomotives, when kept or used in conformity with the regulations of the Secretary of State, or by authority of a Government department, is exempt from licence (*x*).

Execution and conditions of licences.

1167. Licences are valid if signed by two or more of the persons constituting the local authority (*a*), or executed in any other way in which other licences, if any, granted by such authority are executed; and they may be granted for a limited time and may be subject to renewal or not in such manner as the local authority thinks necessary (*b*). The local authority may charge for each licence a sum not exceeding 5*s*. (*b*). A licence may contain such conditions as to the mode of storage, the nature and situation of the premises

(*s*) As defined by the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60); see title SHIPPING AND NAVIGATION. In addition to the conditions mentioned in note (*q*), p. 573, *ante*, the lighthouse authority must keep the vessels containing the carbide in a dry and well-ventilated building, detached from a dwelling-house or separated therefrom by a substantial partition having no opening, and no artificial light capable of igniting inflammable vapour must be taken into the building (Order in Council, 8th August, 1911).

(*t*) *Ibid.*

(*u*) For a list of the Petroleum Acts, see note (*f*), p. 570, *ante*.

(*v*) See p. 573, *ante*.

(*w*) Order in Council, 7th May, 1907.

(*x*) Regulations, dated 31st July, 1907 (Stat. R. & O., 1907, p. 424), made under the Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36), s. 5. The regulations exempt petroleum spirit, kept in quantity not exceeding 60 gallons at one time and in a proper storehouse, for use in motor cars. But the regulations do not apply to petroleum spirit which is kept for sale, or partly for sale and partly for use on light locomotives (*ibid.*, regulation 2). A licence under the Petroleum Act, 1871 (34 & 35 Vict. c. 105), may be granted for a special reason to a person keeping petroleum spirit for the purposes of light locomotives (*ibid.*, regulation 3). It was held in *Godfrey* v. *Napier* (1901), 18 T. L. R. 31, that a licence under the Petroleum Act, 1871 (34 & 35 Vict. c. 105), is not required for petroleum kept and used in conformity with the regulations of the Secretary of State. For the Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36) and motor-car traffic, see title STREET AND AERIAL TRAFFIC.

(*a*) As to the local authority, see p. 570, *ante*. For form of licence, see Encyclopædia of Forms and Precedents, Vol. XI., p. 44.

(*b*) Petroleum Act, 1871 (34 & 35 Vict. c. 105), s. 9. The conditions of licence must not be inconsistent with the provisions as to hawking; see pp. 575 *et seq.*, *post*. For form of certificate of refusal, see Encyclopædia of Forms and Precedents, Vol. XI., p. 45.

in which and the nature of the goods with which petroleum is to be stored, the facilities for the testing of such petroleum from time to time, the mode of carrying such petroleum within the district of the licensing authority, and generally as to the safe keeping of such petroleum as may seem expedient to the local authority (*c*). Any licensee violating any of the conditions of his licence is deemed to be an unlicensed person (*c*).

Refusal or conditional grant of licence.

1168. If the local authority refuses a licence, or grants the same only on conditions with which the applicant is dissatisfied, it must, if he so requires, deliver to him in writing, under the hand or hands of one or more of the persons constituting the local authority, a certificate of the grounds on which it refused the licence or annexed conditions to its grant (*d*).

Appeal to Secretary of State.

The applicant within ten days from the delivery of the certificate may transmit it to a Secretary of State, together with a memorial, praying that the licence may be granted, or that the conditions may not be imposed or may be altered or modified in the manner set forth in the memorial (*d*).

Powers of Secretary of State.

The Secretary of State may, on consideration of such memorial and certificate, and, if he thinks it necessary or desirable, after due inquiry and a report by such person as he may appoint for that purpose, grant the licence, either absolutely or with such conditions as he thinks fit, or alter or modify the conditions imposed by the local authority; and such licence, when certified under the hand of a Secretary of State, is to all intents as valid as if granted by the local authority (*d*).

SUB-SECT. 4.—*Hawking* (*e*).

What constitutes hawking.

1169. A person is deemed to hawk petroleum if by himself or his servants he goes about carrying petroleum to sell, whether going from town to town or to other person's houses, or selling it in the streets of the place of his residence or otherwise, and whether with or without any horse or other beast bearing or drawing burden (*f*).

Power to hawk.

1170. Any person who is licensed to keep petroleum may, subject to the enactments in force with respect to hawkers and pedlars (*g*), hawk such petroleum by himself or his servants (*h*); but this

(*c*) Petroleum Act, 1871 (34 & 35 Vict. c. 105), s. 9.

(*d*) *Ibid.*, s. 10. For form of memorial, see Encyclopædia of Forms and Precedents, Vol. XI., p. 46.

(*e*) The provisions relating to hawking referred to in the text, *infra*, do not apply to carbide of calcium (Order in Council, 8th August, 1911). The effect is that carbide of calcium stands in the same position with respect to hawking as petroleum did before the passing of the Petroleum (Hawkers) Act, 1881 (44 & 45 Vict. c. 67); see note (*h*), *infra*.

(*f*) Petroleum (Hawkers) Act, 1881 (44 & 45 Vict. c. 67), s. 6; compare title MARKETS AND FAIRS, Vol. XX., pp. 55 *et seq.*; and see *ibid.*, note (*h*).

(*g*) See title MARKETS AND FAIRS, Vol. XX., pp. 55 *et seq.*

(*h*) Petroleum (Hawkers) Act, 1881 (44 & 45 Vict. c. 67), s. 1. Before the passing of this Act a person, licensed to keep petroleum upon certain premises and under certain conditions, who hawked it in a cart was convicted of unlawfully keeping petroleum not in pursuance of a licence

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provision does not authorise the hawking of petroleum within the limits of any municipal borough in which, by any lawful authority, such hawking has been forbidden (*i*).

"Petroleum" for the purpose of hawking.

1171. Any petroleum other than that to which the Petroleum Acts (*k*) apply (*l*), while in any carriage (*m*) used for the hawking of petroleum to which the Acts apply, is, for the purposes of the provisions relating to hawking (*n*), to be deemed to be petroleum to which the Acts apply (*o*).

Modification of conditions of licence.

1172. Any conditions annexed to a licence (*p*), so far as they are inconsistent with the provisions relating to hawking (*q*), are void, but otherwise nothing in the conditions affects the application to a licensee of the Petroleum Acts (*r*), or of any licence granted thereunder (*s*).

Regulations.

1173. With respect to the hawking of petroleum, the following regulations (*t*) must be observed:—(1) The amount of petroleum conveyed at one time in any one carriage (*m*) must not exceed 20 gallons; (2) the petroleum must be conveyed in a closed vessel so constructed as to be free from leakage; (3) the carriage must be so ventilated as to prevent any evaporation from the petroleum mixing with the air in or about the carriage in such proportion as to produce, or be liable to produce, an explosive mixture; (4) any fire or light, or any article of an explosive or highly inflammable nature, must not be brought into or dangerously near to the carriage in which the vessels containing the petroleum are conveyed; (5) the carriage must be so constructed or fitted that the petroleum cannot escape therefrom in the form of liquid, whether ignited or otherwise; (6) proper care

(*Coleman* v *Goldsmith* (1879), 43 J. P. 718). The Hawkers Act, 1888 (51 & 52 Vict. c. 33), applies to the hawking of petroleum, and a licence under *ibid.*, s. 6, is necessary. A shopkeeper who took casks of petroleum in a cart to customers on certain days, without knowing beforehand what quantity (if any) each might require, was held to be a hawker for whom a licence was necessary (*O'Dea* v. *Crowhurst* (1899), 68 L. J. (Q. B.), 655); see *Holland* v. *Hall* (1902), 86 L. T. 355; and see titles MARKETS AND FAIRS, Vol. XX., pp. 55 *et seq.*; REVENUE.

(*i*) Petroleum (Hawkers) Act, 1881 (44 & 45 Vict. c. 67), s. 5.

(*k*) For a list of the Petroleum Acts, see note (*f*), p. 570, *ante*.

(*l*) As to such petroleum, see p. 570, *ante*.

(*m*) The expression "carriage" includes any carriage, waggon, cart, truck, vehicle, or other means of conveyance by land, in whatever manner the same may be drawn or propelled (Petroleum (Hawkers) Act, 1881 (44 & 45 Vict. c. 67), s. 6).

(*n*) As to such provisions, see the text, *supra*, and the text, *infra*.

(*o*) Petroleum (Hawkers) Act, 1881 (44 & 45 Vict. c. 67), s. 2. The effect is that while in the carriage the other petroleum is subject to the regulations applicable, and, if the Petroleum (Hawkers) Act, 1881 (44 & 45 Vict. c. 67), s. 2, is contravened, is liable to forfeiture. As to forfeiture, see p. 577, *post*.

(*p*) As to petroleum licences, see pp. 574, 575, *ante*.

(*q*) The words are "inconsistent with this Act," that is, the Petroleum (Hawkers) Act, 1881 (44 & 45 Vict. c. 67).

(*r*) For a list of the Petroleum Acts, see note (*f*), p. 570, *ante*.

(*s*) Petroleum (Hawkers) Act, 1881 (44 & 45 Vict. c. 67), s. 3.

(*t*) *Ibid.*, s. 2.

must be taken to prevent any petroleum escaping into any part of a house or building, or of the curtilage thereof, or into a drain or sewer; (7) the petroleum must be stored in some premises licensed for keeping of petroleum and in accordance with the licence (*a*) for such premises, both every night and also when the petroleum is not in the course of being hawked; (8) all due precautions must be taken for the prevention of accidents by fire or explosion, and for preventing unauthorised persons having access to the vessels containing the petroleum, and every person concerned in hawking the petroleum must abstain from any act whatever which tends to cause fire or explosion, and is not reasonably necessary for the purpose of such hawking; (9) no article or substance of an explosive or inflammable character other than petroleum, nor any article liable to cause or communicate fire or explosion, must be in the carriage while such carriage is being used for the purpose of hawking petroleum (*b*).

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In the event of any contravention of these provisions with reference to any petroleum, the petroleum, together with the vessels containing and the carriage conveying it, are liable to be forfeited, and, in addition thereto, the licensee by whom or by whose servants the petroleum was being hawked is liable on summary conviction (*c*) to a penalty not exceeding £20 (*b*).

Penalty and forfeiture for offence.

But where a servant of the licensee or other person has in fact committed the offence, he is liable to the same penalty as if he were the licensee; and where the licensee is charged with an offence, he is entitled upon information duly laid by him to have any other person whom he charges as the actual offender brought before the court, and if he proves to the satisfaction of the court that he had used due diligence to enforce the provisions, and that the other person had committed the offence in question without his knowledge, consent, or connivance, the other person must be summarily convicted of such offence, and the licensee exempt from any penalty (*b*).

Exemption of licensee on conviction of third party.

SUB-SECT. 5.—*Sampling, Testing, and Seizure.*

1174. Any officer authorised by the local authority (*d*) may purchase any petroleum from a dealer, or may, on producing a copy of his appointment, purporting to be certified by the clerk or some member of the local authority, or producing some other sufficient authority, require the dealer to show him all places, and all vessels in which any petroleum in his possession is kept, and to give him samples of such petroleum on payment of their value (*e*). When the officer has taken samples of petroleum, he may declare in writing to the dealer that he is about to test them, or cause them to be tested (*f*), and may do so at any convenient place at such reasonable

Sampling and testing.

(*a*) As to such licences, see p. 574, *ante*.
(*b*) Petroleum (Hawkers) Act, 1881 (44 & 45 Vict. c. 6), s. 2.
(*c*) As to proceedings before courts of summary jurisdiction, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*
(*d*) As to the local authority, see p. 570, *ante*.
(*e*) Petroleum Act, 1871 (34 & 35 Vict. c. 105), s. 11.
(*f*) A specification of the test apparatus, giving a full technical description of its details, is contained in the Petroleum Act, 1879 (42 & 43 Vict.

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time as he may appoint, and the dealer or any person appointed by him may be present at the testing (*g*). If it appears to the officer or other person so testing that the petroleum from which such samples have been taken is petroleum to which the Petroleum Acts (*h*) apply (*i*), such officer or other person may certify such fact, and the certificate so given is receivable as evidence in any proceedings (*k*) that may be taken against a dealer in petroleum (*l*). A dealer proceeded against may, however, give evidence in proof that such certificate is incorrect, and thereupon the court may appoint a person skilled in testing petroleum to examine the samples to which such certificate relates, and to declare whether it is correct or incorrect (*l*).

Expenses of testing.

Any expenses incurred in testing any petroleum of such dealer under these provisions, on the conviction of the dealer, are deemed to be a portion of the costs of the proceedings against him, and must be paid by him accordingly; in any other event such expenses are paid by the local authority (*l*).

Refusal of information and obstruction of officer.

1175. Any dealer who refuses to show to any officer authorised by the local authority any place or any of the vessels in which petroleum in his possession is kept, or to give him such assistance as he may

c. 47), Sched. I. A modified form of apparatus is prescribed for testing some kinds of mixtures of petroleum; see note (*i*), *infra*. The fee for verification is such fee, not exceeding 5*s*., as the Board of Trade from time to time prescribes, such fees being paid into the Exchequer; the verification mark is to be approved by the Board of Trade and notified in the *London Gazette* (Petroleum Act, 1879 (42 & 43 Vict. c. 47), s. 3). The Order of the Board of Trade dated 1st January, 1880 (Stat. R. & O. Rev., Vol. X., Petroleum, p. 1), prescribed a fee of 5*s*., and its notice of the same date (*ibid.*) approved a mark. A model of the apparatus for testing petroleum is deposited at the Weights and Measures Department of the Board of Trade (see title WEIGHTS AND MEASURES), which will, on payment of a fee of 5*s*., cause to be compared with such model and verified any apparatus constructed in accordance with the statutory provisions which is submitted for the purpose, and, if it is found correct, will stamp it with the approved mark. An apparatus for testing petroleum purporting to be stamped with such mark is, until the contrary is proved, to be deemed to have been verified by the Board (Petroleum Act, 1879 (42 & 43 Vict. c. 47), s. 3).

(*g*) Petroleum Act, 1891 (34 & 35 Vict. c. 105), s. 11.

(*h*) For a list of the Petroleum Acts, see note (*f*), p. 570, *ante*.

(*i*) See p. 570, *ante*. The provisions as to testing do not apply at all to carbide of calcium (Order in Council, 8th August, 1911, and, as regards petroleum mixtures, are modified in respect to (1) liquid mixtures; (2) viscous and sedimentary mixtures; and (3) solid mixtures. For viscous and some kinds of sedimentary mixtures a modified form of apparatus with a stirrer is prescribed, a model of which is deposited with the Board of Trade (Order in Council, 7th May, 1907). The Petroleum Act, 1879 (42 & 43 Vict. c. 47), s. 3, in regard to verification and stamping (see note (*f*), p. 577, *ante*), is applied to such modified apparatus; see Petroleum Act, 1879 (42 & 43 Vict. c. 47), Sched.

(*k*) It is a question of fact for the justices to decide whether in the testing by the officer the statute has been sufficiently complied with (*Beck* v. *Stringer* (1871), L. R. 6 Q. B. 497). As to procedure before courts of summary jurisdiction, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*; compare pp. 367 *et seq.*, *ante*, and see p. 580, *post*.

(*l*) Petroleum Act, 1871 (34 & 35 Vict. c. 105), s. 11.

require for examining them, or to give to such officer samples of such petroleum on payment of the value, or who wilfully obstructs the local authority, or any officer of the local authority, incurs a penalty not exceeding £20 (*m*).

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1176. A court of summary jurisdiction on being satisfied by information on oath that any petroleum is being unlawfully kept, sent, conveyed, or exposed for sale within its jurisdiction at any place, whether a building or not, or in any ship (*n*) or vehicle, must grant a warrant empowering a person therein named to enter the place, ship, or vehicle, and every part thereof, and examine it and search for, and take samples of, any petroleum therein, and if any petroleum be found therein, which is unlawfully kept, sent, conveyed, or exposed for sale, to seize and remove and detain such petroleum, and the vessel containing it, until a court of summary jurisdiction has determined whether they are forfeited or not, and the proceedings for such forfeiture must be commenced forthwith (*o*) after the seizure (*p*). Any person so seizing (*q*) any petroleum is not liable to any suit for detaining it, or for any loss or damage, otherwise than by any wilful act or neglect during such detention (*p*).

Search for and seizure of petroleum.

Any person who, by himself or by anyone in his employ or acting by his direction or with his consent, refuses or fails to admit into any place occupied by or under his control any person demanding entrance in pursuance of the above-mentioned powers, or in any way obstructs or prevents any person in or from making any such search, examination, or seizure, or taking any samples, is liable to a penalty not exceeding £20, and to forfeiture of all petroleum to which the Petroleum Acts (*r*) apply which is found in his possession or under his control (*a*).

Offences.

1177. Where a constable or any officer authorised by the local authority (*b*) has reasonable cause to believe that a contravention of the provisions as to hawking (*c*) is being committed in relation to any petroleum, he may seize and detain such petroleum and the vessels and carriage containing it, until a court of summary jurisdiction has determined whether there was or was not such a contravention, and the provisions above mentioned relating to the search for and seizure of petroleum (*d*) apply to such constable and officer as

Seizure and detention of hawked petroleum.

(*m*) Petroleum Act, 1871 (34 & 35 Vict. c. 105), s. 12. As to legal proceedings, see p. 580, *post*.

(*n*) For definition, see note (*c*), p. 571, *ante*.

(*o*) That is, within a reasonable time (*Thomas* v. *Nokes* (1868), L. R. 6 Eq. 521; *Thomas* v. *Nokes* (1894), 58 J. P. 672).

(*p*) Petroleum Act, 1871 (34 & 35 Vict. c. 105), s. 13.

(*q*) The person exercising the power of seizure may, during twenty-four hours thereafter, use the ship or vehicle, with its tackle, beasts and accoutrements, for the purpose of removing the petroleum seized, on payment of compensation, the amount of which, in case of dispute, is settled by the court before whom the forfeiture proceedings are taken (*ibid.*).

(*r*) For a list of the Petroleum Acts, see note (*f*), p. 570, *ante*.

(*a*) Petroleum Act, 1871 (34 & 35 Vict. c. 105), s. 13. As to legal proceedings, see p. 580, *post*.

(*b*) As to the local authority, see p. 570, *ante*. As to the general powers of constables, see title POLICE, Vol. XXII., pp. 497 *et seq.*

(*c*) For the provisions as to hawking, see pp. 575 *et seq.*, *ante*.

(*d*) The words are "and section 13 of the Petroleum Act, 1871," (34 & 35 Vict. c. 105); and see the text and note (*q*), *supra*.

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if he were the person named in the warrant mentioned therein, and as if the seizure were a seizure in pursuance of these provisions (*e*).

SUB-SECT. 6.—*Proceedings against Offenders.*

Summary proceedings for offences, penalties etc.

1178. All offences and penalties, and all money and costs directed to be recovered as penalties (*f*), may be prosecuted and recovered in manner provided by the Summary Jurisdiction Acts (*g*). A court of summary jurisdiction must not impose a penalty exceeding £50, but it may impose that or any less penalty for any one offence, notwithstanding the offence involves a penalty of higher amount (*h*). No conviction or order may be quashed for want of form, or removed by *certiorari* or otherwise, either at the instance of the Crown or of any private party, into any superior court (*i*).

SECT. 12.—*Pleasure Boats.*

Licences of boats and boatmen.

1179. An urban authority, or a rural authority invested with urban powers in that behalf (*k*), may license the proprietors of pleasure boats and vessels (hereinafter referred to as "pleasure boats"), and the boatmen or other persons in charge thereof (hereinafter referred to as "boatmen"), and may make bye-laws as to the numbering and naming of boats, the number of persons to be carried, the mooring places, rates of hire, and the qualification and conduct of boatmen (*l*).

Extended powers as to licences.

1180. A local authority, where the enactment is in force (*m*), has extended powers as to licensing pleasure boats.

(*e*) Petroleum (Hawkers) Act, 1881 (44 & 45 Vict. c. 67), s. 4.

(*f*) The compensation referred to in note (*g*), p. 579, *ante*, may be recovered in the same way as penalties (Petroleum Act, 1871 (34 & 35 Vict. c. 105), s. 13).

(*g*) See title MAGISTRATES, Vol. XIX., pp. 589 *et seq.* The court of summary jurisdiction, when hearing and determining an information or complaint, is constituted either of two or more justices in petty sessions sitting at a place appointed for holding petty sessions, or of one of the following magistrates sitting alone or with others at some court or other place appointed for the administration of justice: namely, the Lord Mayor, or any alderman of the City of London, a metropolitan police magistrate, a stipendiary magistrate, or some other officer or officers for the time being empowered by law to do alone or with others any act authorised to be done by more than one justice of the peace (Petroleum Act, 1871 (34 & 35 Vict. c. 105), s. 15); and see title MAGISTRATES, Vol. XIX., pp. 565, 567; compare pp. 367 *et seq.*, *ante*.

(*h*) A penalty exceeding £50 would be recoverable by indictment; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 329 *et seq.* As to the exemption of a licensee charged with a contravention of the provisions as to hawking, where the actual offender is convicted, see p. 577, *ante*.

(*i*) Petroleum Act, 1871 (34 & 35 Vict. c. 105), s. 15. As to *certiorari*, generally, see title CROWN PRACTICE, Vol. X., pp. 171, 172.

(*k*) As to the investing of a rural authority with urban powers, see title LOCAL GOVERNMENT, Vol. XIX., p. 332.

(*l*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 172. There are no means under this enactment of compelling such proprietors to take out a licence; and a bye-law to that effect is *ultra vires* (*Byrne* v. *Brown* (1893), 57 J. P. 741). Model bye-laws under this provision have been issued by the Local Government Board. As to the making and confirmation of bye-laws, generally, see pp. 388 *et seq.*, *ante*.

(*m*) *I.e.*, where the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 94, is in force; see pp. 364, 365, *ante*. For forms of licence, see Encyclopædia of Forms and Precedents, Vol. XI., pp. 6, 8.

SECT. 12. Pleasure Boats.

It may grant for any period, upon terms and conditions, licences for boats used for hire and to the boatmen, at an annual fee not exceeding 5*s.* for a pleasure boat and not exceeding 1*s.* for a boatman; and has power to suspend or revoke any licence, provided that the power is plainly set forth in the licence (*n*). Such a licence is not necessary for any boat or vessel duly licensed under any regulation of the Board of Trade (*o*); but, where the enactment is in force (*p*), a pleasure boat may not be used for hire while it remains unlicensed by the local authority, or during the suspension of its licence (*q*). A greater number of passengers for hire than is specified in the licence must not be carried by a pleasure boat, and the name of the owner and the words "Licensed to carry —— persons" must be painted on the pleasure boat (*r*). Offences are punishable by a penalty not exceeding 40*s.* (*s*).

Appeal against refusal, suspension, or revocation of licence.

Any person aggrieved by the withholding, suspension, or revocation of a licence under the above provision may, upon giving twenty-four hours' written notice to the clerk, appeal to a petty sessional court (*a*), held two clear days after such withholding, suspension, or revocation; and the court may make an order as it sees fit, and may award costs, which are recoverable summarily as a civil debt (*b*).

SECT. 13.—*Public Libraries, Museums, Gymnasiums etc.*

SUB-SECT. 1.—*In General* (*c*).

General power of local authorities as to provision of institutions.

1181. The powers of local authorities to provide and maintain public libraries, public museums and gymnasiums, schools for science, and art galleries and schools for art, are mainly contained in the Public Libraries Acts, 1892 to 1901 (*d*), in this section of the title frequently referred to collectively as "the Public Libraries Acts."

(*n*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 94 (1), (2).

(*o*) *Ibid.*, s. 94 (4). As to vessels licensed by the Board of Trade, see title SHIPPING AND NAVIGATION.

(*p*) See note (*m*), p. 580, *ante*.

(*q*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 94 (3).

(*r*) *Ibid.*, s. 94 (5).

(*s*) *Ibid.*, s. 94 (6). As to legal proceedings, see pp. 367 *et seq.*, *ante*.

(*a*) See title MAGISTRATES, Vol. XIX., p. 565.

(*b*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 94 (7); and see title MAGISTRATES, Vol. XIX., p. 609.

(*c*) As to literary and scientific institutions provided under the Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112), see title LITERARY AND SCIENTIFIC INSTITUTIONS, Vol. XIX., pp. 195 *et seq.* As to the British Museum and National Gallery, see *ibid.*, pp. 210—215.

(*d*) These Acts are the Public Libraries Act, 1892 (55 & 56 Vict. c. 53), the Public Libraries (Amendment) Act, 1893 (56 & 57 Vict. c. 11), and the Public Libraries Act, 1901 (1 Edw. 7, c. 19), and are to be construed together (Public Libraries Act, 1901 (1 Edw. 7, c. 19), s. 1). Certain additional powers as to museums are contained in the Museums and Gymnasiums Act, 1891 (54 & 55 Vict. c. 22), which also confers powers as to the provision and maintenance of gymnasiums; see p. 588, *post*. The Schools for Science and Art Act, 1891 (54 & 55 Vict. c. 61), facilitates the transfer of schools for science and art to local education authorities; see title EDUCATION, Vol. XII., p. 24. The Technical and Industrial Institutions Act, 1892 (55 & 56 Vict. c. 29), facilitates the acquisition of land by institutions for promoting technical and industrial instruction and training; see title EDUCATION, Vol. XII., p. 121; and see p. 588, *post*. The Libraries Offences Act, 1898 (61 & 62 Vict. c. 53) (see p. 591, *post*), provides for the summary punishment of offences in libraries and reading rooms. In addition to

SECT. 13. **Public Libraries, Museums, Gymnasiums etc.**

Library districts.

Adoption of Acts.

1182. The Public Libraries Acts (*e*) are only applicable in places where the Public Libraries Act, 1892 (*f*), has been adopted (*g*), and for the purposes of such adoption, and of such application generally where adoption has taken place, every urban district (*h*) and every rural parish (*i*) is a library district (*k*). The City of London is a library district (*l*), as is each of the metropolitan boroughs (*m*). The Public Libraries Act, 1892 (*f*), must be adopted for an entire district or parish; it cannot be adopted for part of a district or part of a parish (*n*).

Adoption of Museums and Gymnasiums Act.

1183. The Museums and Gymnasiums Act, 1891 (*o*), may be adopted for the City of London, any metropolitan (*p*) or other borough, and any urban district by their respective councils (*q*). The adoption may embrace the whole Act, or may be confined either to those parts of it which relate to museums or to those which relate to gymnasiums (*q*).

SUB-SECT. 2.—*Method of Adoption of Acts.*

Adoption of Public Libraries Act, 1892.

1184. In municipal boroughs and other urban districts the adoption of the Public Libraries Act, 1892 (*f*), is effected by a resolution of the urban authority, namely, the town council (*r*), or the urban district council (*a*); in the City of London by a resolution

these general Acts, many towns and districts have obtained special powers as to libraries, museums, and gymnasiums under local Acts, which must be referred to in considering any question that may arise in relation to these matters in such a place, and particularly in regard to the limitation of the charge upon the rates, as to which see p. 593, *post*.

(*e*) See note (*d*), p. 581, *ante*.

(*f*) 55 & 56 Vict. c. 53.

(*g*) See title LOCAL GOVERNMENT, Vol. XIX., pp. 257, 267. The Public Libraries Act, 1892 (55 & 56 Vict. c. 53), repealed a number of earlier Public Libraries Acts, but provided that, where those Acts had been adopted for any library district, such adoption should be deemed to be an adoption of the Public Libraries Act, 1892 (55 & 56 Vict. c. 53) (*ibid.*, s. 28).

(*h*) By "urban district" is meant any municipal borough, including a county borough, and any urban district, as defined by the Local Government Act, 1894, which is not a borough (Public Libraries Act, 1892 (55 & 56 Vict. c. 53), s. 27, as amended by the Local Government Act, 1894 (56 & 57 Vict. c. 73)); and see title LOCAL GOVERNMENT, Vol. XIX., p. 262.

(*i*) A parish is a place for which a separate poor rate is or can be made, or for which a separate overseer is or can be appointed (Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 5); see title LOCAL GOVERNMENT, Vol. XIX., p. 236. An urban parish cannot of itself be a library district.

(*k*) Public Libraries Act, 1892 (55 & 56 Vict. c. 53), s. 1.

(*l*) *Ibid.*, s. 21 (1).

(*m*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 4 (4); see also title METROPOLIS, Vol. XX., p. 405. Generally, the provisions of the London Government Act, 1899 (62 & 63 Vict. c. 14), ss. 4, 31, 34, and of the London (Adoptive Acts) Scheme, 1900 (see pp. 487, 488, *ante*), apply where the Public Libraries Act, 1892 (55 & 56 Vict. c. 53), was adopted before the appointed day.

(*n*) As to the combination of areas, see pp. 584, 589, *post*.

(*o*) 54 & 55 Vict. c. 22.

(*p*) Public Libraries Act, 1901 (1 Edw. 7, c. 19), s. 13.

(*q*) Museums and Gymnasiums Act, 1891 (54 & 55 Vict. c. 22), s. 3.

(*r*) *Ibid.*; Public Libraries (Amendment) Act, 1893 (56 & 57 Vict. c. 11), s. 2; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 6.

(*a*) Museums and Gymnasiums Act, 1891 (54 & 55 Vict. c. 22), s. 6; Public Libraries (Amendment) Act, 1893 (56 & 57 Vict. c. 11), s. 2.

of the Common Council (*b*); in a metropolitan borough by a resolution of the borough council (*b*); in a rural parish, whether having a parish council or not, by a resolution of the parish meeting (*c*).

Adopting resolution.

1185. In the cases of municipal boroughs, urban districts, the City of London, and metropolitan boroughs, the adopting resolution must be passed at a meeting of the council, and one month at least before the meeting special notice thereof and of the intention to propose the resolution must be given to every member of the council (*d*). The resolution should state the date upon which it is to have effect (*e*), and must be published by advertisement in local newspapers and otherwise as prescribed (*f*); and a copy of the resolution must be sent to the Local Government Board (*g*).

Rural parishes.

In the case of a rural parish, the resolution of adoption must be passed by the parish meeting in the manner prescribed by the Local Government Act, 1894 (*h*), and a poll (*i*) taken if one is demanded by any parochial elector present at the meeting (*k*). If a poll is taken a simple majority of those voting is sufficient (*k*). If the resolution is negatived at the meeting and no poll is demanded, or if it is negatived by the result of the poll, no further proceeding may be taken for ascertaining the opinion of the electors until the expiration of one year at least from the day when the opinion was last ascertained (*l*).

Notice of adoption.

In all cases, notice of adoption must forthwith be given by the library authority (*m*) to the Local Government Board (*n*).

Adoption of Museums and Gymnasiums Act, 1891.

1186. The adoption of the Museums and Gymnasiums Act, 1891 (*o*), is effected in the same way and by the same formalities and procedure as the adoption of the Public Libraries Act, 1892 (*p*), in an urban library district (*q*).

(*b*) Public Libraries (Amendment) Act, 1893 (56 & 57 Vict. c. 11), s. 2; Public Libraries Act, 1901 (1 Edw. 7, c. 19), s. 13.

(*c*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 7 (1). This Act repeals (see *ibid.*, s. 89, Sched. II.) the provisions of the Public Libraries Act, 1892 (55 & 56 Vict. c. 53), s. 3, as to the method of taking the opinion of the voters. As to the adoption of the Museums and Gymnasiums Act, 1891 (54 & 55 Vict. c. 22), see the text, *infra*.

(*d*) A notice is duly given if given in the mode in which notices to attend meetings of the council are usually given, and, if there is no such mode, if signed by the clerk and delivered to the member or left at his usual or last known place of abode in England, or forwarded by post in a prepaid letter addressed to him at such abode (Public Libraries (Amendment) Act, 1893 (56 & 57 Vict. c. 11), s. 3 (1)). As to the proceedings at the meetings of the authorities referred to in the text, *supra*, see titles LOCAL GOVERNMENT, Vol. XIX., pp. 278 *et seq.*, 314 *et seq.*; METROPOLIS, Vol. XX., pp. 427, 434 *et seq.*

(*e*) Public Libraries (Amendment) Act, 1893 (56 & 57 Vict. c. 11), s. 3 (2).

(*f*) For the method of publication, see *ibid.*

(*g*) *Ibid.*, s. 3 (3). As to the conclusiveness of the resolution, see *ibid.* s. 3 (4).

(*h*) 56 & 57 Vict. c. 73; see title LOCAL GOVERNMENT, Vol. XIX., p. 254.

(*i*) See title LOCAL GOVERNMENT, Vol. XIX., p. 260.

(*k*) Public Libraries Act, 1892 (55 & 56 Vict. c. 53), s. 3 (4).

(*l*) *Ibid.*, s. 3 (5).

(*m*) See p. 584, *post*.

(*n*) Public Libraries Act, 1901 (1 Edw. 7, c. 19), s. 8.

(*o*) 54 & 55 Vict. c. 22.

(*p*) 55 & 56 Vict. c. 53.

(*q*) Museums and Gymnasiums Act, 1891 (54 & 55 Vict. c. 22), s. 3, (2) (5); and see p. 582, *ante*.

SECT. 13. **Public Libraries, Museums, Gymnasiums etc.**

SUB-SECT. 3.—*Combination of Authorities.*

Annexation of parishes to library district.

1187. Where the Public Libraries Act, 1892 (*r*), has been or is about to be adopted in any library district, neighbouring parishes may be annexed (*s*) to the district and form part of it for the purpose of the Public Libraries Act (*t*). For such annexation the consent of the voters (*u*) in the parish to be annexed, and the consent of the library authority of the annexing district, are necessary (*a*).

Agreements between neighbouring parishes as to execution of adopted Acts.

1188. Where neighbouring parishes have adopted the Public Libraries Act, 1892 (*b*), their several councils or, where there are no parish councils, parish meetings, as the case may be (*c*), may agree to combine for a period for carrying the Public Libraries Acts (*d*) into effect, and may make agreements as to the proportion of the expenses of their execution which is to be borne by each of them (*e*). They may also agree that on the termination of an agreement an adjustment shall be made, and as to the mode of adjustment; and if a dispute arises the adjustment must, on the application of one of the parties, be made by an arbitrator appointed by the Local Government Board (*f*).

Agreements between urban districts.

Where for two or more neighbouring urban districts the Public Libraries Act, 1892 (*b*), is adopted, the library authorities (*g*) may agree to combine for any period to execute the Public Libraries Acts (*d*) and to defray the expenses in agreed proportions. The authorities may appoint a joint committee, who will have all the powers of a library authority except power to borrow (*g*).

SUB-SECT. 4.—*Powers and Duties of Library Authorities.*

Meaning of "library authority."

1189. When the Public Libraries Acts (*d*) are adopted in any district, their execution is entrusted to the "library authority" (*h*). The library authorities are:—in an urban district and in a borough, the "urban authority," that is to say, either the urban district council or the mayor, aldermen, and burgesses of the borough acting by the council (*i*); in cases where a parish has been, for the purposes of

(*r*) 55 & 56 Vict. c. 53.

(*s*) *Ibid.*, s. 10.

(*t*) See note (*d*), p. 581, *ante*.

(*u*) For the meaning of "voter," see note (*k*), p. 585, *post*.

(*a*) Public Libraries Act, 1892 (55 & 56 Vict. c. 53), s. 10. In a library district which has not adopted, but is only contemplating the act of adoption, there is no "library authority." The consent of the council, which would be the "library authority" if the contemplation resulted in adoption, would probably be held sufficient.

(*b*) 55 & 56 Vict. c. 53.

(*c*) As to what parishes have councils, and what parishes have meetings, see title LOCAL GOVERNMENT, Vol. XIX., p. 239. The power to combine is given by the Public Libraries Act, 1892 (55 & 56 Vict. c. 53), s. 9.

(*d*) For a list of the Public Libraries Acts, see note (*d*), p. 581, *ante*.

(*e*) The consent of the parish meeting would in every case be necessary in respect of the expenses (Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 7 (3)). As to the execution of documents by parish councils and parish meetings, see *ibid.*, ss. 3 (9), 19 (11); title LOCAL GOVERNMENT, Vol. XIX., pp. 241, 256. Separate rates would be raised in the combining parishes.

(*f*) Public Libraries Act, 1892 (55 & 56 Vict. c. 53), s. 24. As to agreements to share expenses, see p. 589, *post*.

(*g*) Public Libraries (Amendment) Act, 1893 (56 & 57 Vict. c. 11), s. 4. As to "library authorities," see the text, *infra*.

(*h*) Public Libraries Act, 1892 (55 & 56 Vict. c. 53), s. 4.

(*i*) *Ibid.*; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 6. In urban

the Public Libraries Acts (*j*), annexed to an urban district, the council of that parish if it has a council, or the parish meeting, if the parish has no council, must appoint not more than six commissioners, who, with the council of the urban district or borough, form the library authority of the parish and district taken together (*k*); in single rural parishes, the parish council (*l*), or, if there is no parish council, a body of not more than nine commissioners (*m*) appointed by the parish meeting (*n*); in combined rural parishes with parish councils, a joint committee of the councils (*o*); in combined rural parishes without parish councils, the commissioners appointed by the combining parishes, who form a single body (*p*); in metropolitan boroughs, the borough council (*q*); and in the City of London, the Common Council (*r*).

districts the urban authority is the authority to carry out the Museums and Gymnasiums Act, 1891 (54 & 55 Vict. c. 22); see *ibid.*, s. 4.

(*j*) See note (*d*), p. 581, *ante*.

(*k*) Public Libraries Act, 1892 (55 & 56 Vict. c. 53), s. 10; Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 7 (5), (7). The law on this matter is clear where there is a parish council in the annexed parish. Where there is not one it is assumed that the parish meeting would, under *ibid.*, s. 7 (1), have the power and duty of appointing the commissioners to sit and act as members of the joint library authority. The commissioners appointed by parish meetings must, when appointed, divide themselves into three classes. Of these one-third retire yearly, and their places are filled by other persons chosen by the parish council or, if there be no parish council, by the parish meeting (*ibid.*, s. 6 (2); varied by the Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 6 (1), 19 (4)). Commissioners must be voters (*i.e.*, parochial electors) Public Libraries Act, 1901 (1 Edw. 7, c. 19), s. 9; see titles ELECTIONS, Vol. XII., p. 191; LOCAL GOVERNMENT, Vol. XIX., p. 242) in the district, or persons who, though not voters, would, if the district were a rural parish having a parish council, be qualified for election as parish councillors (see title LOCAL GOVERNMENT, Vol. XIX., p. 241), and, as long as they are so, may, when they retire, be elected afresh (Public Libraries Act, 1892 (55 & 56 Vict. c. 53), ss. 5 (1), 6 (3); Public Libraries Act, 1901 (1 Edw. 7, c. 19), s. 2 (1)). As to disqualification for election, see *ibid.*, s. 2 (3); title LOCAL GOVERNMENT, Vol. XIX., pp. 264, 265. Casual vacancies are filled by appointment by the parish council or parish meeting; but persons appointed to fill casual vacancies only sit so long as those whom they replace, would have sat (Public Libraries Act, 1892 (55 & 56 Vict. c. 53), s. 6 (4)). The commissioners meet at least once a month; but they may be summoned to a special meeting by any commissioner who gives to all the others three clear days' notice specifying the purpose of the special meeting. The quorum is two (*ibid.*, s. 7). All proceedings and orders of the commissioners must be entered in books kept for the purposes and signed by at least two commissioners. Proceedings and orders so signed may be produced and read as evidence of their contents in any judicial proceeding (*ibid.*, s. 8).

(*l*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 7 (7).

(*m*) As to the commissioners, see note (*k*), *supra*.

(*n*) Public Libraries Act, 1892 (55 & 56 Vict. c. 53), s. 5; varied by Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 19 (4).

(*o*) Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 7 (5), (7), 57. Where not all the parishes have councils, the parish meeting of a parish without a council might have conferred upon it the power of a council to appoint members of a joint committee (*ibid.*, s. 19 (10)); see title LOCAL GOVERNMENT, Vol. XIX., pp. 246, 258.

(*p*) Public Libraries Act, 1892 (55 & 56 Vict. c. 53), s. 9 (2). More than six commissioners may not be appointed by each parish (*ibid.*).

(*q*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 4 (2).

(*r*) Public Libraries Act, 1892 (55 & 56 Vict. c. 53), s. 21.

SECT. 13. **Public Libraries, Museums, Gymnasiums etc.**

Constitution of commissioners.

1190. For the purposes of acquiring and holding property as, and carrying out the duties of, a library authority, the commissioners appointed by a parish meeting are constituted bodies corporate by the name of the "Commissioners for Public Libraries and Museums for the parish of —," with perpetual succession and a common seal, and with power to acquire and hold lands for the purposes of the Public Libraries Acts (*s*) without any licence in mortmain (*t*).

Provision of libraries, museums, and science and art schools.

1191. Subject to a certain and fixed limit of expenditure (*u*), the library authority (*v*) may provide public libraries, public museums, schools for science, art galleries, and schools for art (*a*); and where any such institution has thus been established the library authority may establish in connection therewith any other such institution without taking further proceedings with respect to adoption (*b*).

Acquisition and application of land.

1192. For the purpose of such provision the library authority may purchase and hire land, and erect, take down, rebuild, alter, repair, and extend buildings, and fit up, furnish, and supply such buildings with all requisite furniture, fittings, and conveniences (*c*).

Application of Lands Clauses Acts.

The Lands Clauses Acts (*d*), with the exception of the provisions relating to purchase of land otherwise than by agreement, are incorporated with the Public Libraries Act, 1892 (*e*). The result of the exception is that a library authority can acquire land by agreement only, and has no power to compensate owners of other lands injuriously affected by land being purchased and used for library purposes (*f*). Land purchased under the statutory powers is not thereby freed from any restrictive covenants to which it may be subject (*g*).

Appropriation of land held by urban authority.

1193. A library authority, if it is an urban district council, may, with the consent of the Local Government Board, appropriate for

(*s*) For a list of the Public Libraries Acts, see note (*d*), p. 581, *ante*.

(*t*) Public Libraries Act, 1892 (55 & 56 Vict. c. 53), s. 5 (2). As to licence in mortmain, see title CORPORATIONS, Vol. VIII., pp. 367 *et seq.*

(*u*) See p. 593, *post*.

(*v*) See p. 584, *ante*.

(*a*) Public Libraries Act, 1892 (55 & 56 Vict. c. 53), s. 11 (1).

(*b*) *Ibid.*, s. 11 (2).

(*c*) *Ibid.*, s. 11 (1). All real or personal property acquired, purchased, or given for the purposes of the Public Libraries Acts (for a list of which see note (*d*), p. 581, *ante*) is vested in the library authority (Public Libraries Act, 1892 (55 & 56 Vict. c. 53), s. 14). As to purchase of land for a public library, see the text, *infra*.

(*d*) 1845 (8 & 9 Vict. c. 18); 1860 (23 & 24 Vict. c. 106); 1869 (32 & 33 Vict. c. 18); 1883 (46 & 47 Vict. c. 15); 1895 (58 & 59 Vict. c. 11); see titles COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 1 *et seq.*, 16 *et seq.*; SALE OF LAND.

(*e*) Public Libraries Act, 1892 (55 & 56 Vict. c. 53), s. 12 (1).

(*f*) *Ferrar* v. *London Sewers Commissioners* (1869), L. R. 4 Exch. 227.

(*g*) See *Kirby* v. *Harrogate School Board*, [1896] 1 Ch. 437, C. A., where, although the land was acquired by agreement under the Lands Clauses Acts, the operation of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 68, was not excluded by the terms of the incorporating enactment; and see, generally, titles LANDLORD AND TENANT, Vol. XVIII., pp. 515 *et seq.*; REAL PROPERTY AND CHATTELS REAL.

the purposes of the Public Libraries Acts (*h*) any land which is vested in it (*i*).

Acquisition of property for charitable purposes.

1194. A library authority may also receive land by way of gift, sale, or exchange, from persons who own land for ecclesiastical, parochial, or charitable purposes; and such persons are authorised to grant or convey lands, not exceeding one acre in any one case, to the library authority accordingly (*k*).

Necessary conditions.

The grant or conveyance of such property is only permitted subject to certain conditions: thus, the consent of the Ecclesiastical Commissioners (*l*) is required to the grant or conveyance of ecclesiastical property; the consent of the board of guardians (*m*) of the union which includes the parish to which the parochial property belongs is required to the grant or conveyance of parochial property; and the consent of the Charity Commissioners (*n*) is required to the grant or conveyance of charitable property (*o*).

Agreement for use of other libraries.

1195. If, in or near a library district, there is a library established or maintained out of funds subject to the jurisdiction of the Charity Commissioners (*n*), the library authority of that district may, with the consent of the voters (*p*) therein, make an agreement with the governing body of the library by which the inhabitants of the library district may have the benefit of the use of it; but if the governing body objects to, or fails to enter into, such agreement, or is unable, for want of powers, to do so, the Charity Commissioners or Board of Education (*q*) may, if they think fit, become parties to such an agreement on behalf of the governing body (*r*).

(*h*) For a list of the Public Libraries Acts, see note (*d*), p. 581, *ante*.

(*i*) Public Libraries Act, 1892 (55 & 56 Vict. c. 53), s. 12 (2).

(*k*) *Ibid.*, s. 13 (1).

(*l*) As to the Ecclesiastical Commissioners, see title ECCLESIASTICAL LAW, Vol. XI., pp. 794 *et seq.*

(*m*) As to the boards of guardians, see title POOR LAW, Vol. XXII., pp. 530 *et seq.*

(*n*) As to the Charity Commissioners and their jurisdiction, see title CHARITIES, Vol. IV., pp. 302 *et seq.*

(*o*) Public Libraries Act, 1892 (55 & 56 Vict. c. 53), s. 13 (2). Such land may be held without any licence in mortmain. In the case of lands belonging to an educational charity, the consent of the Board of Education is required in place of that of the Charity Commissioners; see titles CHARITIES, Vol. IV., p. 223; EDUCATION, Vol. XII., pp. 99 *et seq.*

(*p*) Public Libraries Act, 1892 (55 & 56 Vict. c. 53), s. 16 (2). This consent is given, in urban districts, not by the voters, but by the urban authority (Public Libraries (Amendment) Act, 1893 (56 & 57 Vict. c. 11), s. 2). In rural parishes the consent must be given by the voters on a poll taken according to the provisions of the Local Government Act, 1894 (56 & 57 Vict. c. 73); see *ibid.*, s. 7 (2); and see title LOCAL GOVERNMENT, Vol. XIX., p. 260. Every person who is a parochial elector within the meaning of the Local Government Act, 1894 (56 & 57 Vict. c. 73), is a voter for this purpose (Public Libraries Act, 1901 (1 Edw. 7, c. 19), s. 9).

(*q*) In the case of a library supported by the funds of an educational charity, the Board of Education, which has succeeded to the duties of the Charity Commissioners in regard to these charities, must be substituted for the Commissioners in this provision; and see titles CHARITIES, Vol. IV., p. 223; EDUCATION, Vol. XII., pp. 99 *et seq.*; and see *ibid.*, p. 13, note (*q*).

(*r*) Public Libraries Act, 1892 (55 & 56 Vict. c. 53), s. 16 (2).

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1196. Where the Museums and Gymnasiums Act, 1891 (*s*), has been adopted (*t*), the local authority may provide or maintain museums for the reception of local antiquities or other objects of interest, and gymnasiums with all the usual apparatus, and may erect buildings and do all things necessary for the provision and maintenance of museums and gymnasiums (*a*).

Provision of museums and gymnasiums.

Appropriation of library authority's museum.

1197. If the Museums and Gymnasiums Act, 1891 (*b*), has been adopted, either wholly or so far as relates to museums only, in the area of an urban library authority, that authority may appropriate for the purpose of that Act (*b*) any museum provided under the Public Libraries Act, 1892 (*c*). If this is done, the appropriated museum is, after such appropriation, maintained, so far as it is not supported by the fees taken and charges made (*d*), out of the general district rate (*e*), and not out of the library rate (*f*).

Acquisition of land.

1198. An authority which has adopted the Museums and Gymnasiums Act, 1891 (*g*), may acquire land for the purposes of that Act as if for the purposes of the Public Health Act, 1875 (*h*), but only by agreement (*i*). With the consent of the Local Government Board the authority may appropriate for such purposes any land which is vested in it or at its disposal (*k*).

Sale or exchange of land by library authority.

1199. A library authority, whether an urban council or not, may, with the consent of the Local Government Board, sell any land vested in it for the purposes of the Public Libraries Acts (*l*), or exchange it for land better adapted for such purposes; and the moneys derived from a sale or exchange may be applied in or towards the purchase of other land better adapted for such purposes, or may be applied for any purpose for which capital money may be applied (*m*).

Houses, buildings, or lands so vested in the library authority which are not at the time of letting required for such purposes

(*s*) 54 & 55 Vict. c. 22.

(*t*) Adoption can be effected in cities, borough and urban districts; see p. 584, *ante*. As to adoption for partial purposes only, see p. 582, *ante*.

(*a*) Museums and Gymnasiums Act, 1891 (54 & 55 Vict. c. 22), s. 4.

(*b*) 54 & 55 Vict. c. 22.

(*c*) 55 & 56 Vict. c. 53; see Public Libraries Act, 1901 (1 Edw. 7, c. 19), s. 7.

(*d*) See p. 590, *post*.

(*e*) Museums and Gymnasiums Act, 1891 (54 & 55 Vict. c. 22), s. 10 (2); see p. 380, *ante*; title RATES AND RATING.

(*f*) As to the library rate, see pp. 592 *et seq.*, *post*.

(*g*) 54 & 55 Vict. c. 22; see p. 584, *ante*; and see note (*t*), *supra*.

(*h*) 38 & 39 Vict. c. 55; see titles COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 163; SALE OF LAND.

(*i*) Museums and Gymnasiums Act, 1891 (54 & 55 Vict. c. 22), s. 11 (1).

(*k*) *Ibid.*, s. 11 (2). For the provisions of the Schools for Science and Art Act, 1891 (54 & 55 Vict. c. 61), see title EDUCATION, Vol. XII., p. 24. For the provisions of the Technical and Industrial Institutions Act, 1892 (55 & 56 Vict. c. 29), as to the taking and holding of land by technical and industrial institutions, see title EDUCATION, Vol. XII., p. 121.

(*l*) For a list of the Public Libraries Acts, see note (*d*), p. 581, *ante*.

(*m*) Subject to approval by the Local Government Board (Public Libraries Act, 1892 (55 & 56 Vict. c. 53), s. 12 (3)).

may be let, and the rents and profits thereof must be applied to such purposes (*n*).

Lease of land.

Sale of museum or gymnasium.

1200. If it appears to a local authority (*o*) that a museum or gymnasium which has been established (*p*) for seven years or upwards is unnecessary or too expensive, it may sell it, with the consent of the Local Government Board, for the best price reasonably obtainable (*q*). The proceeds of such sale are applicable towards repayment of money borrowed for the purpose of the museum or gymnasium (*r*), and, so far as not required for such repayment, may be applied to any purpose, approved by the Local Government Board, to which capital moneys are properly applicable (*s*).

Regulation of institutions under the Public Libraries Acts.

1201. The general management, regulation, and control of the library, museum, art gallery or school, as the case may be, is vested in and exercised by the library authority (*t*). The only general restriction imposed upon its powers of management is that it may not make any charge for admission to a library or museum, or for the use of a lending library if the person using such lending library is an inhabitant of the library district (*a*); but the library authority may charge for the use of the lending library by persons who are not inhabitants of the district (*b*). The library authority may provide in any building under its control books, newspapers, maps, and specimens of art and science (*c*), pay for bookbinding and repairs, appoint and dismiss salaried officers and servants, and make regulations for the safety and use of the library, and with regard to admission thereto (*d*).

Agreements between authorities as to use of single library.

1202. An agreement may be made by the authorities of any two or more library districts to share the expense of the purchase, erection, repair, and maintenance of a single library, in agreed portions and for a specified period, and such agreement may include arrangements as to the management and use of the library, and as to the hire, interchange, and use of books and newspapers

(*n*) Public Libraries Act, 1892 (55 & 56 Vict. c. 53), s. 12 (4).

(*o*) *I.e.*, an authority which has adopted the Museums and Gymnasiums Act, 1891 (54 & 55 Vict. c. 22); see p. 584, *ante*.

(*p*) Under the Museums and Gymnasiums Act, 1891 (54 & 55 Vict. c. 22); see p. 584, *ante*.

(*q*) Museums and Gymnasiums Act, 1891 (54 & 55 Vict. c. 22), s. 12 (1).

(*r*) As to borrowing, see p. 594, *post*.

(*s*) Museums and Gymnasiums Act, 1891 (54 & 55 Vict. c. 22), s. 12 (2).

(*t*) Public Libraries Act, 1892 (55 & 56 Vict. c. 53), s. 15. Urban library authorities may severally appoint committees to exercise all or any of their library powers (*ibid.*, s. 15 (3)).

(*a*) *Ibid.*, s. 11 (3). As to charges allowed by the Museums and Gymnasiums Act, 1891 (54 & 55 Vict. c. 22), see p. 590, *post*.

(*b*) Public Libraries Act, 1892 (55 & 56 Vict. c. 53), s. 11 (3). The library authority may grant such use free of charge if it thinks fit.

(*c*) *Ibid.*, s. 15 (1).

(*d*) *Ibid.*, s. 15 (2). This is subject, of course, to the statutory obligation to admit readers and students free. The regulations require no confirmation or approval. As to the bye-laws which may be made by library authorities, see p. 591, *post*.

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belonging to one or other of the parties to the agreement (*e*). A similar agreement may also be made to provide for the sharing of expenses and management of a museum, school for science, art gallery, or school for art (*f*).

Any such agreement may be made by a metropolitan borough council (*g*), and, in the City of London, by the Common Council (*h*). In neither case is the consent of the voters (*i*) necessary to sanction the arrangement (*k*).

Regulation of museums and gymnasiums.

1203. An urban authority may appoint and pay officers and servants for a museum or gymnasium provided under the Museums and Gymnasiums Act, 1891 (*l*), and may employ and pay instructors in connection with a gymnasium (*m*).

Museums.

A museum so provided must be open to the public for at least three days in each week free of charge (*n*). Subject to this, the urban authority may admit any person or class of persons thereto for payment, and may lend the museum or a room in it, either gratuitously or for payment, for any lecture or exhibition or for any purpose of education or instruction (*o*). Such special admission may be granted with or without payment as directed either by the urban authority, or, with the authority's consent, by the person to whom the museum or room is lent (*o*).

Gymnasiums.

A gymnasium so provided must be open to the public for two hours at least on five days in the week (*p*). Apart from this, the urban authority may admit persons, or classes of persons, to the gymnasium for a fee, or may grant the exclusive use of it to any person or body of persons for gymnastic exercises for not more than two hours in each day, on such terms as to payment and otherwise as it thinks fit (*q*).

Letting to public.

The urban authority may, for not more than six consecutive days, and not more than twenty-four days in any year, close the gymnasium for use as a gymnasium, and grant the use thereof to any person, either with or without charge, for any lecture, exhibition, public meeting, entertainment, or other public purpose. On such occasions a fee may be charged, fixed either by the authority

(*e*) Public Libraries Act, 1901 (1 Edw. 7, c. 19), s. 5 (1).
(*f*) *Ibid.*, s. 5 (2).
(*g*) By *ibid.*, s. 13, metropolitan borough councils are declared to be "urban authorities" for the purpose of the Public Libraries (Amendment) Act, 1893 (56 & 57 Vict. c. 11), and are therefore, it is submitted, urban authorities for the purpose of the Public Libraries Acts (see note (*d*), p. 581, *ante*) generally, since the Acts are to be construed as one; see also London Government Act, 1899 (62 & 63 Vict. c. 14), s. 4 (2), (4).
(*h*) Public Libraries (Amendment) Act, 1893 (56 & 57 Vict. c. 11), s. 2; Public Libraries Act, 1901 (1 Edw. 7, c. 19), s. 13.
(*i*) As to the meaning of "voters," see note (*k*), p. 585, *ante*.
(*k*) Public Libraries (Amendment) Act, 1893 (56 & 57 Vict. c. 11), s. 2 (i.), (ii.).
(*l*) 54 & 55 Vict. c. 22. As to such provision, see p. 588, *ante*.
(*m*) Museums and Gymnasiums Act, 1891 (54 & 55 Vict. c. 22), s. 9.
(*n*) *Ibid.*, s. 5.
(*o*) *Ibid.*
(*p*) *Ibid.*, s. 6 (1).
(*q*) *Ibid.*, s. 6 (2).

or, with its consent, by the person to whom the exclusive use is granted (*a*).

The urban authority may, on giving a fortnight's notice, close the museum or gymnasium for repairs (*b*).

SUB-SECT. 5.—*Bye-laws and Offences.*

Closing museum for repairs.

Bye-laws under Public Libraries Acts.

1204. In addition to the general powers of regulation (*c*) given to library authorities, they may make bye-laws (*d*) for the use and management of any library, museum, art gallery, or school which, by virtue of the Public Libraries Acts (*e*), is under their control (*f*). Such bye-laws must be confirmed by the Local Government Board (*g*), although the general regulations made for management of public libraries (*h*) do not require any confirmation or approval. The bye-laws may be framed so as to regulate the use of such institutions and their contents, to protect them from injury, destruction, or misuse, to require guarantees from persons using such institutions against the loss of or injury to any books or other articles, and to enable officers of the library authority to remove any person who commits any breach of the Libraries Offences Act, 1898 (*i*), or of the bye-laws (*k*).

Offences against bye-laws.

Statutory offences.

1205. Offences against the bye-laws may be prosecuted and penalties recovered (*l*) in the manner provided by the Summary Jurisdiction Acts (*m*).

A penalty of not more than 40*s*., recoverable summarily, is imposed (*n*) for certain offences committed in any library, museum, art gallery, or art or science school established under the Public Libraries Acts (*o*). The acts prohibited, which to be punishable must be done "to the annoyance or disturbance of any person using" such an institution, are: (1) behaving in a disorderly manner; (2) using violent, abusive, or obscene language; (3) betting or gambling;

(*a*) Museums and Gymnasiums Act, 1891 (54 & 55 Vict. c. 22), s. 6 (3).
(*b*) *Ibid.*, s. 8.
(*c*) See p. 589, *ante*.
(*d*) Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 182—186 (see pp. 388 *et seq.*, *ante*), apply to such bye-laws (Public Libraries Act, 1901 (1 Edw. 7, c. 19), s. 3 (2)).
(*e*) For a list of the Public Libraries Acts, see note (*d*), p. 581, *ante*.
(*f*) Public Libraries Act, 1901 (1 Edw. 7, c. 19), s. 3 (1).
(*g*) See note (*d*), *supra*; model bye-laws have been framed by the Local Government Board.
(*h*) As to such regulations, see p. 589, *ante*.
(*i*) 61 & 62 Vict. c. 53.
(*k*) Public Libraries Act, 1901 (1 Edw. 7, c. 19), s. 3 (1). As to the use of library books by persons suffering from an infectious disease, see Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 59, and p. 451, *ante*.
(*l*) Public Libraries Act, 1901 (1 Edw. 7, c. 19), s. 3 (3).
(*m*) See title MAGISTRATES, Vol. XIX., pp. 589 *et seq.* As to definition of the Summary Jurisdiction Acts, see the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 13 (10).
(*n*) Libraries Offences Act, 1898 (61 & 62 Vict. c. 53), s. 2.
(*o*) For a list of the Public Libraries Acts, see note (*d*), p. 581, *ante*. By the Public Libraries Act, 1901 (1 Edw. 7, c. 19), s. 4, the operation of the Libraries Offences Act, 1898 (61 & 62 Vict. c. 53), is extended to a library, museum, art gallery, or school provided under the Public Libraries Act, 1892 (55 & 56 Vict. c. 53).

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(4) persisting, after proper warning, in remaining in such an institution beyond the hours fixed for closing it (*a*).

Regulations and bye-laws under Museums and Gymnasiums Act.

1206. Museum and gymnasium authorities (*b*) may make regulations (*c*) for fixing the times at which a museum or gymnasium shall be open free to the public; for facilitating the use of a museum by students; for regulating the use of a gymnasium by classes or otherwise, and fixing fees for such use; for fixing the conditions on which a museum shall be lent for a special purpose; for determining the duties of the instructor, officers, and servants in connection with the museum or gymnasium; and, generally, for managing the museum or gymnasium (*d*). These authorities may also make bye-laws for regulating the conduct of those who use the museum or gymnasium, and for the removal of any person who infringes such bye-laws (*e*).

SUB-SECT. 6.—*Expenses.*

In urban districts.

1207. The expenses incurred by a library authority in execution of the Public Libraries Acts (*f*) or incidental thereto (*g*) may be defrayed in an urban district, other than a borough, out of the general district rate, or out of the improvement rate (*h*), or out of a separate rate made, assessed, and levied in like manner as a general district or improvement rate (*i*).

In municipal boroughs.

In a municipal borough such expenses may be paid out of the borough fund or borough rate or out of a rate made, assessed, and levied in the same manner as the borough rate (*i*).

In rural parishes.

In rural parishes such expenses may be paid out of a rate raised with and as part of the poor rate; but in such case persons assessed in respect of lands used as arable, meadow, or pasture ground only, or as woodlands or market gardens, or nursery grounds are allowed two-thirds of the sum assessed on them in respect of those lands for the purposes of the Public Libraries Acts (*k*).

Annexed parish.

Where a parish or part of a parish is annexed to a library district (*l*),

(*a*) Libraries Offences Act, 1898 (61 & 62 Vict. c. 53), s. 2.
(*b*) As to such authorities, see pp. 584, 588, *ante*.
(*c*) These require no confirmation; compare note (*d*), p. 388, *ante*.
(*d*) Museums and Gymnasiums Act, 1891 (54 & 55 Vict. c. 22), s. 7 (1).
(*e*) The Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 182—186, and any Act extending or amending them (see pp. 388 *et seq.*, *ante*), apply to these bye-laws (Museums and Gymnasiums Act, 1891 (54 & 55 Vict. c. 22), s. 7 (2)), which must be confirmed by the Local Government Board.
(*f*) For a list of the Public Libraries Acts, see note (*d*), p. 581, *ante*.
(*g*) Including the cost of taking the opinion of voters (see p. 583, *ante*) in districts where this step may be necessary (Public Libraries Act, 1892 (55 & 56 Vict. c. 53), s. 18 (1)).
(*h*) *Ibid.*; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 207; see p. 381, *ante*. As to the making of rates, see title RATES AND RATING.
(*i*) Public Libraries Act, 1892 (55 & 56 Vict. c. 53), s. 18 (1).
(*k*) *Ibid.*, s. 18 (1) (c). Orchards and allotments are not given this allowance. As to the poor rate, see title RATES AND RATING.
(*l*) Public Libraries Act, 1892 (55 & 56 Vict. c. 53), s. 10. As to such annexation, see p. 584, *ante*.

it must defray its share of the expenses as if it were a separate library district (*m*).

In metropolitan boroughs such expenses are "expenses of a borough council" (*n*), and are therefore, subject to the provisions of any scheme, payable out of the general rate of the borough (*o*). If the adoption (*p*) is in force only in a part of a borough, such expenses are payable out of a rate levied in that part as an additional item in the general rate of the borough (*q*).

In metropolitan boroughs.

In the City of London such expenses, including all expenses incurred in ascertaining the opinion of the voters (*a*), are paid out of the general rate levied by the Common Council (*b*).

In the City of London.

1208. With regard to all such rates, except that levied in the City of London (*c*), no rate or addition to a rate may be levied for the purposes of the Public Libraries Acts (*d*) for any one financial year in any library district to an amount exceeding one penny in the pound (*c*). If some of the rateable hereditaments in a library district are unoccupied, and therefore not liable to pay rates, the total sum to be raised must not exceed that which can be obtained by levying a penny rate on those remaining rateable hereditaments in respect of which rates can be actually levied (*e*).

Limitation of rate for purposes of Public Libraries Acts.

Adoption (*f*) may be effected subject to a condition that the rate or addition to a rate levied to meet such expenses shall not exceed one halfpenny, or shall not exceed three farthings, in the pound. Where such a condition is made providing for a halfpenny rate, it may be altered afterwards so as to allow a rate of three farthings, or it may be removed; if the limitation is fixed at three farthings, it may be removed (*g*).

Resolutions to impose, alter, or remove, any limitation on the rate to be levied are passed in an urban district by the urban council and in a borough by the borough council (*h*). With regard to rural parishes, the opinion of the voters (*a*) on these questions must be ascertained if any ten of them by a written requisition ask the library authority to ascertain it (*i*). If the library districts are for

Resolutions to impose, alter, or remove limitation of rate.

(*m*) Public Libraries Act, 1892 (55 & 56 Vict. c. 53), s. 18 (3).

(*n*) This follows, it is assumed, from the provision of the London Government Act, 1899 (62 & 63 Vict. c. 14), s. 4 (2); and see titles METROPOLIS, Vol. XX., pp. 405, 440, 460, 461; RATES AND RATING.

(*o*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 10 (1).

(*p*) As to adoption for part of a borough, see note (*n*), p. 582, *ante*.

(*q*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 10 (4).

(*a*) As to the meaning of "voters," see note (*k*), p. 585, *ante*.

(*b*) Public Libraries Act, 1892 (55 & 56 Vict. c. 53), s. 21 (3); and see title METROPOLIS, Vol. XX., p. 439.

(*c*) Public Libraries Act, 1892 (55 & 56 Vict. c. 53), ss. 2 (1), 21 (4).

(*d*) For a list of the Public Libraries Acts, see note (*d*), p. 581, *ante*.

(*e*) *R.* v. *Liverpool Justices* (1862), 8 Jur. (N. S.) 642.

(*f*) As to adoption, see pp. 582 *et seq.*, *ante*.

(*g*) Public Libraries Act, 1892 (55 & 56 Vict. c. 53), s. 2 (2).

(*h*) Public Libraries (Amendment) Act, 1893 (56 & 57 Vict. c. 11), s. 2 (2). Where a parish has been annexed to an urban district under the Public Libraries Act, 1892 (55 & 56 Vict. c. 53), s. 10, it would seem that a resolution of the urban council, including the representative commissioners appointed under *ibid.*, s. 10, would bind the parish as well as the urban district; see pp. 584, 585, *ante*.

(*i*) Such opinion is ascertained by a poll of the parochial electors taken in the manner prescribed by the Local Government Act, 1894 (56 & 57

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a time combined (*k*) or are parties to a sharing agreement (*l*), such agreements would not, it is submitted, deprive the voters (*m*) of the right to express their opinion on a question of altering or removing a limitation (*n*).

In metropolitan boroughs and in the City of London the limitation may be imposed, removed, or altered by resolutions of the borough council and the Common Council of the City respectively (*o*).

Limitation of rate for purposes of Museums and Gymnasiums Act.

The amount which may be spent in any one year under the Museums and Gymnasiums Act (*p*) must not exceed one halfpenny in the pound for a museum and one halfpenny in the pound for a gymnasium (*q*).

Borrowing powers under Public Libraries Acts.

1209. In addition to the power of raising rates, library authorities may borrow money for the purposes of the Public Libraries Acts (*r*) on the security of the fund or rate applicable to those purposes (*s*). Such moneys may only be borrowed with the sanction of the Local Government Board; and the Public Works Loans Commissioners may lend in the manner provided by the Public Works Loans Act, 1875 (*t*). Besides the sanction of the Local Government Board, the consent of the parish meeting is required to borrowings by a parish council (*a*), or by commissioners appointed for a parish (*b*).

Grants by Board of Education.

1210. Library authorities may also accept grants from the Board of Education (*c*) to meet part of the expenses of buying a site, erecting, enlarging, repairing, or furnishing any school for art or science, or art and science, or the residence of a teacher in any such school (*d*);

Vict. c. 73); see Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 7 (2), superseding the Public Libraries Act, 1892 (55 & 56 Vict. c. 53), s. 3, as to ascertaining the opinions of the voters. When the opinion has been ascertained another poll cannot be taken until the expiration of one year (*ibid.*, s. 3 (5)). As to the poll, see title LOCAL GOVERNMENT, Vol. XIX., pp. 260, 261.

(*k*) See p. 584, *ante*.

(*l*) See p. 587, *ante*.

(*m*) As to the meaning of "voters," see note (*k*), p. 585, *ante*.

(*n*) The sections relating to these agreements contain no enactment as regards this matter; but there is nothing to take away the right of the voters, so it must be assumed that it remains.

(*o*) See Public Libraries (Amendment) Act, 1893 (56 & 57 Vict. c. 11), s. 2; Public Libraries Act, 1901 (1 Edw. 7, c. 19), s. 13.

(*p*) 54 & 45 Vict. c. 22.

(*q*) *Ibid.*, s. 10 (5).

(*r*) For a list of the Public Libraries Acts, see note (*d*), p. 581, *ante*.

(*s*) Public Libraries Act, 1892 (55 & 56 Vict. c. 53), s. 19 (1). Where a parish council is a library authority, it must borrow in accordance with the Local Government Act, 1894 (56 & 57 Vict. c. 73); see *ibid.*, ss. 11, 12; but (*ibid.*, s. 12) the provisions referred to in note (*t*), *infra*, are applied; see, generally, title LOCAL GOVERNMENT, Vol. XIX., pp. 243, 244.

(*t*) 38 & 39 Vict. c. 89; see Public Libraries Act, 1892 (55 & 56 Vict. c. 53), s. 19 (2), (3). The Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 233, 234, 236—239 inclusive, apply to money so borrowed with the necessary modifications (Public Libraries Act, 1892 (55 & 56 Vict. c. 53), s. 19 (2)); see note (*l*), p. 595, *post*; and see, generally, title MONEY AND MONEY-LENDING, Vol. XXI., pp. 58—63; and see pp. 382 *et seq.*, *ante*.

(*a*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 11; see title LOCAL GOVERNMENT, Vol. XIX., p. 243.

(*b*) Public Libraries Act, 1892 (55 & 56 Vict. c. 53), s. 19 (1); Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 19 (4).

(*c*) As to the Board of Education, see title EDUCATION, Vol. XII., pp. 8 *et seq.*

(*d*) Public Libraries Act, 1892 (55 & 56 Vict. c. 53) s. 17.

and may comply with any conditions attached by the Board to such grants, and may execute any instruments required by the Board for carrying into effect such conditions. If they accept such grants they must comply with the conditions upon which they are made (*e*).

Expenses under Museums and Gymnasiums Act, 1891.

1211. Except so far as they are maintained by fees received for their use, which are appropriated to paying for their provision and maintenance (*f*), museums and gymnasiums provided for the purposes of the Museums and Gymnasiums Act, 1891 (*g*), must be provided and maintained out of the general district rate (*h*).

Borrowing powers.

The borrowing powers which urban authorities have for meeting general expenses under the Public Health Act, 1875 (*i*), may be exercised, for the purposes of the Museums and Gymnasiums Act, 1891 (*k*), and certain provisions (*l*) with regard to the exercise of such powers contained in the Public Health Act, 1875 (*m*), apply to such borrowings (*n*). Loans may be made by the Public Works Loans Commissioners, and, where this is done, certain other provisions (*o*) with regard to such loans contained in the Public Health Act, 1875 (*m*), as amended by later statutes, apply (*n*).

SUB-SECT. 7.—*Accounts and Audit.*

Keeping and audit.

1212. Separate accounts of the receipts and expenditure of a library authority and its officers must be kept, and must be audited, if the library authority is an urban authority, in the manner provided by the Public Health Acts (*p*), and if a body of commissioners appointed for a parish, in the manner provided by the Acts relating to the relief of the poor (*q*).

Form and publication.

Library authorities must conform to all the provisions of the District Auditors Act, 1879 (*r*), with regard to the preparation and submission of accounts and to all regulations for keeping accounts,

(*e*) Public Libraries Act, 1892 (55 & 56 Vict. c. 53), s. 17.

(*f*) Museums and Gymnasiums Act, 1891 (54 & 55 Vict. c. 22), s. 10 (1); and see p. 590, *ante*.

(*g*) 54 & 55 Vict. c. 22.

(*h*) Museums and Gymnasiums Act, 1891 (54 & 55 Vict. c. 22), s. 10 (2); see p. 380, *ante*; title RATES AND RATING.

(*i*) 38 & 39 Vict. c. 55.

(*k*) 54 & 55 Vict. c. 22, s. 10 (3).

(*l*) Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 233, 234, 236—239 inclusive; see title LOCAL GOVERNMENT, Vol. XIX., p. 282; and see pp. 382 *et seq.*, *ante*; and note (*t*), p. 594, *ante*.

(*m*) 38 & 39 Vict. c. 55.

(*n*) Museums and Gymnasiums Act, 1891 (54 & 55 Vict. c. 22), s. 10 (3).

(*o*) Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 242, 243, as amended by the Public Works Loans Act, 1879 (42 & 43 Vict. c. 77), s. 2. The latter statute was again amended by the Public Works Loans Act, 1892 (55 & 56 Vict. c. 61); and see p. 384, *ante*.

(*p*) Where the urban authority is the council of a borough, the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 246, applies; where it is an urban council (not of a borough), *ibid.*, s. 247, applies (Public Libraries Act, 1892 (55 & 56 Vict. c. 53) s. 20 (1)); see title LOCAL GOVERNMENT, Vol. XIX., pp. 283, 324, 325; and see p. 387, *ante*.

(*q*) Public Libraries Act, 1892 (55 & 56 Vict. c. 53), s. 20 (2); see title POOR LAW, Vol. XXII., pp. 550, 551.

(*r*) 42 & 43 Vict. c. 6; see titles LOCAL GOVERNMENT, Vol. XIX., pp. 284 *et seq.*; POOR LAW, Vol. XXII., p. 551.

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and the certifying, publication, and production for audit of the accounts (*a*).

Inspection.

If the library authority is any other body than a municipal borough council, the accounts of the authority must at all reasonable times be open to the inspection of any ratepayer in the library district free of charge, and any such ratepayer may make copies of or extracts from them.

Offences.

Penalties are provided, and may be summarily recovered, in cases where any library authority, or an officer thereof, fails to allow such inspection, or the taking of such copies or extracts (*b*).

Accounts of museum and gymnasium authority.

The accounts of an urban authority in respect of a museum or gymnasium must be kept separate from their other accounts. They are audited in the manner prescribed by the Public Health Act, 1875 (*c*), as amended from time to time (*d*).

SECT. 14.—*Sanitary Accommodation* (*e*).

SUB-SECT. 1.—*Outside London.*

Provision of sanitary accommodation.

1213. All houses must have a sufficient water-closet, earth-closet, or privy, and an ashpit covered with proper doors and coverings (*f*). If a house is without sufficient accommodation of this kind, the local authority (*g*) may proceed for a penalty, or may, on a report from its surveyor or inspector of nuisances, by written notice (*h*) require the owner (*i*) or occupier within a specified reasonable time to do the work required to give such accommodation (*k*).

(*a*) District Auditors Act, 1879 (42 & 43 Vict. c. 6), ss. 3, 5.

(*b*) Public Libraries Act, 1892 (55 & 56 Vict. c. 53), s. 20 (3).

(*c*) 38 & 39 Vict. c. 55; see p. 387, *ante*.

(*d*) Museums and Gymnasiums Act, 1891 (54 & 55 Vict. c. 22), s. 10 (4); Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 245—250.

(*e*) As to bye-laws with respect to the air-space about buildings, and the ventilation, drainage, and sanitary accommodation of buildings, see pp. 415 *et seq.*, *ante*.

(*f*) Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 35, 36. The provision requiring proper doors and coverings applies not only to ashpits (for definition, see note (*h*), p. 420, *ante*), but also to water-closets, earth-closets (which term includes any places for the reception and deodorisation of fæcal matter constructed to the satisfaction of the local authority (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 37)), and privies. If a person erects a house, or rebuilds a house which has been pulled down to or below the ground floor, without complying with this requirement he is liable to a penalty not exceeding £20 (*ibid.*, s. 35) (as to legal proceedings, see pp. 367 *et seq.*, *ante*). If two cottages have one common water-closet, earth-closet, or privy, the statute is satisfied, provided the accommodation afforded by that convenience is sufficient (*Clutton Guardians* v. *Pointing* (1879), 4 Q. B. D. 340). Tub-closets are "privies" (see note (*g*), p. 420, *ante*). As to sanitary accommodation in factories and workshops, see title FACTORIES AND SHOPS, Vol. XIV., pp. 452 *et seq.*; and, for forms relating to the provision of sanitary accommodation, see Encyclopædia of Forms and Precedents, Vol. X., pp. 503—510.

(*g*) See pp. 372—374, *ante*.

(*h*) See as to the validity of such a notice, note (*l*), p. 597, *post*. As to notices generally, see pp. 370 *et seq.*

(*i*) For the definition of "owner," see note (*o*), p. 427, *ante*.

(*k*) The sanitary authority has two quite distinct remedies in case a house has no sufficient accommodation of this kind. If a newly-built house, or a house rebuilt above the first floor, is not so provided, it may proceed for a penalty under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 35. If a house not newly built or rebuilt is in default, the authority may (*ibid.*, s. 36)

If a house has an insufficient earth-closet or privy, and the authority considers that it should have a water-closet, or *vice versâ*, it may enforce the introduction of accommodation of the kind which it approves (*l*). If, however, a local authority considers that it is desirable to introduce a water-closet system, instead of an earth-closet or privy system, in their district generally, it may not lay down by resolution a general rule requiring water-closets or earth-closets in all cases (*m*). The right to require a new kind of accommodation only arises when the local authority is satisfied, on the report of its surveyor or inspector, that, in one or more particular cases, the existing accommodation is insufficient (*n*).

give written notice to provide what is needed, and, in case of default, may do the necessary work and recover the expenses thereof; and see *Bower* v. *Caistor Rural District Council* (1911), 75 J. P. 186. The demand for expenses does not require authentication (*Willis* v. *Rotherham Corporation* (1911), 108 L. T. 436); see p. 370, *ante*.

(*l*) *Agnew* v. *Manchester Corporation* (1902), 1 L. G. R. 9 (decided under a private Act of Parliament); *Nicholl* v. *Epping Urban Council*, [1899] 1 Ch. 844; *Sutcliffe* v. *Sowerby Bridge Urban District Council* (1909), 100 L. T. 967 (both decided under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 36). Where the written notice given by an authority stated that the house had not a sufficient water-closet, but omitted any reference to an earth-closet or privy, it was held that the omission did not vitiate the notice (see *Sutcliffe* v. *Sowerby Bridge Urban District Council, supra;* compare *Meyrick* v. *Pembroke Corporation* (1912), 76 J. P. 365).

(*m*) See *Tinkler* v. *Wandsworth Board of Works* (1858), 2 De G. & J. 261, C. A. (decided under an identical provision (now repealed) of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 81); *Wood* v. *Widnes Corporation*, [1898] 1 Q. B. 463, C. A.; *Robinson* v. *Sunderland Corporation* (1898), 78 L. T. 194. An order for substitution (recommended by a sub-committee which had considered some particular case or cases), which was passed by a committee and approved by the sanitary authority, was held good (*Agnew* v. *Manchester Corporation, supra*).

(*n*) See *Nicholl* v. *Epping Urban Council, supra;* and note (*m*), *supra*. The difficulty in the way of local authorities desiring to inaugurate generally a new system of accommodation in their districts, which was illustrated in the case of *Wood* v. *Widnes Corporation, supra*, can be surmounted by such authorities if they apply for and are given powers under the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), Part III. This Act (*ibid.*, s. 39 (2)) enables a local authority to insist on the provision of proper and sufficient water-closets or slop-closets in any place where there are a sufficient water supply and sewer, or to require "such one or more of either class of closet as the circumstances of the case may render necessary." Where there are a sufficient water supply and sewer, the authority may require the owner of any building to alter any existing closet accommodation, other than a water-closet or slop-closet, into a water-closet or slop-closet. If the owner does not comply in fourteen days, the local authority may do the work required by the notice. If the work done by the local authority in default of the owner is in respect of a pail-closet it must pay for the cost of it; but if the work is done in respect of any other form of closet the local authority pays half the cost and the other half may be recovered summarily (see Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 35; title MAGISTRATES, Vol. XIX., p. 609) from the owner as a civil debt (Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 39 (4)). But this provision has no effect with respect to a slop-closet unless the Local Government Board has been satisfied by the local authority and has declared that it shall so have effect by an order published in such way as the Local Government Board directs (*ibid.*, s. 39 (5)). For definitions of "closet accommodation," "pail-closet," "water-closet," "slop-closet," and "sufficient water supply and sewer," see Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 39 (1). See further *ibid.*, s. 40, as to expenses incurred by the local authority under *ibid.*, s. 39, and

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Where the owner or occupier of a house considers that the house in question has a sufficient water-closet, earth-closet, or privy, and is aggrieved by a decision of the local authority to the contrary, his remedy is by appeal to the Local Government Board, not to a court of law (*o*).

Appeal against decision of local authority.

Public conveniences.

1214. An urban sanitary authority, and a rural sanitary authority with urban powers, may provide and maintain in proper and convenient situations urinals, water-closets, earth-closets, privies and ashpits, and other similar conveniencies for public accommodation (*p*). Where an urban or rural sanitary authority has made such provision, it has, if the enactment (*q*) is in force in its district, the same powers

the power of the authority to declare them to be private improvement expenses; and as to private improvement expenses, see pp. 381, 382, *ante*. As to the adoption of these statutory provisions in sanitary districts, see pp. 364, 365, *ante*. As to sewers and water supply, see titles SEWERS AND DRAINS; WATER SUPPLY. Persons aggrieved by any requirement of the local authority under the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 39, or objecting to the reasonableness of any expenses wholly or partly recoverable from them thereunder, may appeal, within fourteen days of the receipt of the notice, to a court of summary jurisdiction, and the court may make an order which it thinks reasonable, but may not go into any matter except the reasonableness of the work. Pending such order, the works and any proceedings for recovery of expenses must be stayed (*ibid.*, s. 42). An appeal does not appear to lie to quarter sessions under *ibid.*, s. 7; and see note (*g*), p. 369, *ante*.

(*o*) Under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 268; see pp. 379, 380, *ante*. It is not for the court to decide on the merits between alternative types of sanitary accommodation; such differences must be decided by the Local Government Board (see *Robinson* v. *Sunderland Corporation* (1898), 78 L. T. 194, *per* RIDLEY, J., at pp. 196, 197); and if a local authority, on a report from its surveyor, concludes that water-closets are insufficient for want of a proper flushing apparatus, and accordingly requires works to be done, and does them in default of the owner, it may recover the expenses summarily; for it is for the local authority to use its discretion on the report of its surveyor, and the court will not interfere (*R.* v. *Sherborne Local Board* (1880), *Times*, 20th March; S. C., *sub nom. Bogle* v. *Sherborne Local Board*, 46 J. P. 675; see *St. John's, Hackney, Vestry* v. *Hutten*, [1897] 1 Q. B. 210 (a metropolitan case)).

(*p*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 39. Such urinals and similar public accommodation may not under this provision be constructed under a highway, as the soil of the highway is not vested in the local authority beyond what is necessary to maintain the street as a street (*Baird* v. *Tunbridge Wells Corporation*, [1894] 2 Q. B. 867, C. A.; affirmed, [1896] A. C. 434; *London and North Western Railway* v. *Westminster Corporation*, [1902] 1 Ch. 269; [1904] 1 Ch. 759, C. A.; [1905] A. C. 426); and see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI, p. 52. But an urban or rural sanitary authority is empowered to provide and maintain both sanitary conveniences and lavatories in or under any street where the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 47, is in force (see pp. 364, 365, *ante*), and, if it has provided them, may let them to other persons (Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 47). But *ibid.*, s. 47, does not vest the soil of the street in the authority, and an authority cannot, without acquiring the necessary right in the soil, make any construction under the street; see *Baird* v. *Tunbridge Wells Corporation*, *supra*. As to nuisances caused by these conveniences, see p. 604, *post*. As to the rights of highway authorities in this matter, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 257, 258.

(*q*) *I.e.*, where the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 20, is in force. As to its adoption in urban districts by resolution, or inauguration in rural districts by order of the Local Government Board, see *ibid.*, ss. 3, 5; and see pp. 363, 364, *ante*.

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of making regulations as to management and bye-laws as to decent conduct, and of letting the conveniences, and of charging fees, as the metropolitan borough councils have in London (*a*); and the provisions, hereinafter referred to (*b*), applicable to London, against erecting sanitary conveniences without the consent of the metropolitan borough council, and against fouling sanitary conveniences which are used in common, or causing annoyance by allowing such common conveniences to be unclean, are available, where the enactments respectively are in force (*c*), and may be enforced in an urban or rural district (*d*). Where the enactment is in force (*e*), an urban or rural district council may also make bye-laws with respect to keeping water-closets supplied with sufficient water for flushing.

Application of Public Health Acts Amendment Act, 1890.

1215. Where the enactment is in force (*f*), the sanitary authority (*g*) may require urinals to be placed and maintained in inns, beer-houses, refreshment-houses, and in all places of public entertainment (*h*).

Urinals in public places.

SUB-SECT. 2.—*In London.*

1216. In London (*i*) all new houses (*k*) and all houses pulled down to or below the ground floor and rebuilt must have a sufficient ashpit (*l*) and one or more sufficient water-closets (*m*); and the

Sanitary conveniences for houses.

(*a*) Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 20. For these provisions, see pp. 602, 603, *post*.

(*b*) See p. 602, *post*. "London" means the administrative county of London (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 141); see title METROPOLIS, Vol. XX., p. 392. As to the application of this Act to the City of London, see *ibid.*, p. 469.

(*c*) *I.e.*, Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), ss. 20, 21; see pp. 363, 364, *ante*. As to sanitary accommodation in manufactories, see title FACTORIES AND SHOPS, Vol. XIV., pp. 452—454.

(*d*) As to such districts, see p. 372, *ante*.

(*e*) *I.e.*, Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 23 (1). As to the powers of rural councils in this matter, see *ibid.*, s. 23 (3), extending the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 157; pp. 416, note (*s*), 420; and see also pp. 388 *et seq.*, *ante*.

(*f*) *I.e.*, where the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 44, is in force; see pp. 364, 365, *ante*.

(*g*) See pp. 364, 372, *ante*.

(*h*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 44 (1). The penalty for non-compliance is a fine not exceeding 20*s*. (*ibid.*, s. 44 (2)); and, as to legal proceedings, see pp. 367 *et seq.*, *ante*.

(*i*) As to the meaning of "London," see note (*b*), *supra*.

(*k*) For the definition of "house," see note (*g*), p. 401, *ante*.

(*l*) For definition of "ashpit," see Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 141.

(*m*) The ashpit must have proper doors and coverings, and the water-closet a suitable water supply and works and apparatus such as to make it work effectually (*ibid.*, s. 37 (1)). Offences are punishable with a fine not exceeding £20 (*ibid.*, s. 37 (2)). Where sewerage or water supply sufficient for a water-closet is not "reasonably available," the Act is complied with if a privy or earth-closet is provided (*ibid.*, s. 37 (4) (a)), and a separate water-closet need not, but apparently may, be required for each house where, before the 1st January, 1892, a water-closet was used in common by the inmates of two or more houses, and the borough council thinks it may still be properly so used (*ibid.*, s. 37 (4) (b)). For forms relating to the provision of water-closets, see Encyclopædia of Forms and Precedents, Vol. X., pp. 303—310.

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sanitary authority (*n*), where it appears to it that any house is without either of these conveniences, may order (*o*) the owner (*p*) or occupier to provide them. If the person so ordered does not comply with the order, the sanitary authority (*n*) may either proceed for the statutory penalty or, in the alternative, enter on his premises, do what is necessary to provide the accommodation required, and recover from the owner the expenses of doing the work (*q*). Persons aggrieved by any such notice or act of the sanitary authority (*n*) may appeal to the London County Council, whose decision on the grievance is final (*r*).

County council bye-laws.

1217. The London County Council must make bye-laws with respect to water-closets, earth-closets, privies, ashpits, cesspools, and

(*n*) See title METROPOLIS, Vol. XX., pp. 408, 428, 466, 469 ; and see p. 373, *ante*.

(*o*) The order is made by giving the owner or occupier notice in writing to make provision, and the notice must contain directions in accordance with which the provision is to be made. The notice may require the work to be done at once or within a reasonable time, which must be specified in it (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 37 (3)). It may require the provision of more than one water-closet, even though the house has a privy or an earth-closet, if sufficient sewerage and water supply are reasonably available to overcome the exemption contained in *ibid.*, s. 37 (4) (a) ; for the omission from *ibid.*, s. 37 (3), of the word "privy," which appears in the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 81 (now repealed), gets over one of the difficulties pointed out in *Tinkler* v. *Wandsworth Board of Works* (1858), 2 De G. & J. 261, C. A. ; see note (*m*), p. 597, *ante ;* see also *St. Luke's, Middlesex, Vestry* v. *Lewis* (1862), 1 B. & S. 865. As to service and authentication of notices and orders, see pp. 370, 371, *ante*. The provisions as to service of notices apply to summonses under the Summary Jurisdiction Acts (*R.* v. *Mead*, [1894] 2 Q. B. 124).

(*p*) For the definition of owner, see note (*o*), p. 427, *ante*.

(*q*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 37 (3). The penalty is a fine not exceeding £5, and 40*s.* a day for each day during which the offence continues (*ibid.*) ; and as to legal proceedings, see, further, title METROPOLIS, Vol. XX., pp. 467, 468, 469 ; and see pp. 367 *et seq.*, *ante*. The magistrate has no power to order that in default of sufficient distress to meet a fine thus imposed the person fined may be imprisoned with hard labour (*R.* v. *Slade, Ex parte Saunders, R.* v. *London Justices, Ex parte Saunders* (1895), 72 L. T. 568). These expenses being recoverable from the owner, are also recoverable from the occupier for the time being of the premises (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 121), and may be recovered from such occupier even where a judgment has been recovered against an owner and remains unsatisfied (*Bermondsey Vestry* v. *Ramsey* (1871), L. R. 6 C. P. 247) ; but see note (*p*), p. 368, *ante*. The owner must allow the occupier to deduct any sum paid to the borough council under this provision from his rent (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 121) ; and see, further, titles LANDLORD AND TENANT, Vol. XVIII., p. 478 ; NUISANCE, Vol. XXI., p. 574. But this provision does not affect any contract between the owner and occupier which provides that the occupier shall pay or discharge all " rates, dues and sums of money payable in respect of such premises," or " any contract whatsoever between landlord and tenant " (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 121 (b)) ; and, as to such contracts, see title LANDLORD AND TENANT, Vol. XVIII., pp. 489—496.

(*r*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 37 (5) ; and see title METROPOLIS, Vol. XX., p. 468. This is the only appeal on the question of necessity of the works required, and that question cannot be raised as a defence to proceedings for a penalty (*St. John's, Hackney, Vestry* v. *Hutton*, [1897] 1 Q. B. 210).

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receptacles for dung, and their proper accessories in connection with buildings (*s*). Every sanitary authority in London (*t*) must make bye-laws with respect to the keeping of water-closets supplied with sufficient water for their effective action (*u*), and must observe and enforce such bye-laws. Directions given by the sanitary authority must be in accordance with such bye-laws; if not, they are void (*a*).

Sanitary authority bye-laws.

1218. A sanitary authority (*b*) in London has power at all reasonable times by day on giving twenty-four hours' notice, or, in cases of emergency, without notice, to enter any premises in its district and examine any water-closet, earth-closet, privy, ashpit, cesspool, or any works or apparatus connected therewith (*c*). For this purpose the sanitary authority may open the ground wherever it thinks fit, doing as little damage as may be (*d*). If the work in question is found on examination to be in proper order and condition, and in compliance with the statute and the bye-laws of the London County Council or the sanitary authority (*b*), the latter must reinstate the place opened up as soon as may be, and pay all the costs of examination and full compensation for all damage caused thereby. If the examination shows that the work is either not in proper order or condition or not in compliance with the statute or bye-laws, the expense of the examination falls on the person offending (*e*), and may be recovered summarily from him (*f*), and if the work has not been made or provided according to the bye-laws of the London County Council and of the sanitary authority (*b*) and the directions of the sanitary

Power to enter and examine sanitary conveniences.

Recovery of expenses.

(*s*) Whether constructed before or since the 5th August, 1891 (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 39 (1)). As to the City of London, see *ibid.*, s. 133; City of London (Various Powers) Act, 1900 (63 & 64 Vict. c. ccxxviii.), ss. 54, 63; as to expenses, see *ibid.*, ss. 60, 64—67. As to bye-laws providing for notice being given to the person against whom proceedings will be taken if they are not complied with, see *Nokes* v. *Islington Corporation* (No. 1), [1904] 1 K. B. 610; and see note (*s*), p. 394, *ante*. Bye-laws as to the construction of water-closets do not apply unless a water-closet is really being constructed; and if during repair of drains repairs have incidentally to be done to traps or pans which have been broken in the process of drain repair, that is not a constructing of water-closets within the meaning of the London County Council bye-laws (*Metropolitan Industrial Dwellings Co.* v. *Long* (1903), 2 L. G. R. 233). As to bye-laws, generally, see title METROPOLIS, Vol. XX., p. 467; and see pp. 388 *et seq.*, *ante*; *Marylebone Borough Council* v. *White* (1912), 76 J. P 382 (bye-law as to soil pipes).

(*t*) For such authorities, see title METROPOLIS, Vol. XX., pp. 408, 428, 466, 469; and see p. 373, *ante*. As to bye-laws in force in the City of London, see title METROPOLIS, Vol. XX., p. 469.

(*u*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 39 (2).

(*a*) *Ibid.*, s. 39 (3). Model bye-laws have been framed by the Local Government Board. As to the powers of metropolitan sanitary authorities for regulating pipes, drains and other means of communicating with sewers, see title SEWERS AND DRAINS.

(*b*) See note (*t*), *supra*.

(*c*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 40 (1). As to the exercise of powers of entry, see title METROPOLIS, Vol. XX., p. 467.

(*d*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 40 (1).

(*e*) It is not clear upon the wording of *ibid.*, s. 40, who is the person offending. A recently arrived occupier may apparently be made liable, under this provision, to meet defects in sanitary arrangements not due to act or omission on his part.

(*f*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 40 (1), 117.

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authority or contravenes the statute, the person so offending (*g*) is liable to a fine not exceeding £10 (*h*).

Unlawful construction. Discontinued water supply.

A similar fine may be imposed on any person who, without the consent of the sanitary authority (*i*), constructs any water-closet, earth-closet, privy, ashpit, or cesspool which has been ordered by the sanitary authority either not to be made or to be demolished, or who discontinues any water supply without lawful authority, or who destroys any sink, trap, siphon, pipe, or any connected works or apparatus without lawful authority, or so that the destruction creates a nuisance or is dangerous or injurious to health (*h*).

Proceedings and penalties.

In any such case the sanitary authority (*i*) may order (*j*) the person so offending (*g*) to make good the defect within a reasonable time (*k*), and if he fails to do so the sanitary authority (*i*) may proceed for a penalty not exceeding 20*s*. a day or, in the alternative, enter the premises, do the necessary work of remedy, and recover the expenses thereof from the person so offending (*l*).

Provision of public lavatories and sanitary conveniences.

1219. A sanitary authority in London (*m*) may provide and maintain (*n*) public lavatories and ashpits and public sanitary conveniences other than privies, in situations where they think they are required, may supply them with water, and may defray the expense of providing them and of any damage done to any person by their erection and construction, and the expense of keeping them (*o*). For this purpose the subsoil of any road, exclusive of the footway adjoining any building or its curtilage, vests in the sanitary authority (*p*).

In exercising these powers the question whether one place or

(*g*) See note (*e*), p. 601, *ante*.

(*h*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 41 (1) (a), (b), (c), (d). Fines recovered are paid to the sanitary authority; see title METROPOLIS, Vol. XX., p. 468; and see pp. 367 *et seq.*, *ante*.

(*i*) See note (*t*), p. 601, *ante*.

(*j*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 41 (1). As to such orders, see title METROPOLIS, Vol. XX., p. 469.

(*k*) *I.e.*, either fourteen days or such further time as is allowed by the sanitary authority or as appears necessary to a magistrate to do the work (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 41 (1)).

(*l*) *Ibid.*, s. 41 (2). Even though the water-closet, earth-closet, privy, ashpit or cesspool, or any connected work or apparatus, or other work connected therewith, complies with the statute and all bye-laws, yet if, on examination, it appears to be in bad order or condition, or to require cleansing, alteration or amendment, the sanitary authority may by notice order the owner or occupier to place the work in proper order or condition, either forthwith or in a reasonable time to be mentioned in the notice. If he does not comply, the sanitary authority may again proceed for a fine (not exceeding £5, and a further fine not exceeding 40*s*. for each day during which the offence continues), or, in the alternative, enter and do the work and recover the expenses from the owner or occupier (*ibid.*). As to legal proceedings, see titles METROPOLIS, Vol. XX., pp. 468, 469; NUISANCE, Vol. XXI., pp. 573, 574; and see pp. 367 *et seq.*, *ante*. In proceedings for a fine, the justices may inquire into the validity of the notices (*Fulham Vestry* v. *Solomon*, [1896] 1 Q. B. 198, 200).

(*m*) See note (*t*), p. 601, *ante*.

(*n*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 44.

(*o*) These are to be paid as if they were expenses of sewerage (*ibid.*); see title SEWERS AND DRAINS.

(*p*) The effect of statutory vesting of a highway in local authorities is dealt with in title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 58.

another is more suitable for a convenience of any of these kinds is for the sanitary authority (*q*), but it will be controlled by the court if it acts in an unreasonable manner or causes a nuisance to adjoining owners (*r*).

But if the sanitary authority (*q*) acts *bonâ fide* in providing the conveniences, its action will not be controlled by the court, even though, in making the approaches to water-closets, it makes what is incidentally a subway between two sides of a broad street (*s*).

Bye-laws and regulations as to user.

1220. A sanitary authority (*q*) which provides any of these conveniences may make regulations as to their management and bye-laws as to the decent conduct of those who use them (*a*), and it may let them (*b*), and charge fees for the use of lavatories or water-closets (*c*).

Access.

No public lavatory, ashpit, or convenience may be erected in, or accessible (*d*) from, any street, without the consent in writing of the sanitary authority (*e*).

Improper use and insanitary condition of convenience.

1221. Where in London a sanitary convenience is used in common by the occupiers of two or more separate dwelling-houses or other persons, provisions are in force for penalising any person who improperly uses or fouls any such convenience or anything used in connection therewith (*f*), and for penalising all those who use the convenience in common, or such of them as may be found to be in default, if the convenience or its approaches or walls, floors or seats, are for want of proper cleansing in a condition which, in the opinion of the sanitary authority or its sanitary inspector or medical officer, is a nuisance or annoyance to any inhabitant of the district (*g*).

(*q*) See note (*t*), p. 601, *ante*.

(*r*) *Biddulph* v. *St. George's, Hanover Square, Vestry* (1863), 9 Jur. (N. S.) 434, 953, C. A.; *Vernon* v. *St. James, Westminster, Vestry* (1880), 16 Ch. D. 449, C. A.

(*s*) *Westminster Corporation* v. *London and North Western Railway*, [1905] A. C. 426, reversing [1904] 1 Ch. 759, C. A., and restoring [1902] 1 Ch. 269. The dissenting judgment of Lord JAMES OF HEREFORD, [1905] A. C. at p. 434, deserves special notice.

(*a*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76, s. 45 (1) (a).

(*b*) The lease may not be for more than three years, and may be subject to conditions (*ibid.*, s. 45 (1) (b)).

(*c*) *Ibid.*, s. 45 (1) (c).

(*d*) As to the meaning of "accessible," see *Chibnall* v. *Paul & Son* (1881), 29 W. R. 536.

(*e*) This consent may be given on such terms as to the management and removal thereof at any time required by the council (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 45 (2)). Breach of this provision is punishable with a fine not exceeding £5, and a continuing penalty not exceeding 20*s.* a day, if the breach continues after conviction (*ibid.*, s. 45 (3)). This section does not apply to conveniences set up by railway companies in their yards or in the approaches thereto (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 45 (4)).

(*f*) *Ibid.*, s. 46 (1). As to the provinces, see p. 604, *post*.

(*g*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 46 (2). The penalty (a fine not exceeding 10*s.*, and a fine not exceeding 5*s.* a day for a continuing offence after conviction) is recoverable if it is proved to the court that the opinion of the council or its officers is as set out in the text, *supra*. As to the provinces, see p. 604, *post*. As to legal proceedings, see titles METROPOLIS, Vol. XX., pp. 468, 469; NUISANCE, Vol. XXI., pp. 573, 574; and see pp. 367 *et seq.*, *ante*. As to sanitary authorities in

Sanitary Accommodation.

Exercise of statutory powers.

1222. The power of local authorities (*h*) to provide sanitary conveniences is a discretionary one, and so long as it is exercised in good faith and fairly the court will not restrain such exercise (*i*), but the power must not be so exercised as to create a nuisance to adjoining owners (*i*), and it is no defence to prove that the sanitary condition of the neighbourhood has been improved by the erection (*k*).

Power to examine conveniences alleged to be nuisances.

1223. Nuisances arising in connection with private sanitary conveniences are the subject of statutory provisions. The local authority (*h*) has power, after notice, to enter and examine any drain, water-closet, earth-closet, privy, ashpit, or cesspool in its district, after receiving a complaint that it is a nuisance or injurious to health.

Orders for repairs or removal.

The authority may require any necessary repairs to be done under penalties for default, and may execute the works and recover the cost thereof from the owner of the premises, or may declare them to be private improvement expenses (*l*). Further, where the enactments (*m*) are in force (*n*), the local authority (*h*) may require the owner or occupier to fill up or remove such cesspools and the like as are objectionable for sanitary reasons (*o*), and, by notice (*p*) in writing, may require the owner of any sanitary convenience (*q*) to remove it within a reasonable time, if it is so placed or made as to be a nuisance or offensive to public decency (*r*).

Overflow from conveniences.

1224. In urban districts (*s*), the allowing the contents of any

London, see title METROPOLIS, Vol. XX., pp. 408, 428, 466, 469; and see p. 373, *ante*.

(*h*) As to the meaning of "local authority," see pp. 364, 372, *ante*.

(*i*) See *Biddulph* v. *St. George's, Hanover Square, Vestry* (1863), 9 Jur. (N. S.) 434, 953, C. A.; *Vernon* v. *St. James', Westminster, Vestry* (1880), 16 Ch. D. 449, C. A.; *Spicer* v. *Margate Corporation* (1880), 24 Sol. Jo. 821; *Sellors* v. *Matlock Bath Local Board* (1885), 14 Q. B. D. 928; *Mogg* v. *Bocken* (1888), 5 T. L. R. 22; *Pethick* v. *Plymouth Corporation* (1894), 58 J. P. 476; *Mason* v. *Wallasey Local Board* (1876), 58 J. P. 477; *Parish* v. *London Corporation* (1901), 67 J. P. 55; *Leyman* v. *Hessle Urban District Council* (1902), 67 J. P. 56; *Mayo* v. *Seaton Urban District Council* (1903), 68 J. P. 7; and other cases cited in title NUISANCE, Vol. XXI., pp. 521, 523, 564.

(*k*) *Parish* v. *London Corporation, supra.*

(*l*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 41. The penalty is a fine not exceeding 40*s*., and not exceeding 5*s*. for every day the offence continues (*ibid.*); and, as to the powers of local authorities in the case of nuisances summarily abatable, see title NUISANCE, Vol. XXI., pp. 538 *et seq.*, 566 *et seq.* As to private improvement expenses, see pp. 381, 382, *ante*.

(*m*) *I.e.*, Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), ss. 43 (1), 46; see the text, *infra*.

(*n*) See pp. 364, 365, *ante*.

(*o*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 46.

(*p*) As to notices, see p. 370, *ante*.

(*q*) For the definition of "sanitary convenience," see Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 11 (3); compare Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 141.

(*r*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 43 (1). The penalty for non-compliance with the requirement is a fine not exceeding 20*s*. (Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 63), s. 43 (2)). As to legal proceedings, see pp. 367 *et seq.*

(*s*) See p. 372, *ante*.

water-closet, privy, or cesspool to overflow or soak therefrom is an offence punishable by penalties, and the local authority may abate the nuisance and recover the expense thereof from the occupier (*t*).

Damage to conveniences and faulty construction.

1225. In London the destruction or damage or interference with sanitary conveniences so as to cause a nuisance or injury to health is the subject of penalties (*u*), and so also where a water-closet or drain is so constructed or repaired as to produce the like result (*v*).

Common conveniences.

1226. Nuisances in connection with sanitary conveniences used in common by the occupiers of two or more separate dwelling-houses, or by other persons, may, where the enactment is in force (*w*), be dealt with by penalties (*a*).

SECT. 15.—*Scavenging and Cleansing.*

SUB-SECT. 1.—*Houses and Streets.*

Removal of trade refuse.

1227. If a sanitary authority in London (*b*), or a local authority of an area in respect of which the enactment is in force (*c*), is asked by an owner (*d*) or occupier to remove trade refuse (*e*), it must do so, and may charge the owner or occupier a reasonable sum for such removal, such sum to be finally settled in the event of dispute by a court of summary jurisdiction (*f*).

(*t*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 47; and, as to the powers of local authorities in the case of nuisances summarily abatable, see title NUISANCE, Vol. XXI., pp. 538 *et seq.*, 566 *et seq.*

(*u*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 15. As to destroying apparatus so as to cause a nuisance or injury or danger to health, see *ibid.*, s. 41 (1) (d); and see p. 602, *ante*.

(*v*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 42. Provision is made for punishing the actual offender instead of the person proceeded against (*ibid.*).

(*w*) *I.e.*, Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 21; see pp. 363, 364, *ante*. The enactment is similar to the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 46; see p. 603, *ante*.

(*a*) Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), ss. 11 (3), 21.

(*b*) As to sanitary authorities in London, see title METROPOLIS, Vol. XX., pp. 408, 428, 448, 469; and see p. 373, *ante*.

(*c*) *I.e.*, Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 48; see pp. 364, 365, *ante*.

(*d*) For the definition of "owner," see note (*o*), p. 427, ante.

(*e*) For the definition of "trade refuse" applicable to the areas of London sanitary authorities, see note (*l*), p. 568, *ante*. In the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 48, "sludge" is excepted from the provision.

(*f*) *Ibid.*; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 33 (1). If any question arises in any case as to what is to be considered trade refuse, either party may apply to a court of summary jurisdiction to determine it, and such determination is final (*ibid.*, s. 33 (2); Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 48). It cannot be reviewed by a superior court (*Westminster Corporation* v. *Gordon Hotels, Ltd.*, [1906] 2 K. B. 39; [1907] 1 K. B. 910, C. A.; [1908] A. C. 142). In arguing this case, the point that the magistrate's decision was final, which was taken successfully in the Court of Appeal and also in the House of Lords, was not raised in the King's Bench Division, where the question of what is trade refuse and what is house refuse was fully argued. The result of the decision of the Divisional Court is that, in considering whether refuse is house or trade refuse, regard must be had to its physical nature and character, and not to the process or circumstances by which it is

SECT. 15. Scavenging and Cleansing.

Removal of house refuse and cleansing of conveniences by district councils.

1228. A district council, whether urban or rural, may, and if required by the Local Government Board, must (*g*), itself undertake or contract for the removal of house refuse (*h*) from premises, and the cleansing of earth-closets, privies, ashpits (*i*) and cesspools, either for the whole or any part of its district (*g*).

If a district council has undertaken or contracted for such removal or cleansing, and fails, without reasonable excuse, to do such removal or cleansing, within seven days after a written request from the occupier asking it to do so, it is liable to pay to the occupier a penalty of 5*s.* a day for every day during which such default continues after the expiration of the seven days (*j*).

Offence by district council.

Removal of house refuse in London.

1229. In London, every sanitary authority (*k*) must secure the removal of house refuse (*l*) at proper periods, and the cleansing and emptying at proper periods of ashpits (*m*), and of any earth-closets,

accumulated; see especially [1906] 2 K. B. 36, *per* BRAY, J., at pp. 52—54. Accordingly, refuse *ejusdem generis* as ordinary house refuse remains "house refuse," though produced in the course of carrying on the business of providing refreshments in a shop or restaurant for profit. Such refuse does not become trade refuse merely because there is no "house" (in the sense of a building in which persons sleep at night) in connection with which it is accumulated (*Lyons (J.) & Co., Ltd.* v. *London Corporation*, [1909] 2 K. B. 588).

(*g*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 42. If a nuisance arises by reason of the district council not discharging this duty after having undertaken it, the council is responsible, and cannot use its powers under *ibid.*, ss. 94, 95, to compel the owner of the premises concerned to substitute and fix water-closets there instead of the existing privies (*Barnett* v. *Laskey* (1898), 79 L. T. 408); and see note (*s*), p. 564, *ante*. A district council which has undertaken to cleanse earth-closets, privies and the like, in the whole of its area, may not refuse to cleanse tub-closets within it on the ground that it has power under a local Act to approve or disapprove them, and has not approved them (*Pegg and Jones, Ltd.* v. *Derby Corporation*, [1909] 2 K. B. 511). Persons must not obstruct the district council or a contractor in carrying out the provisions referred to in the text, *supra*, and if they so obstruct are liable to a fine not exceeding £5 (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 42), but occupiers may keep such refuse if they intend to use or sell it, provided it is so kept as not to be a nuisance (*ibid.*). If a council agrees with a contractor to remove refuse or cleanse cesspools it must arrange by the contract or otherwise that the refuse is so disposed of as not to be a nuisance; and if it makes no such arrangement, any person injured by the disposal of the refuse is entitled to damages against the council, as well as against the contractor (*Robinson* v. *Beaconsfield Rural Council*, [1911] 2 Ch. 188, C. A.); and see title NEGLIGENCE, Vol. XXI., pp. 473, 474. For forms of contract for removal of refuse, see Encyclopædia of Forms and Precedents, Vol. X., pp. 593, 596.

(*h*) For a definition of "house refuse," see note (*l*), p. 568, note (*f*), p. 605, *ante*.

(*i*) As to the meaning of "ashpit," see note (*h*), p. 420, *ante*.

(*j*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 43. The fact that the district council has not approved the privies in its district is not such a "reasonable excuse," even though it has power to approve or disapprove under a private Act (*Pegg and Jones, Ltd.* v. *Derby Corporation, supra*). For form of request, see Encyclopædia of Forms and Precedents, Vol. X., p. 589.

(*k*) As to sanitary authorities in London, see title METROPOLIS, Vol. XX., pp. 408, 428, 466, 469; and see p. 373, *ante*.

(*l*) For the definition of "house refuse," see note (*l*), p. 568, *ante*.

(*m*) As to the meaning of "ashpits," see the definition in Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 141; and compare Publ

privies, or cesspools in its district, and must give sufficient notice of the times appointed for such removal, cleansing, and emptying (*n*). If such removal or cleansing is not done at the ordinary and published times (*o*), such removal and cleansing must be carried out within forty-eight hours after the sanitary authority (*p*) has received a notice in writing from the occupier of the premises concerned requiring the removal or cleansing (*q*).

Sale of collected house refuse.

1230. Both within and outside London, house refuse collected from houses belongs to the sanitary authority (*r*) which collects it (*s*). In London it may be sold and the purchase-money used to defray the expenses of executing the Public Health (London) Act, 1891 (*t*). In urban districts it may be sold or otherwise disposed of, and the profits thus made (*u*) go into the general district fund, and in rural districts, if in respect of a contributory place, to the credit of

Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 11 (1); note (*h*), p. 420, *ante*.

(*n*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 30 (1) (a). This enactment prevents sanitary authorities from escaping liability if, in cases where they have contracted with other persons for such work, the contractors fail to do it. It virtually overrules the decision in *Ellis* v. *Strand District Board of Works* (1892), 67 L. T. 307, C. A., in which the district board were held not liable for default of such other persons.

(*o*) The object of the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 30 (1) (a), is to cause the sanitary authority to fix and publish times for removal of house refuse so that occupiers may know of them. No person, other than an occupier, in default of the sanitary authority, may collect, receive, or carry away house refuse under a penalty not exceeding £5 (*ibid.*, s. 34 (2)). To refuse to allow the removal is an obstruction of the sanitary authority within *ibid.*, s. 116 (1); see title METROPOLIS, Vol. XX., p. 467.

(*p*) See note (*k*), p. 606, *ante*.

(*q*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 30 (1) (b). The penalty for which a sanitary authority in London is liable if it fails to comply with any of the provisions of *ibid.*, s. 30, is a fine not exceeding £20 (*ibid.*, s. 30 (2)). As to taking gratuities for removing refuse, see *ibid.*, s. 30 (3). The sanitary authority must either agree with contractors to do the work of removal or itself employ a sufficient number of scavengers to do it (*ibid.*, s. 31).

(*r*) As to such sanitary authorities, see pp. 372—374, *ante*; and see title METROPOLIS, Vol. XX., pp. 408, 428, 466, 469.

(*s*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 42; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 32. It would seem, however, that the refuse produced by a manufacture does not vest in the sanitary authority if, after being first produced, it has still a commercial value and may be used by the producers in some further business process; see *Filbey* v. *Combe* (1837), 2 M. & W. 677, and *Law* v. *Dodd* (1848), 1 Exch. 845. These cases were decided under the Metropolitan Paving Act, 1817 (57 Geo. 3, c. xxix.), ss. 59, 60 (now repealed). If a sanitary authority in London (see note (*k*), p. 606, *ante*) neglects for seven days to remove any house refuse which it is bound to remove, the occupier may, after giving the borough council twenty-four hours' notice to remove it, give it away or sell it without any prejudice to the other remedies (see p. 606, *ante*) under the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), and the buyer may lawfully take it away (*ibid.*, s. 34 (1)).

(*t*) 54 & 55 Vict. c. 76, s. 32; and see title METROPOLIS, Vol. XX., p. 451.

(*u*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 42. It is not clear whether the whole yield of the sale of refuse is "profit" or only so much thereof as may remain after deducting the cost of collection.

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the fund or rate out of which the sanitary authority pays for expenses incurred in such place (*a*).

Bye-laws as to removal of house refuse.

1231. Urban and rural sanitary authorities (*b*) which do not themselves undertake or contract for removal of house refuse and cleansing of sanitary conveniences may make bye-laws imposing upon occupiers the duty of such removal or cleansing at such intervals as the authorities think fit (*c*); and, where the enactment is in force (*d*), may, if they themselves undertake or contract for the removal of house refuse, make bye-laws imposing on occupiers duties to facilitate such removal (*e*).

Cleansing of dwelling-houses.

On receiving the proper certificate (*f*) from the medical officer of health, or from two medical practitioners, to the effect that a house (*g*) should be whitewashed or cleansed to prevent danger to health or to prevent or check infectious disease, an urban or rural sanitary authority (*h*) may, by notice in writing, require the owner, or occupier to cleanse (*i*), purify, or whitewash such house within a time specified in the notice, and, if he fails to comply with the notice, may proceed summarily against him for a penalty of 10*s*. for every day during which he continues to make default, and may also do the work required, and recover the expenses of so doing from the person in default in a summary manner (*k*).

Cleansing of extra-metropolitan streets.

1232. For the cleansing of streets outside London, urban district councils have the same powers and duties as for collecting refuse from houses, and the provisions already referred to (*l*), allowing them to sell refuse from houses, relating to the proceeds of such sales, and forbidding obstruction of the council or its agents,

(*a*) *I.e.*, expenses under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 42 (*ibid.*). As to contributory places and their financial arrangements with rural councils, see *ibid.*, ss. 229, 230; and see pp. 381, 382, *ante*.

(*b*) As to such authorities, see pp. 372, 373, *ante*; and as to such contracts, see the text, *supra*.

(*c*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 44. Model bye-laws under this provision have been issued by the Local Government Board.

(*d*) *I.e.*, where the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 26 (2), is in force; see pp. 363, 364, *ante*.

(*e*) Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 26 (2). This provision is one which rural councils may adopt without order of the Local Government Board; see *ibid.*, s. 50; and see p. 363, *ante*. As to London, see Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 16 (2), 133. See also note (*c*), *supra*.

(*f*) As to the contents of the certificate etc., see Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 46.

(*g*) For the definition of "house," see note (*g*), p. 401, *ante*.

(*h*) See pp. 372, 373, *ante*.

(*i*) For the definition of "owner," see note (*o*), p. 427, *ante*.

(*k*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 46. Where the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 56, is in force (see pp. 364, 365, *ante*), the local authority (see p. 372, *ante*) may, on the certificate of its medical officer that any filthy article in a dwelling-house is likely to injure health, cause it to be cleansed, purified or destroyed, and compensate any person not in default. There is a similar provision in force in London as to filthy, dangerous, or unwholesome articles (London County Council (General Powers) Act, 1904 (4 Edw. 7, c. ccxliv.), s. 19); as to the cleansing of verminous persons in London, see *ibid.*, s. 20. For form of notice to cleanse and purify premises, see Encyclopædia of Forms and Precedents, Vol. X., p. 596. As to the cleansing of lodging-houses, see p. 512, *ante*.

(*l*) See p. 607, *ante*; and see title, HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 256.

apply equally in the matter of cleansing streets (*m*). Rural district councils have no power to cleanse streets unless invested with urban powers (*n*). The power to make bye-laws mentioned above (*o*) also authorises urban and rural district councils to make bye-laws imposing on occupiers the duty of cleansing footways and pavements adjoining their premises (*p*). Urban councils may also make bye-laws for preventing nuisances arising from snow, filth, dust, ashes, and rubbish (*q*), and may provide fit places for the deposit of any refuse collected by them from houses or streets (*r*).

Cleansing of metropolitan streets.

1233. In London every sanitary authority (*s*) must keep the streets in its borough which are repairable by the inhabitants at large, including the footways, properly swept and cleansed, and remove all street refuse (*t*). The penalty for non-performance of this duty (*u*) is a fine not exceeding £20 (*v*), and the sanitary authority (*s*) may be compelled, on complaint of any person, to

(*m*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 42.

(*n*) *Ibid.*; see title LOCAL GOVERNMENT, Vol. XIX., p. 332.

(*o*) See p. 608, *ante*. As to the cleansing of extra-metropolitan streets, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 256.

(*p*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 44. Where the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 26 (1), is in force (see pp. 363, 364, *ante*), bye-laws may also be made prescribing the times at which fæcal or offensive or noxious matters may be carried through the streets of the district, for prescribing the proper construction of refuse carts, and compelling the sweeping up of any offensive matter or liquid which is dropped in the course of removal; see the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 50), s. 26 (1). As to bye-laws, generally, see pp. 388 *et seq.*, *ante*.

(*q*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 44; and see title NUISANCE, Vol. XXI., pp. 514, 540. Model bye-laws under this provision have been issued by the Local Government Board. As to the provision being put in force in a rural district, see title LOCAL GOVERNMENT, Vol. XIX., p. 332. As to the keeping of swine, waste and stagnant water, and overflowing closets, see pp. 604, *ante*, pp. 611, 612, *post*; title NUISANCE, Vol. XXI., p. 513.

(*r*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 45. As to receptacles for temporary deposit of rubbish, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 257.

(*s*) As to sanitary authorities in London, see title METROPOLIS, Vol. XX., pp. 408, 428, 466, 469; and see p. 373, *ante*.

(*t*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 29 (1). For definition of "street refuse," see *ibid.*, s. 141; pp. 568, note (*m*), 605, note (*f*), *ante*. The Act says that cleansing and removal must be carried out "so far as reasonably practicable." As to the expenses of providing wharves and destructors for disposal and removal of street refuse, see the Public Health (London) Act, 1891, Amendment Act, 1893 (56 & 57 Vict. c. 47), s. 3; and as to the cleansing of metropolitan streets, see also title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 204. Bye-laws as to carriage of fæcal and offensive matters (similar to those referred to in note (*p*), *supra*), must be made by the London County Council and enforced by the sanitary authorities (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 16 (2), (3); but the bye-laws do not extend to the City (*ibid.*, s. 133).

(*u*) The non-performance of the duty does not necessarily render a sanitary authority liable to an action for damages for non-feasance (*Saunders* v. *Holborn District Board of Works*, [1895] 1 Q. B. 64); and see title NEGLIGENCE, Vol. XXI., pp. 422, 423.

(*v*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 29 (2).

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carry out the duty by an order of the Local Government Board, which order is enforceable by mandamus (*a*), or the Board may, except where the City Corporation is the defaulter, appoint the London County Council to perform the duty (*b*). Every sanitary authority (*c*) must employ, or contract for the employment of, sufficient scavengers to do the work (*d*), and the provisions applicable to the sale and disposal of house refuse (*e*) apply to street refuse. Every sanitary authority (*c*) must make and enforce bye-laws for preventing nuisances arising from snow, ice, salt, dust, ashes, rubbish, offal, carrion, fish, filth, and other offensive matters (*f*).

Removal of obnoxious matter.

Disposal.

1234. If the inspector of nuisances of an urban district council, or, in London, the sanitary inspector, thinks that any obnoxious matter should be removed (*g*), he may give the owner of the matter or the occupier of the premises whereon it exists notice to remove it. If it is not removed within twenty-four hours, or, in London, within forty-eight hours, it becomes the property of the district council, or, in London, of the sanitary authority (*c*), which may remove and sell it, and, so far as the sale does not repay the expenses of removal, may, either in or outside London, recover such expenses in a summary manner from the former owner of the refuse, or from the occupier or, if there is no occupier, the owner of the premises (*h*). If the sale of the matter realises a sum in excess of the cost of removal, the balance must be paid on demand to the former owner of the matter removed (*i*).

(*a*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 101. As to mandamus, see title CROWN PRACTICE, Vol. X., pp. 89, 106; and see note (*g*), p. 378, *ante*.

(*b*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 101, 103.

(*c*) As to sanitary authorities in London, see title METROPOLIS, Vol. XX., pp. 408, 428, 466, 469; and see p. 373, *ante*.

(*d*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 31.

(*e*) See pp. 607, 608, *ante*. As to this, see Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 49, and Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 35 (1).

(*f*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 16 (1); and see title NUISANCE, Vol. XXI., pp. 514, 540. Model bye-laws have been framed by the Local Government Board. As to bye-laws, generally, see pp. 388 *et seq.*, *ante*.

(*g*) The Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 35 (1), adds here, "and it is not the duty of the sanitary authority to remove it." The Local Government Board will put the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 49, 50 (see the text, *infra*), into force in a rural district (see title LOCAL GOVERNMENT, Vol. XIX., p. 332) only in very exceptional circumstances.

(*h*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 35 (1), (2); Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 49. At common law, all persons are liable to prevent their land from being used so as to be a public nuisance, and the Attorney-General, proceeding at the relation of an urban or borough council in London, is entitled to an injunction to restrain such a nuisance in spite of the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 30, 35: the court, in hearing a motion for such an injunction, took into consideration that the repeated exercise by a vestry in London of its powers under *ibid.*, s. 35, would be inconvenient and ineffective (*A.-G.* v. *Tod Heatley*, [1897] 1 Ch. 560, C. A.). As to an accumulation of seaweed coming within the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 49, see *Margate Pier (Proprietors)* v. *Margate Town Council* (1869), 33 J. P. 437.

(*i*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 35 (1).

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1235. In London the sanitary authorities (*j*) may employ, or contract with, scavengers to remove manure and other refuse matter from the stables and cowhouses within their districts, the occupiers of which consent in writing to such removal (*k*).

Removal of manure and waste or stagnant water.

Urban and metropolitan sanitary authorities may also give public notice requiring manure to be removed from premises at fixed periods (*l*).

It is an offence to allow waste or stagnant water to remain in a cellar or dwelling-house in an urban district twenty-four hours after written notice has been given by the urban authority to remove it; the authority has the same power of abating the nuisance as in the case of overflow from a sanitary convenience (*m*).

SUB-SECT. 2.—*Offensive Ditches.*

Powers of urban or rural authorities.

1236. If a watercourse or open ditch near the district of an urban or rural sanitary authority, or forming the boundary between that district and another is foul or offensive, the authority of the former district may apply to a justice in the latter district for an order to remedy the matter. The justice may summon the local authority of the latter district before him to show cause why an order should not be made upon it to cleanse such watercourse or open ditch and to execute such permanent or structural works as may be necessary; and, after a hearing, such an order may be made (*n*).

For form of agreement, see Encyclopædia of Forms and Precedents, Vol. X., pp. 586, 593.

(*j*) See note (*c*), p. 610, *ante*.

(*k*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 36 (1). The occupiers must not revoke their consent without one month's notice in writing, and in spite of such agreement remain liable to fines for placing dung or manure on footways or carriage-ways or allowing deposits of refuse to accumulate on their premises so as to be a nuisance or dangerous to health (*ibid.*).

(*l*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 50; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 35 (2). The penalty for non-compliance is a fine not exceeding 20*s.* a day, recoverable without further notice, *ibid.* The Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 50, imposes a similar penalty for permitting further accumulation or not continuing the periodical removal directed by the public notice; and see note (*g*), p. 610, *ante*. For form of notice, see Encyclopædia of Forms and Precedents, Vol. X., p. 590.

(*m*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 47. The penalty is not exceeding 40*s.*, with a daily penalty of not exceeding 5*s.* (*ibid.*); see also pp. 604, 605, *ante*.

(*n*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 48. The order may be made on an application *ex parte* if the adjoining local authority does not appear, and may determine who must do the works and in what proportion and by whom the costs of the works must be paid (*ibid.*). An order on a council to do works outside its district is good though its execution involves a trespass (*Woburn Union* v. *Newport Pagnell Union* (1887), 51 J. P. 694). But a power to cover offensive ditches at the side of roads and substitute pipe or other drains does not authorise a district council to remove posts and rails and cover a ditch which is fenced off from the highway (*Tutill* v. *West Ham Local Board* (1873), L. R. 8 C. P. 447). As to the power of surveyors of highways under the Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 67, see *A.-G.* v. *Copeland*, [1902] 1 K. B. 690, C. A.; and see titles HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 113; SEWERS AND DRAINS;

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Powers of metropolitan sanitary authorities.

1237. In London sanitary authorities (*o*) may cause ditches at the sides of and across public roads, byeways and footways to be filled up, and may substitute for them pipes or other drains across or alongside such roads or ways, and may make appropriate means of carrying water from them (*p*). They must also cause to be drained, cleansed, covered, or filled up all ponds, pools, ditches and other places in which drainage, filth, or anything offensive or likely to be prejudicial to health is collected or contained (*q*). They must also give written notice to the person who causes such collection, or to the owner or occupier of the premises where it exists, requiring him to take steps to remove it in a time specified in the notice (*r*). Persons aggrieved by any notice or act of the sanitary authority (*s*) in relation to the construction, covering, filling up or other alteration of any drain under this provision, may appeal to the London County Council, whose decision is final (*t*).

WATERS AND WATERCOURSES. As to the power of a parish council to deal with offensive ditches, see title LOCAL GOVERNMENT, Vol. XIX., p. 248. For form of notice, see Encyclopædia of Forms and Precedents, Vol. X., p. 597. As to watercourses generally, see title WATERS AND WATERCOURSES.

(*o*) As to sanitary authorities in London, see title METROPOLIS, Vol. XX., pp. 408, 428, 466.

(*p*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 87. Land gained by such works may be thrown into the adjoining highway, in which case it becomes repairable as part thereof (*ibid.*); and see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 200, 201.

(*q*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 43 (1) (a). This provision is apparently designed for the cases in which it cannot be discovered who is responsible for the offensive accumulation or who owns the place where it exists.

(*r*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 43 (1), (6). This is the procedure where the person responsible for the collection, or the owner or the occupier of its *locus*, cannot be discovered. The penalty for non-compliance is a fine not exceeding £5, and a fine not exceeding £2 for each day the offence continues (*ibid.*, s. 43 (2)). For the definition of owner, see note (*o*), p. 427, *ante*. In lieu of proceeding for a penalty the sanitary authority may enter on the premises, abate the nuisance, and recover the expenses of the abatement from the owner (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 43 (2)). The sanitary authority may pay for the abatement as part of their sewerage expenses (*ibid.*, s. 43 (2) (a)). As to nuisances summarily abatable, see, further, title NUISANCE, Vol. XXI., pp. 566 *et seq.*, and, as to legal proceedings, see pp. 367 *et seq.*, *ante*. As to procedure before courts of summary jurisdiction, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.* If the work of abatement damages any ancient mill or right connected therewith the sanitary authority must make full compensation for such damage in the manner provided by the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 225, 226. As to the time for applying to justices for compensation, see *R.* v. *Edwards* (1884), 13 Q. B. D. 586, C. A. The sanitary authority may, in the alternative, purchase the mill or right in the manner provided by the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 149—156. As to the procedure, see title METROPOLIS, Vol. XX., pp. 456 *et seq.*

(*s*) See note (*o*), *supra*.

(*t*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 43 (3); and see title METROPOLIS, Vol. XX., pp. 468, 469.

PUBLIC-HOUSE.

See INNS AND INNKEEPERS; INTOXICATING LIQUORS.

PUBLIC LIBRARIES AND MUSEUMS.

See PUBLIC HEALTH AND LOCAL ADMINISTRATION.

PUBLIC MEETINGS.

See CRIMINAL LAW AND PROCEDURE; STREET AND AERIAL TRAFFIC.

PUBLIC OFFICER.

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PUBLIC SCHOOLS.

See EDUCATION.

PUBLIC WORSHIP.

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See INNS AND INNKEEPERS; INTOXICATING LIQUORS.

PUBLICATION.

See COPYRIGHT AND LITERARY PROPERTY; CRIMINAL LAW AND PROCEDURE; LIBEL AND SLANDER.

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PUNISHMENT.

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PURCHASERS AND PURCHASES.

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PYX.

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QUALIFICATION OF VOTERS.

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QUANTITY SURVEYORS.

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QUANTUM MERUIT.

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QUAYS.

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QUEEN.

See CONSTITUTIONAL LAW.

QUEEN ANNE'S BOUNTY.

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QUIA EMPTORES.

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QUIA TIMET.

See EQUITY.

QUIET ENJOYMENT.

See LANDLORD AND TENANT.

QUIT RENT.

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QUO WARRANTO.

See CROWN PRACTICE; MAGISTRATES.

QUORUM.

See LOCAL GOVERNMENT; MAGISTRATES.

R. S. C.

See PRACTICE AND PROCEDURE.

RABBITS.

See ANIMALS.

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See ANIMALS.

RACES AND RACECOURSES.

See GAMING AND WAGERING; THEATRES AND OTHER PLACES OF ENTERTAINMENT.

RACK RENT.

See LANDLORD AND TENANT.

RAILWAY AND CANAL COMMISSION.

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RAILWAYS AND CANALS.

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Part I.—Constitution of a Railway Company.

SECT. 1.—*Formation.*

SUB-SECT. 1.—*Under Special Act.*

Nature of special Act and incorporation of General Clauses Acts.

1238. A railway company is usually formed by an Act of Parliament which is called the company's "special Act," and which authorises the construction of the railway (*a*). Before 1845, each special Act was complete in itself and contained all the powers conferred by the legislature on the company. In that year, however, certain general Acts were passed for the purpose of consolidating those provisions which had been usually inserted in Acts incorporating companies for carrying on public undertakings

(*a*) See Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 2. From six months after the passing of the special Act the company is bound to keep at its principal office a copy of the Act, and in that time to deposit a copy in the office of the clerk of the county council (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 83 (6)) of each county into which the railway extends. All persons interested must be permitted to inspect such copies and to make extracts therefrom, and penalties are incurred by any breach of these provisions (Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 162, 163). For the steps necessary to obtain a special Act, see title PARLIAMENT, Vol. XXI., pp. 727 *et seq.*

and authorising the compulsory acquisition of land or the construction of railways. These general Acts are the Companies Clauses Consolidation Act, 1845 (*b*), the Lands Clauses Consolidation Act, 1845 (*c*), and the Railways Clauses Consolidation Act, 1845 (*d*). Each of these Acts applies to every company incorporated by any special Act, passed since the 8th May, 1845, by which power is given to such company to construct a railway and to acquire lands compulsorily for the purposes of such construction; and such Acts must be incorporated in the special Act and form part thereof, and all their clauses and provisions apply to the undertaking authorised, save so far as they are expressly varied or excepted by the special Act (*e*).

Companies to which the Clauses Acts apply.

1239. These Clauses Acts do not apply to companies incorporated by special Acts passed before 8th May, 1845; but as all such companies which are now in existence have since that date obtained further powers from Parliament, and as the Clauses Acts have been applied to them by their further special Acts, it may be presumed that the Clauses Acts apply to every railway company in the kingdom (*f*).

Division of Clauses Act, 1863.

1240. The Railways Clauses Act, 1863 (*g*), is divided into five parts, of which Part I., relating to construction of a railway, Part III., relating to working agreements, Part IV., relating to steam vessels, and Part V., relating to amalgamation, apply to a railway company where they are expressly incorporated in a special Act passed after the 28th July, 1863, by such special Act (*h*).

Application of Companies Clauses Consolidation Act.

1241. The constitution, regulation, and management of a railway company formed under a special Act, the rights and liabilities of shareholders in such company, and the powers of the company with regard to the raising of capital and issuing of shares are governed by the Companies Clauses Consolidation Act, 1845 (*i*).

Acquisition by Crown.

1242. When twenty-one years have elapsed after the authorisation of any railway made or authorised since the year 1843, the Crown has power at any time, on certain conditions, to purchase such railway for a sum equal to twenty-five years' purchase of the annual

(*b*) 8 & 9 Vict. c. 16; see title COMPANIES, Vol. V., pp. 674 *et seq.*

(*c*) 8 & 9 Vict. c. 18; see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 12 *et seq.*

(*d*) 8 & 9 Vict. c. 20.

(*e*) See s. 1 of each of the Acts referred to in notes (*b*), (*c*), (*d*), *supra*. The Acts are usually incorporated in the special Act by express words, but this seems to be unnecessary. As to the exemption of the land of a railway company from compulsory acquisition for the purposes of the Housing Acts, see Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 45; title PUBLIC HEALTH AND LOCAL ADMINISTRATION, p. 547, note (*p*).

(*f*) It is assumed throughout this title that the general Acts apply fully to every railway company mentioned. It is doubtful, however, whether the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), applies to every company whose original Act was passed before the 8th May, 1845, and certainly none of the Acts of 1845 (see notes (*b*), (*d*), *supra*) applies to works constructed under powers granted before that date.

(*g*) 26 & 27 Vict. c. 92.

(*h*) *Ibid.*, ss. 2, 3, 22, 30, 36.

(*i*) 8 & 9 Vict. c. 16. With regard to all such matters as are referred to in this paragraph, see title COMPANIES, Vol. V., pp. 674 *et seq.*

SECT. 1. Formation.

divisible profits calculated on an average of the three preceding years (*j*).

SUB-SECT. 2.—*Under Certificate of the Board of Trade.*

Application by promoters.

1243. Where any companies or persons intending to construct a railway have contracted for the purchase of all the lands required for that purpose, they may apply to the Board of Trade for a certificate authorising such construction under the Railways Construction Facilities Act, 1864 (*k*).

Contract for acquisition of land.

1244. Such company or persons (called the "promoters") (*l*) and all parties seised or possessed of or entitled to such lands may make provisional contracts for the purchase or taking and sale of the lands under the same conditions as are prescribed by the Lands Clauses Acts (*m*) for the taking of lands by agreement (*n*).

Such promoters and parties have none of the powers conferred by those Acts (*m*) with regard to the acquisition of land otherwise than by agreement (*o*); and a person under disability or incapacity, though he may contract for the sale of lands, has no power to carry the contract into execution or to deal further with the lands before the certificate comes into operation (*p*). Neither may the promoters before that time take or hold lands, though they may contract for them (*p*).

The promoters need not enter into any contracts with regard to the use of, diversion of, or interference with, any highway before applying for a certificate (*q*).

Deposit of maps and plans.

1245. On making their application to the Board of Trade, the promoters must deposit maps, plans, sections, and books of reference, together with an estimate of the cost of construction, and a draft of the proposed certificate, and must publish notices of the application (*r*).

Draft certificate.

1246. The Board of Trade must inquire in such manner as it thinks fit into the whole scheme and consider any representations and objections (*s*). If the Board is satisfied that all requirements

(*j*) The Railway Regulation Act, 1844 (7 & 8 Vict. c. 85), ss. 2, 3. This power does not appear to have ever been exercised.

(*k*) 27 & 28 Vict. c. 121, s. 6. The provisions of this Act extend and apply *mutatis mutandis* to the making of new works in connection with an existing railway (*ibid.*, s. 54).

(*l*) *Ibid.*, s. 2.

(*m*) *I.e.*, the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), and the Lands Clauses Consolidation Acts Amendment Act, 1860 (23 & 24 Vict. c. 106) (Railways Construction Facilities Act, 1864 (26 & 27 Vict. c. 121), s. 2).

(*n*) *Ibid.*, s. 3; see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 56 *et seq.*

(*o*) See *ibid.*, pp. 62 *et seq.*

(*p*) Railways Construction Facilities Act, 1864 (27 & 28 Vict. c. 121), s. 3. By *ibid.*, s. 4, provisions are made for the acquisition, if required, of Crown lands.

(*q*) *Ibid.*, s. 5.

(*r*) *Ibid.*, s. 6. Rules relating to these matters are made under the Act (*ibid.*, ss. 6, 64, and Sched.).

(*s*) *Ibid.*, ss. 7, 8.

have been observed by the promoters, it may (*t*), if it thinks fit, settle a draft certificate to the effect that the promoters are authorised to make the railway therein described, inserting in such certificate such provisions as it deems necessary (*u*). The draft certificate must then be laid before both Houses of Parliament, and if either House within six weeks after it is so laid resolve that it ought not to be made, the scheme proceeds no further and all contracts relating to the acquisition of land for the undertaking are void (*a*). If, however, neither House within that time passes any such resolution, the Board of Trade may make and issue a certificate in conformity with the draft (*b*), which must be published in the *London Gazette* (*c*).

Issue of certificate.

1247. The certificate as from the time prescribed therein (not being prior to the publication), or if no time is prescribed, then as from the time of such publication, has the same force and operation and is as valid as if it were an Act of Parliament (*d*).

Operation of certificate.

The Lands Clauses Acts (*e*) are incorporated in the certificate, except as therein excepted, and except as to the provisions relating to the taking of lands or the assessment of compensation otherwise than by agreement, and to the entry by the promoters upon lands (*f*). The Railways Clauses Acts (*g*) are incorporated with the certificate, except as therein excepted, and except as to the correction of errors in plans, the temporary occupation of lands, and the leasing of railways (*h*). The general Acts applying to railways also apply to the company and to the railway (*i*).

Incorporation of Clauses Acts and General Acts.

1248. Where the promoters are not a company already incorporated and are seven or more in number, a company must be

Incorporation of company.

(*t*) It is not obligatory on the Board to settle a draft certificate; it has a discretion, and, if it refuses, all contracts for the purchase or taking of land for the purpose of the undertaking cease to be binding (Railways Construction Facilities Act, 1864 (27 & 28 Vict. c. 121), s. 52).

(*u*) *Ibid.*, ss. 11, 12. The certificate may be in the form set out in the schedule to the Act (*ibid.*, s. 13). The promoters must give public notice of the certificate according to the rules under the Act (*ibid.*, s. 15).

(*a*) *Ibid.*, ss. 14, 16.

(*b*) *Ibid.*, s. 17.

(*c*) *Ibid.*, s. 18, or in the *Edinburgh Gazette* or *Dublin Gazette* if the proposed railway is in Scotland or Ireland, and in both the *London Gazette* and *Edinburgh Gazette* if it is partly in England and partly in Scotland (*ibid.*).

(*d*) *Ibid.*, s. 19. The certificate must be judicially noted without being pleaded (*ibid.*, s. 20). Terms used in it have the same meanings as they have when used in the Act (*ibid.*, s. 21; see *ibid.*, s. 2). The powers given by the certificate cease at the end of five years from the commencement of its operation, or within any shorter period therein prescribed (*ibid.*, s. 22).

(*e*) See note (*m*), p. 624, *ante*.

(*f*) Railways Construction Facilities Act, 1864 (27 & 28 Vict. c. 121), ss. 2, 23. The exception does not include the provisions in the Acts relating to the compensation for enfranchisement of copyholds (*ibid.*).

(*g*) *I.e.*, the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), and the Railways Clauses Act, 1863 (26 & 27 Vict. c. 92).

(*h*) Railways Construction Facilities Act, 1864 (27 & 28 Vict. c. 121), s. 31.

(*i*) *Ibid.*, s. 51. For a list of the general Acts, see *ibid.*, Sched. IV.

SECT. 1. Formation.

incorporated by the certificate (*k*). Where they are not a company and are less than seven in number, a company may be incorporated by the certificate if the promoters so desire (*l*). Where a company is incorporated, the certificate must contain proper provisions with apt terms for creating a body corporate, by an appropriate name, with perpetual succession, a common seal, and power to take, hold, and dispose of lands and other property for the purposes and subject to the restrictions of the certificate (*m*).

Certificate as the special Act.

In every case in which a company is formed, the certificate is to be deemed the special Act, and the Companies Clauses Acts are incorporated with the certificate (*n*).

Issue of shares.

1249. No share may be issued, nor does any share vest in the person accepting it, until at least one-fifth of the amount of such share is paid up (*o*).

SECT. 2.—*Powers.*

SUB-SECT. 1.—*In General.*

Usual powers in special and incorporated Acts.

1250. The special Act (*p*) of a railway company, combined with the general Acts incorporated therewith, usually confers on the company power to construct a railway and the auxiliary works, to acquire compulsorily the lands necessary for such construction (*q*), and to raise the capital required for the purpose (*r*).

Construction of powers to make railway.

1251. The powers conferred are as a rule enabling and not compulsory; and when the special Act says "It shall be lawful" to construct a railway, these words are permissive only, and there is no obligation on the company to make the railway (*s*): so words providing that the railway "shall be completed" within a named time are not usually compulsory, but mean that if the company choose to exercise its powers of making the railway it must complete it within the time (*t*); but, on the construction of the

(*k*) Railways Construction Facilities Act, 1864 (27 & 28 Vict. c. 121), s. 24.

(*l*) *Ibid.*, s. 25.

(*m*) *Ibid.*, s. 26.

(*n*) *Ibid.*, s. 27. These Acts are the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), and the Companies Clauses Act, 1863 (26 & 27 Vict. c. 118) (Railways Construction Facilities Act, 1864 (27 & 28 Vict. c. 121), s. 2).

(*o*) *Ibid.*, s. 28.

(*p*) See pp. 622 *et seq.*, *ante*. A special Act must be construed strictly against the company, but liberally in favour of the public (*Parker* v. *Great Western Rail. Co.* (1844), 7 Scott (N. R.), 825; and see title STATUTES).

(*q*) See, further, title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 153, 154.

(*r*) See title COMPANIES, Vol. V., pp. 680 *et seq.*

(*s*) *York and North Midland Rail. Co.* v. *R.* (1853), 1 E. & B. 858, Ex. Ch.; approved in *Scottish North-Eastern Rail. Co.* v. *Stewart* (1859), 5 Jur. (N. S.) 607, H. L.; followed in *Great Western Rail. Co.* v. *R.* (1853), 1 E. & B. 874, Ex. Ch., and in *R.* v. *Great Western Rail. Co.* (1893), 62 L. J. (Q. B.) 572, C. A.; and overruling *R.* v. *Lancashire and Yorkshire Rail. Co.* (1852), 1 E. & B. 228; see also *R.* v. *French* (1879), 4 Q. B. D. 507, C. A.; *Darlaston Local Board* v. *London and North Western Rail Co.*, [1894] 2 Q. B. 694, C. A.

(*t*) *York and North Midland Rail. Co.* v. *R.*, *supra*; compare *Midland Railway* v. *Great Western Railway*, [1909] A. C. 445. With regard to

special Act, the company may be under an obligation to make the railway, in which case a mandamus may issue to compel it to fulfil that obligation (*a*).

Construction of powers to maintain, restore, or complete a railway.

Similarly, if the railway is made, there is no obligation on the company to maintain it or to restore it should it be destroyed (*b*).

If the company has made part of an authorised railway, it is under no obligation to make the rest (*c*); and the failure to complete the whole railway is no public injury such as to justify the interference of the Attorney-General (*d*).

Where, however, the special Act has authorised one entire railway, and capital has been subscribed to make the whole line, the company may be restrained at the suit of a shareholder from determining to abandon part and use the capital subscribed for making the remaining portion only (*e*); but when a company authorised to make a railway, having made part, is unable for want of funds to complete the whole, the court exercises a discretion as to granting any injunction which would have the effect of preventing the portion made from being used for the benefit of the public and the shareholders (*f*).

Contractual effect of special Act.

1252. The special Act does not constitute a contract, between the company and the owners of the land required, so as to give a landowner any rights against the company until it exercises its option to take that person's land by giving him a notice to treat (*g*).

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General principle and its interpretation.

1253. A company which has been incorporated for a special purpose by Act of Parliament may not apply any part of its funds

railways constructed under the Railways Construction Facilities Act, 1864 (27 & 28 Vict. c. 121), there are in that Act elaborate provisions for securing the completion of a railway by requiring a deposit by the promoters and providing for the forfeiture of such deposit on failure to complete; see *ibid.*, ss. 34—47. In the case of an existing railway using the powers of that Act a penalty may be enforced against the company for failing to complete (*ibid.*, s. 48).

(*a*) *Great Western Rail. Co.* v. *R.* (1853), 2 W. R. 54, Ex. Ch.

(*b*) *R.* v. *Great Western Rail. Co.* (1893), 62 L. J. (Q. B.) 572, C. A.

(*c*) *York and North Midland Rail. Co.* v. *R.* (1853), 1 E. & B. 858, Ex. Ch.

(*d*) *A.-G.* v. *Birmingham and Oxford Junction Rail. Co.* (1851), 3 Mac. & G. 453.

(*e*) *Cohen* v. *Wilkinson* (1849), 12 Beav. 125. But a shareholder remaining passive, when he might interfere with the mode of action of the directors, may lose his right to interfere (*Graham* v. *Birkenhead, Lancashire and Cheshire Junction Rail. Co.* (1850), 2 Mac. & G. 146; see *Bagshaw* v. *Eastern Union Rail. Co.* (1850), 2 Mac. & G. 389. As to the general nature of the remedy of injunction, see title INJUNCTION, Vol. XVII., pp. 197 *et seq.* As to abandonment, see p. 772, *post.*

(*f*) *Hodgson* v. *Powis* (*Earl*) (1850), 12 Beav. 529; see *Browne* v. *Monmouthshire Rail. and Canal Co.* (1851), 13 Beav. 32; and where by its Act a company was forbidden to open a line until a certain junction was made, the court refused an injunction against opening the line on being satisfied that the company intended to make the junction (*Cromford and High Peak Rail. Co.* v. *Stockport, Disley and Whaley Bridge Rail. Co.* (1857), 1 De G. & J. 326, C. A.).

(*g*) *York and North Midland Rail. Co.* v. *R.*, *supra.* As to notice to treat, see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 64.

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to objects unauthorised by the Act, however desirable it may appear to so apply them (*h*). Even the assent of every individual shareholder in such a company does not justify the application (*i*). But although what is not permitted by such an Act must be taken to be prohibited, the principle should be interpreted reasonably and liberally, so that everything which may fairly be considered as incidental to, or consequential upon, those things which Parliament has authorised ought to be considered as within the powers of the company unless expressly forbidden (*k*).

Examples of acts *ultra* and *intra vires*.

1254. Where a company engages in a business not expressly or impliedly authorised by its Act, its conduct is calculated to injure the public, and an injunction at the suit of the Attorney-General is the proper remedy (*l*). Thus, a company will be restrained from acting as dealer in coal (*m*), or from running omnibuses in a way not incidental to or consequential upon the powers conferred upon it (*n*); but it is not *ultra vires* of a company if it lets rolling stock on hire to another company which runs over its line and in the working of which it is interested (*o*). A company may not hold shares in another company (*p*), nor guarantee dividends or the return of capital to the shareholders in another company, however advantageous to its own business such schemes may appear to be (*q*); nor may a company subscribe to public or charitable objects, even

(*h*) *Eastern Counties Rail. Co.* v. *Hawkes* (1855), 5 H. L. Cas. 331; *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1875), L. R. 7 H. L. 653; see *Amalgamated Society of Railway Servants* v. *Osborne*, [1910] A. C. 87, *per* Lord MACNAGHTEN, at p. 94, *per* Lord ATKINSON, at p. 103; and see title CORPORATIONS, Vol. VIII., pp. 359 *et seq.*

(*i*) *Wenlock* (*Baroness*) v. *River Dee Co.* (1883), 36 Ch. D. 675, n., C. A.

(*k*) *A.-G.* v. *Great Eastern Rail. Co.* (1880), 5 App. Cas. 473. Where a railway company was amalgamated with a dock company by Act of Parliament, the supplying by the railway company to the docks of water for all purposes of the docks from a source acquired by the railway company for railway purposes was held not to be *ultra vires* of the railway company (*A.-G.* v. *North Eastern Railway*, [1906] 2 Ch. 675, C. A.).

(*l*) *A.-G.* v. *Great Northern Rail. Co.* (1860), 1 Drew. & Sm. 154; see p. 740, *post*; and see title INJUNCTION, Vol. XVII., pp. 227, 228.

(*m*) *A.-G.* v. *Great Northern Rail. Co.*, *supra* (where the relator was a coal merchant).

(*n*) *A.-G.* v. *Mersey Railway*, [1907] A. C. 415. But where it can be shown that it is incidental to, or consequential upon, the use of the powers conferred upon the company it may be within its powers to run omnibuses (*ibid.*; see *London County Council* v. *A.-G.*, [1902] A. C. 165).

(*o*) *A.-G.* v. *Great Eastern Rail. Co.* (1879), 11 Ch. D. 449, C. A.; affirmed (1880), 5 App. Cas. 473 (where the relator was a manufacturer of rolling stock); but, *semble*, it would be *ultra vires* of a railway company to manufacture rolling stock for, or let it to, companies in which it was not interested (*ibid.*). As to agreements between companies, see pp. 701 *et seq.*, *post*.

(*p*) *Great Eastern Rail. Co.* v. *Turner* (1872), 8 Ch. App. 149.

(*q*) *Colman* v. *East Counties Rail. Co.* (1846), 10 Beav. 1. In this case an injunction was granted restraining the company from fulfilling a contract to guarantee dividends etc. to the shareholders in a steamship company, the working of whose ships in connection with the railway would have increased the business and profits of the railway company. The fact that the plaintiff shareholder was suing at the instigation of a rival company was held to be immaterial; see also *Carlisle* v. *South Eastern Rail. Co.* (1850), 13 Beav. 295.

when such subscription may indirectly benefit the company (*r*); nor may it use its funds to defray the cost of promoting a Bill in Parliament even for an extension of its own powers (*s*); but when the interests of the company are threatened by a Bill promoted by others, it may lawfully use its funds in opposing such a Bill (*t*).

Delegation of powers.

1255. The powers conferred by Parliament upon a railway company cannot be delegated to any other company without authority (*a*), but an agreement by which one company gives running powers over its railway to another company is not delegation nor *ultra vires* (*b*).

Contract not to exercise statutory power.

1256. A contract not to use land for the authorised purposes for which it was acquired, or any contract by a company not to exercise their statutory powers, is void (*c*). So a contract to use land in a manner prohibited by the special Act is *ultra vires* and void, even

(*r*) *Tomkinson* v. *South Eastern Rail. Co.* (1887), 35 Ch. D. 675 (where the company proposed to subscribe to the fund for the erection of the Imperial Institute). A company which is a going concern may use its funds in gratuities to directors and servants in a reasonable way with the view of getting better work in the future; but a company which is transferring its business to another company cannot use its funds in gratuities (*Hutton* v. *West Cork Rail. Co.* (1883), 23 Ch. D. 654, C. A.).

(*s*) *Caledonian Rail. Co.* v. *Solway Junction Rail. Co.* (1883), 49 L. T. 526; *Munt* v. *Shrewsbury and Chester Rail. Co.* (1850), 13 Beav. 1; *Stevens* v. *South Devon Rail. Co.* (1851), 13 Beav. 48; *East Anglian Railways Co.* v. *Eastern Counties Rail. Co.* (1851), 11 C. B. 775; *Vance* v. *East Lancashire Rail. Co.* (1856), 3 K. & J. 50. Although the court will restrain a company from using its funds to promote a Bill, it will not as a rule restrain the company from promoting a Bill (*Stevens* v. *South Devon Rail. Co., supra*; *Vance* v. *East Lancashire Rail. Co., supra*). The court has power to restrain an improper application to Parliament, but "it is difficult to conceive or define what are the cases in which it would be proper for the court to exercise that power" (*Re London, Chatham and Dover Railway Arrangement Act, Ex parte Hartridge and Allender* (1869), 5 Ch. App. 671, *per* SELWYN, L.J., at p. 679); and the court will not restrain an application to Parliament, even when such application is in direct breach of an undertaking or contract (*A.-G.* v. *Manchester and Leeds Rail. Co.* (1838), 1 Ry. & Can. Cas. 436; *Lancaster and Carlisle Rail. Co.* v. *London and North Western Rail. Co.* (1856), 2 K. & J. 293).

(*t*) This seems clearly to be the law, but the point does not seem to have been raised in the case of a railway company; see *R.* v. *White* (1884), 14 Q. B. D. 358, C. A.; *A.-G.* v. *Andrews* (1850), 2 Mac. & G. 225; *A.-G.* v. *Eastlake* (1853), 11 Hare, 205. It is not illegal or a fraud on Parliament for a company to agree to withdraw opposition to a Bill (*Shrewsbury and Birmingham Rail. Co.* v. *London and North Western Rail. Co.* (1850), 2 H. & Tw. 257).

(*a*) *Beman* v. *Ruffard* (1851), 1 Sim. (N. S.) 550; *Great Northern Rail. Co.* v. *Eastern Counties Rail. Co.* (1851), 9 Hare, 306; *Winch* v. *Birkenhead, Lancashire, and Cheshire Junction Rail. Co.* (1852), 5 De G. & Sm. 562.

(*b*) *Midland Rail. Co.* v. *Great Western Rail. Co.* (1873), 8 Ch. App. 841. As to running powers, see pp. 701 *et seq.*, *post*.

(*c*) *Ayr Harbour Trustees* v. *Oswald* (1883), 8 App. Cas. 623; *Re South Eastern Railway and Wiffin's Contract*, [1907] 2 Ch. 366. In the latter case a railway company was authorised to acquire land for certain specified purposes and "for other purposes of and connected with" its undertaking: it acquired land by voluntary agreement, and covenanted to use the land for a passenger station and "for no other purpose"; and it was held that this covenant was *ultra vires* and not binding on the company. As to the capacity of a railway company to dedicate a highway or right of way, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI. pp. 36, 32; and see *Great Central Rail. Co.* v. *Balby-with-Hexthorpe Urban District Council*; *A.-G.* v. *Great Central Rail Co.*, [1912] 2 Ch. 110.

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though the prohibition was in the interest of an individual and not of the public and the act might be done with the consent of the individual (*d*).

Incidental acquisition of land or construction.

1257. A company at any time may purchase land within the limits of deviation of its railway for any purpose necessary or incidental to the business of the railway (*e*); and a company cannot be restrained from constructing authorised works, after the time for completion of the railway has expired, upon land acquired before such time expired (*f*).

Circulars to shareholders.

1258. A company may use its funds to print and issue circulars and proxy forms to its shareholders in order to explain and obtain support for the policy of the directors (*g*).

SUB-SECT. 3.—*Capital.*

Power to raise capital.

1259. The capital which a railway company may raise for its authorised purposes depends on the powers conferred upon it by its special Act. It must be divided into shares, but these shares may be converted into stock subject to the prescribed conditions (*h*).

Division of ordinary stock.

1260. When a railway company has paid a dividend on its ordinary stock of not less than 3 per cent. in the preceding year, it may by resolution of an extraordinary general meeting divide its paid-up ordinary stock into two classes, preferred and deferred.

Preferred and deferred ordinary stock.

Preferred and deferred ordinary stock may only be issued for equal amounts of paid-up ordinary stock, and by way of division of portions of ordinary stock into two equal parts, and only in sums of multiples of £10. The stock held by any person can only be so divided at his request in writing, which may apply to the whole of the stock held by him or to any portion thereof divisible into twentieth parts. The certificates for the stock so divided must be delivered up to and cancelled by the company and new certificates in exchange issued gratis (*i*).

Dividends.

As between the two classes of stock, the preferred ordinary stock must bear a fixed maximum dividend of 6 per cent., and to that extent it has priority over all deferred ordinary stock, whether created at the same or a later time; it ranks *pari passu* with all undivided ordinary stock, but after all preference and guaranteed stock (*i*). After all holders of preferred ordinary stock have received their 6 per cent. dividend in any year, all holders of deferred ordinary stock rank *pari passu* with all holders of undivided ordinary stock in respect of any dividend exceeding 6 per cent. (*i*).

(*d*) *Corbett* v. *South Eastern and Chatham Railways Managing Committee* [1906] 2 Ch. 12, C. A.

(*e*) *Thompson* v. *Hickman*, [1907] 1 Ch. 550; see also Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 45.

(*f*) *Great Western Railway* v. *Midland Railway*, [1908] 2 Ch. 644, C. A.; affirmed, *sub nom. Midland Railway* v. *Great Western Railway*, [1909] A. C. 445; see *Tiverton and North Devon Rail. Co.* v. *Loosemore* (1884), 9 App. Cas. 480.

(*g*) *Peel* v. *London and North Western Railway*, [1907] 1 Ch. 5, C. A.

(*h*) See Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), ss. 6, 61; Companies Clauses Act, 1863 (26 & 27 Vict. c. 118). This subject is treated fully in title COMPANIES, Vol. V., pp. 680—687.

(*i*) Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 13.

If in any year ending the 31st December no profits are available, the deficiency may not be made good out of the profits of any subsequent year, or out of any other funds of the company. The holders of either class of divided stock have the same rights of voting and otherwise as the holders of undivided ordinary stock. The terms and conditions upon which divided stock of either class is issued must be stated in the certificate. All divided stock of either class is held on the same trusts, and is subject to the same charges, liabilities and dispositions as affect the ordinary stock in substitution for which it was issued at the time of division (*j*).

Rights of stockholders.

1261. Where a railway is about to be made upon or near land which is likely to be improved or benefited by the undertaking, the owner of such land who desires to subscribe to the capital of the railway company may apply to the Board of Agriculture and Fisheries (*k*) for an order that the amount of his desired subscription may be charged upon such land (*l*). If, after making inquiries, the Board is satisfied that the railway will effect a certain increase of the annual value of the land exceeding the annual amount proposed to be charged thereon, it may make a provisional order sanctioning the proposal (*m*). When the railway has been completed and opened for traffic, and when as much of the traffic subscribed for and held by the landowner as equals in nominal amount the money authorised to be charged has been fully paid up and the certificates therefor deposited with the Board, the Board must by an absolute order execute to the landowner or his assigns a charge upon the said land of the amount authorised, including in the principal charged, if the landowner so wishes, the expenses of obtaining the order and of any advance which may have been made to him of the authorised amount (*n*).

Charge of landowner's subscriptions.

SUB-SECT. 4.—*Borrowing.*

1262. No railway company created by statute may legally borrow money unless power to borrow is given by its special Act, or otherwise than in the manner and to the extent prescribed by that Act (*o*).

Ultra vires.

A company issuing any note or other negotiable or assignable instrument by way of security for money advanced otherwise than under the powers conferred by its special Act is liable to a penalty equal to the sum borrowed (*p*).

Penalty.

(*j*) Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 13; and as to the declaration of dividends, see, further, title COMPANIES, Vol. V., p. 724.

(*k*) The powers of the Land Commissioners for England were transferred to the Board of Agriculture and Fisheries by the Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30), s. 2; and see title CONSTITUTIONAL LAW, Vol. VII., p. 104.

(*l*) Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), s. 78. As to canals, see p. 780, *post*.

(*m*) *Ibid.*, ss. 79, 80.

(*n*) *Ibid.*, s. 82; and see title LAND IMPROVEMENT, Vol. XVIII., p. 300.

(*o*) See *Wenlock* (*Baroness*) v. *River Dee Co.* (1885), 10 App. Cas. 354. As to the powers of borrowing possessed by a statutory company generally, see title COMPANIES, Vol. V., pp. 730 *et seq.*

(*p*) Railway Regulation Act, 1844 (7 & 8 Vict. c. 85), s. 19. This is recoverable by action in a court of record (*ibid.*, s. 24).

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Security for money already due.

1263. But where a railway company is already indebted and gives to its creditor, with the approval of the shareholders, a Lloyd's bond (*q*) or instrument under the seal of the company acknowledging a sum of money to be due, the holder of such instrument has a valid claim against the assets of the company for such sum, so far as the company has had consideration for the sum (*r*).

Powers to borrow.

1264. Where a company has power to borrow on mortgage or bond, it may, subject to the provisions of its special Act, borrow on mortgage or bond such sums, not exceeding in the whole the amount prescribed (*s*), as from time to time may be authorised by a general meeting of the company, and may mortgage the undertaking and execute bonds as security for the repayment of such sums (*t*).

Register of charges.

The secretary of the company must keep a register of all instruments given as security for money borrowed; and the register must be open without charge to all shareholders in the company and to other persons interested in the loan (*a*). Sums of money repaid may be borrowed again if authorised by a general meeting of the company (*b*).

Issue of debenture stock in respect of expenses under Regulation of Railways Act, 1868.

1265. Whenever a company is ordered by the Board of Trade to provide any of the appliances or execute any of the work mentioned in the Regulation of Railways Act, 1889 (*c*), s. 1, or to incur any expenditure under that Act (*c*), the Board must on the application of the company fix the amount of such expenditure which is properly chargeable to capital account, and the company may issue debentures or debenture stock for that amount in priority to, or *pari passu* with, any existing debentures or debenture stock bearing interest not exceeding 5 per cent.; but the sum so raised may be applied to no other purpose than carrying out such orders of the Board of Trade (*d*).

Additional capital authorised by certificate of Board of Trade.

1266. Where a company desire to raise additional capital they may obtain authority to do so by a certificate of the Board of Trade (*e*). The certificate must state that the company is authorised to raise as capital for the purposes named a specified sum of money

(*q*) As to Lloyd's bonds, see title BONDS, Vol. III., p. 82.

(*r*) *Re Cork and Youghal Rail. Co.* (1869), 4 Ch. App. 748; *White* v. *Carmarthen etc. Rail. Co.* (1863), 1 Hem. & M. 786. If there is no debt existing when such a bond is given the bond cannot create a debt (*Chambers* v. *Manchester and Milford Rail. Co.* (1864), 5 B. & S. 588).

(*s*) It is prescribed by the Standing Orders of the House of Lords that in the case of a Railway Bill a company shall not be authorised to raise by mortgage or debenture stock a larger sum than one-third of its capital, and not until 50 per cent. of the whole of the capital has been paid (Standing Orders of the House of Lords (Private Business), No. 112).

(*t*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 38; see title COMPANIES, Vol. V., pp. 730 *et seq.*

(*a*) Railway Regulation Act, 1844 (7 & 8 Vict. c. 85), s. 21.

(*b*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 39; and as to general meetings, see title COMPANIES, Vol. V., pp. 717, 718.

(*c*) 52 & 53 Vict. c. 57; see p. 693, *post.*

(*d*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 3. As to the similar provision under the Railway Employment (Prevention of Accidents) Act, 1900 (63 & 64 Vict. c. 27), see pp. 750 *et seq.*, *post.*

(*e*) *I.e.*, under the Railway Companies Powers Act, 1864 (27 & 28 Vict. c. 120); see p. 637, *post.*

by the issue of new shares or stock, or partly in that mode and partly by borrowing on mortgage, at the option of the company or as prescribed in the certificate, and with power to create and issue debenture stock (*f*).

Conditions upon which certificate is issued and restrictions as to application of sums borrowed.

1267. Before such power of borrowing is exercised, the whole of the share capital authorised by the certificate must have been subscribed for and one half actually paid; and the fact of such subscription and payment must be proved before and certified by a justice (*g*), who must be satisfied before he so certifies that shares for the whole of the capital have been issued and accepted, that not less than one fifth part of the amount of each separate share was paid before or at the time it was issued or accepted, and that all the shares are taken in good faith and held by persons legally liable for them (*h*). The company may not borrow any sum exceeding one third of the share capital authorised by the certificate, nor may it pay interest or dividends to any shareholder out of money raised by calls or borrowing (*i*); nor may it out of money so raised pay or deposit any sum required for an application to Parliament or to the Board of Trade; nor may it apply any part of the money so raised to any purpose other than that authorised (*k*).

Priority of money borrowed.

1268. All money borrowed by a company on mortgage or bond or debenture stock has priority against the company and the company's property over all other debts, in case a receiver of the undertaking of the company is appointed (*l*). This priority, however, does not apply to a rentcharge granted by the company in consideration of land taken by it under its compulsory powers (*m*), nor to any rent

(*f*) Railway Companies Powers Act, 1864 (27 & 28 Vict. c. 120), s. 9. The stock or shares may either be ordinary or preference, or partly one and partly the other (*ibid.*).

(*g*) The justice certifies under the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 40; see title COMPANIES, Vol. V., p. 733.

(*h*) Railway Companies Powers Act, 1864 (27 & 28 Vict. c. 120), s. 23 (1); Railways Construction Facilities Act, 1864 (27 & 28 Vict. c. 121), s. 29 (1).

(*i*) Railway Companies Powers Act, 1864 (27 & 28 Vict. c. 120), s. 23 (2), (3); Railways Construction Facilities Act, 1864 (27 & 28 Vict. c. 121), s. 29 (2), (3). This provision does not prevent the company from paying to a shareholder under the certificate such interest on money advanced by him beyond the amount of calls actually made as is allowed by the Companies Clauses Acts (Railway Companies Powers Act, 1864 (27 & 28 Vict. c. 120), s. 23 (3); Railways Construction Facilities Act, 1864 (27 & 28 Vict. c. 121), s. 29 (3)); see title COMPANIES, Vol. V., p. 696.

(*k*) Railway Companies Powers Act, 1864 (27 & 28 Vict. c. 120), s. 23 (2)—(5); Railways Construction Facilities Act, 1864 (27 & 28 Vict. c. 121), s. 29 (2)—(5).

(*l*) Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 23. As to the construction of this provision, see *Re Liskeard and Caradon Railway*, [1903] 2 Ch. 681. It was explained in *Re Hull, Barnsley and West Riding Junction Rail. Co.* (1888), 40 Ch. D. 119, C. A., that this provision does not give these creditors any lien or charge which they did not possess before the Act, and that the provision only applies to assets in the hand of a receiver. As to the appointment of a receiver, see p. 765, *post*; and see, generally, title RECEIVERS.

(*m*) As to the granting of such rentcharges, see Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 10, 11, and Lands Clauses Consolidation Acts Amendment Act, 1860 (23 & 24 Vict. c. 106), ss. 2—5; see

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reserved by a lease of land granted to the company under any special Act in which priority is given to such rent, nor to any claim in respect of land taken, used, or injuriously affected by the construction of the railway (*n*).

Money applied in discharge of previous borrowings.

1269. Money which is borrowed by a company for the purpose of paying off bonds or mortgages of the company given or made under its statutory powers, and actually applied for that purpose, is deemed to be money borrowed within those statutory powers (*o*).

Interest on debenture stock.

1270. Debenture stock may be issued at any rate of interest the company thinks fit (*p*).

Certificate and indorsed declaration.

1271. Every mortgage deed or bond for securing money borrowed by a railway company, and every certificate for debenture stock issued by the company, must have put on it, by indorsement or otherwise, a declaration that the instrument is issued under the borrowing powers of the company and that these powers have not been exceeded (*q*). This declaration must be in the prescribed form (*r*), and must be signed by two directors specially authorised and appointed by the board to sign such declarations and by the officer responsible for the correctness of the declaration (*s*).

Penalty for delivery without declaration or for false declaration.

Any railway company delivering any such mortgage deed, bond, or certificate without such declaration is liable to a penalty of £20, recoverable summarily (*t*), and any director or officer who knowingly authorises or permits such delivery, or who signs any such declaration knowing the same to be false in any particular, is guilty of an offence and punishable on indictment with fine or imprisonment, or summarily by a penalty not exceeding £10 (*a*).

SUB-SECT. 5.—*Carriage of Passengers and Goods.*

Carriage and charges therefor.

1272. Every company authorised to construct a railway may use

also title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 59; and, as to rentcharge generally, see title RENTCHARGES AND ANNUITIES.

(*n*) Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 23.

(*o*) *Ibid.*, s. 26.

(*p*) *Ibid.*, s. 24; see also Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), s. 22; Companies Clauses Act, 1869 (32 & 33 Vict. c. 48), ss. 1, 2; title COMPANIES, Vol. V., p. 740.

(*q*) Railway Companies Securities Act, 1866 (29 & 30 Vict. c. 108), s. 14.

(*r*) The form is given in *ibid.*, Sched. II., as amended by the Railway Companies (Accounts and Returns) Act, 1911 (1 & 2 Geo. 5, c. 34), Sched. II., which Act repeals the greater part of the Railway Companies Securities Act, 1866 (29 & 30 Vict. c. 108).

(*s*) Railway Companies Securities Act, 1866 (29 & 30 Vict. c. 108), s. 14; Railway Companies (Accounts and Returns) Act, 1911 (1 & 2 Geo. 5, c. 34), s. 2 (3).

(*t*) For procedure before courts of summary jurisdiction, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*

(*a*) Railway Companies Securities Act, 1866 (29 & 30 Vict. c. 108), ss. 15, 16, 17, amended (as to *ibid.*, ss. 16, 17) by the Railway Companies (Accounts and Returns) Act, 1911 (1 & 2 Geo. 5, c. 34), Sched. II. (as to the Railway Companies Securities Act, 1866 (29 & 30 Vict. c. 108), s. 17), and partially repealed by the Perjury Act, 1911 (1 & 2 Geo. 5, c. 6), see *ibid.*, ss. 5, 16 (3), Sched. As to perjury, generally, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 490 *et seq.*

and employ locomotive engines or other moving power (*b*), and carriages and wagons to be drawn or propelled thereby, and may carry and convey upon the railway all such passengers and goods (*c*) as shall be offered to it for that purpose, and may make such reasonable charges in respect thereof as it may from time to time determine not exceeding the tolls authorised to be taken by it (*d*).

Toll.

The word "toll" includes any rate or charge or other payment under a special Act for any passenger, animal, carriage, goods, merchandise, or things of any kind conveyed on the railway (*e*), and any payment the consideration for which is the passage on the railway of passengers, carriages, or goods (*f*).

Maximum rates.

The maximum rates and charges which may be taken by any railway company are fixed by a special Act applying to the company (*g*).

SUB-SECT. 6.—*Use of Steamboats.*

Exercise of powers.

1273. A railway company may not use, maintain, or work steam vessels in connection with its trains or otherwise unless powers for that purpose are given to it by a special Act (*h*). If a special Act does confer such powers upon a company, then in every seventh year after the passing of such Act, reckoning from the 1st January next after its passing, the Railway and Canal Commissioners (*i*) (frequently referred to in this title as "the Commissioners") may give the company notice in writing (stating their reasons) that in their opinion

(*b*) As to damage caused by the authorised use of engines, see pp. 725, 726, *post*. As to the use of electric power on railways, see p. 697, *post*.

(*c*) As to the rights and liabilities of a railway company as carriers, see title CARRIERS, Vol. IV., pp. 1 *et seq*.

(*d*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 86.

(*e*) *Ibid.*, s. 3. This is not a strict definition; the section merely specifies matters which the word includes (*Great Northern Rail. Co.* v. *South Yorkshire Railway and River Dun Co.* (1854), 9 Exch. 642). The word as used in the Act and other Acts varies in meaning (*Highland Rail. Co.* v. *Jackson* (1876), 3 R. (Ct. of Sess.) 850). As to ferry tolls, see title FERRIES, Vol. XIV., p. 560. As to highway and bridge tolls, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 62, 65.

(*f*) *Great Northern Rail. Co.* v. *South Yorkshire Railway and River Dun Co., supra*.

(*g*) By the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 24, every railway company was required to submit to the Board of Trade a revised classification of merchandise traffic and a revised schedule of maximum rates applicable thereto. These classifications and schedules, after the objections of parties interested had been heard, were settled by the Board and then embodied in provisional orders and confirmed by Acts of Parliament; see title CARRIERS, Vol. IV., p. 83. A large number of cases were decided before 1888 on questions concerning tolls which are no longer of any authority or importance.

(*h*) *Colman* v. *Eastern Counties Rail. Co.* (1846), 10 Beav. 1; see *South Wales Rail. Co.* v. *Redmond* (1861), 10 C. B. (N. S.) 675; *Southsea and Isle of Wight Steam Ferry Co.* v. *London and South Western Rail. Co. and London, Brighton and South Coast Rail. Co.* (1876), 2 Ry. & Can. Tr. Cas. 341.

(*i*) These powers were transferred from the Board of Trade to the Commissioners by the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 10. As to the Railway and Canal Commissioners, see, further, pp. 753 *et seq.*, *post*.

SECT. 2. Powers.

the interests of the public are prejudicially affected by the exercise of such powers.

Qualified restriction or absolute prohibition.

If, after receiving such notice, the company does not before the beginning of the next session of Parliament make provision to the satisfaction of the Commissioners for the protection of such interests, or if the injury done is in the opinion of the Commissioners incapable of being remedied by the company, then the Commissioners must report their opinion to both Houses of Parliament with the reasons on which that opinion is founded. On the expiration of twelve months from the presentation of such report, the powers of the company relating to steam vessels, or such of them as are specified in the report, can no longer be exercised unless Parliament in the meantime otherwise provides (*j*).

Application of law as to carriage in case of through traffic.

1274. Whenever a railway company uses, maintains, or works, or is party to an arrangement for using, maintaining, or working (*k*) steam vessels for the purpose of carrying on a communication between places, the provisions of the Railway and Canal Traffic Act, 1854 (*l*), as to a contract of carriage being just and reasonable, and of the Railway and Canal Traffic Act, 1888 (*m*), as to through traffic at through rates, apply to the traffic carried by such vessels (*n*); and all provisions with respect to the conveyance of mails by railway also apply, so far as they are applicable, to such vessels (*o*).

SUB-SECT. 7.—*Additional Powers.*

Cases in which application for certificate may be made.

1275. A railway company may obtain powers in addition to those conferred by the special Act (*p*) or certificate (*q*) of the company by virtue of a certificate of the Board of Trade in certain cases, namely:—

(i.) Where the company desires to enter into an agreement with

(*j*) Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 35.

(*k*) To bring a railway company within the meaning of the words "use, maintain, or work" it has been held that the mere existence of through booking arrangements betweeen the company and the owners of steamboats is not sufficient (*Ayr Harbour Trustees and Barr (P.) & Co.* v. *Glasgow and South Western Rail. Co., Caledonian Rail. Co., North British Rail. Co., and North Eastern Rail. Co.* (No. 1) (1881), 4 Ry. & Can. Tr. Cas. 81). An agreement to use must be definite and contain an obligation upon the owners of the steamboats to ply (*Caledonian Rail. Co.* v. *Greenock and Wemyss Bay Rail. Co.* (No. 2) (1881), 4 Ry. & Can. Tr. Cas. 70); but an agreement by which the owners definitely undertake to run steamboats between ports at certain times for a fixed period brings the railway company within these provisions (*Belfast Central Rail. Co.* v. *Great Northern Rail. Co.* (*Ireland*) (No. 4) (1884), 4 Ry. & Can. Tr. Cas. 379).

(*l*) 17 & 18 Vict. c. 31; see *Riggall & Son* v. *Great Central Rail. Co.* (1909), 14 Com. Cas. 259; *Jenkins* v. *Great Central Railway*, [1912] 1 K. B. 1.

(*m*) 51 & 52 Vict. c. 25.

(*n*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 25; see title CARRIERS, Vol. IV., p. 72.

(*o*) Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 20. As to carriage of mails, see p. 700, *post;* and see titles CARRIERS, Vol. IV., pp. 70 *et seq.*; POST OFFICE, Vol. XXII., pp. 651 *et seq.*

(*p*) As to companies incorporated by special Act, see p. 622, *ante.*

(*q*) As to companies incorporated by certificate, see p. 624, *ante.*

some other railway company with respect to the maintenance and management or use and working of their railways, or the fixing, collection, and apportionment of rates and charges, or the joint or separate ownership, maintenance, management and use of a station or other work:

(ii.) Where the company desires an extension of time for the sale of superfluous lands:

(iii.) Where the company desires to raise additional capital (*r*):

(iv.) Where the company desires to make new provisions, or to alter existing provisions, with respect to the general meeting of the company or the exercise of the right of voting; the appointment, number, and rotation of directors; the powers of directors; the proceedings and liabilities of directors; or the appointment and duties of auditors (*s*).

Procedure to obtain certificate.

1276. To obtain such a certificate the company must apply to the Board of Trade, lodging at the office of the Board of Trade a draft of the certificate which it proposes and giving notice of the application according to the rules in force (*t*). On being satisfied that the company has complied with such rules, and after taking into consideration any representations made to it, the Board of Trade may settle a draft certificate purporting to give the company the powers set out, and containing such provisions as the Board deem necessary or proper, subject to the provisions of any special Act of the company (*u*). The draft certificate as thus settled must then be laid before both Houses of Parliament and notice given in accordance with the rules (*v*). If within six weeks neither House resolves that the certificate ought not to be made, the Board of Trade may, at the expiration of that time, make and issue a certificate in conformity with the draft (*a*). The certificate must then be published in the *London Gazette* (*b*).

(*r*) Railway Companies Powers Act, 1864 (27 & 28 Vict. c. 120), s. 3. For agreements with other companies, see p. 703, *post*. As to sale of superfluous lands, see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 26; as to raising additional capital, see title COMPANIES, Vol. V., p. 680; and see p. 632, *ante*.

(*s*) Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 38. As to the matters referred to in (iv.), see title COMPANIES, Vol. V., pp. 706 *et seq.*, 717 *et seq.*

(*t*) Railway Companies Powers Act, 1864 (27 & 28 Vict. c. 120), s. 4. Under *ibid.*, s. 35, the rules are those set out in the schedule, but the Board of Trade has power to make rules adding to, altering, or amending those rules.

(*u*) *Ibid.*, ss. 5—10. A form of certificate is given in *ibid.*, schedule; see *ibid.*, s. 11. As to opposing an application, see the Railways (Powers and Construction) Acts, 1864, Amendment Act, 1870 (33 & 34 Vict. c. 19). The making of a certificate is in the discretion of the Board of Trade (Railway Companies Powers Act, 1864 (27 & 28 Vict. c. 120), s. 24). A certificate may be made jointly under this Act, and under the Railways Construction Facilities Act, 1864 (27 & 28 Vict. c. 121) (Railway Companies Powers Act, 1864 (27 & 28 Vict. c. 120), s. 26); see p. 622, *ante*.

(*v*) Railway Companies Powers Act, 1864 (27 & 28 Vict. c. 120), ss. 12, 13.

(*a*) *Ibid.*, ss. 14, 15.

(*b*) *Ibid.*, s. 16. *I.e.*, if the head office of the company or companies concerned is in England. It must be published in the *Edinburgh Gazette* or *Dublin Gazette*, if the company, or any company concerned, has its head office in Scotland or Ireland (*ibid.*).

SECT. 2. Powers.

Effect of certificate.

1277. As from the time of such publication, or from the time prescribed, not being prior to such publication, the certificate has the same force and operation and is as absolutely valid and conclusive as if it were an Act of Parliament; its validity cannot be impeached on account of any alleged informality, and it must be judicially noticed without being specially pleaded (*c*). Nothing, however, in the certificate may exempt any railway company from the provisions of any general Act of Parliament relating to railways or to the audit of the accounts of railway companies, or from any alteration and revision under the authority of Parliament of maximum tolls and charges fixed by the certificate (*d*).

Powers of Board of Trade as to issue, amendment, and revocation of certificate.

1278. In all cases where, if the company were proceeding for additional powers by Bill, the approval of the Bill by the shareholders would be required under the standing orders of either House of Parliament, the Board of Trade must be satisfied that the like approval has been expressed before issuing a certificate (*e*). The Board may from time to time by certificate amend, extend, vary or revoke any certificate, or correct any error in the same (*f*).

SECT. 3.—*Rates and Taxes.*

SUB-SECT. 1.—*In General.*

Rates.

1279. The property of a railway company, in theory and so far as statute law is concerned, is rated on the same principles as the property of any other owner, the greater part of it having come into existence since the passing of the Parochial Assessments Act, 1836 (*g*). These principles, however, are so difficult to apply to the lines and other property of a railway company that in the absence of guidance from the legislature the courts have been driven to evolve, by a process of violent distortion, rules for the rating of this class of property (*h*).

Taxes.

1280. The same taxes are payable by a railway company as by any other corporation or person, except in respect of the duty on the fares of passengers carried (*i*). The profits of a railway company, and the salaries of persons holding offices or employments under it, are assessed for income tax by the Special Commissioners (*k*).

(*c*) Railway Companies Powers Act, 1864 (27 & 28 Vict. c. 120), ss. 17, 18. The certificate is proved by production of a copy of the *Gazette* containing a copy of it (*ibid.*, s. 30). Copies printed by the printers of the *Gazette* must be kept at the office of the company for sale to persons desiring to buy them, for a price not exceeding 1*s.*, under pain of a penalty (*ibid.*, s. 31).

(*d*) *Ibid.*, s. 25.

(*e*) *Ibid.*, s. 27. As to approval by shareholders to promotion of a Bill, see title PARLIAMENT, Vol. XXI., p. 739.

(*f*) Railway Companies Powers Act, 1864 (27 & 28 Vict. c. 120), ss. 28, 29.

(*g*) 6 & 7 Will. 4, c. 96; see title RATES AND RATING.

(*h*) See *R.* v. *Great Western Rail. Co.* (1851), 15 Q. B. 379, *per* Lord CAMPBELL, C.J. For the principles of railway rating, see title RATES AND RATING.

(*i*) As to this duty, see pp. 639, 640, *post*; as to taxes in general, see titles INCOME TAX, Vol. XVI., pp. 607 *et seq.*; LAND TAX, Vol. XVIII., pp. 307 *et seq.*; and, generally, see titles CORPORATIONS, Vol. VIII., pp. 377, 378; REVENUE.

(*k*) Income Tax Act, 1860 (23 & 24 Vict. c. 14), ss. 5, 6. As to Special Commissioners, see title INCOME TAX, Vol. XVI., p. 614.

Passenger duty.

1281. A duty at the rate of 5 per cent. is payable to the Crown upon sums received or charged for the hire, fare, or conveyance of passengers upon a railway (*l*).

Exempted fares.

1282. Fares which do not exceed the rate of 1*d.* a mile are exempt from duty; but fares for return or periodical tickets are exempt only where the ordinary fare for the single journey does not exceed that rate (*m*). Fares payable for the carriage of the royal forces are also exempt from duty (*n*).

Stations in one urban area.

1283. When the Board of Trade is satisfied that any two or more railway stations are within an area which has a continuous urban (*o*) character and contains a population of not less than 100,000, they may certify that such stations are within one urban district; and on fares exceeding the rate of 1*d.* a mile for conveyance between such stations the duty is at the rate of 2 per cent. (*p*).

Amount on which duty is assessed.

1284. The duty is payable on the full amount received by the company from a passenger, whether it be solely for the conveyance of the passenger, or whether some portion of it be for accommodation incidental to that conveyance (*q*). Hence, when the regular fare does not exceed 1*d.* a mile, but the passenger pays a sum for extra accommodation which, with the regular fare, brings the total sum to above 1*d.* a mile, the Crown is entitled to duty on the whole of the sum paid (*r*).

(*l*) Railway Passenger Duty Act, 1842 (5 & 6 Vict. c. 79), s. 2, Sched. This is an excise duty (Railway Passenger Duty Act, 1847 (10 & 11 Vict. c. 42), s. 1), and is collected and regulated by the Board of the Commissioners of Inland Revenue (Inland Revenue Board Act, 1849 (12 & 13 Vict. c. 1). As to excise duties, generally, see title REVENUE.

(*m*) Cheap Trains Act, 1883 (46 & 47 Vict. c. 34), s. 2 (1). "Fare" here includes all sums received or charged for the hire, fare, or conveyance of passengers upon or along any railway (*ibid.*, s. 8).

(*n*) Cheap Trains Act, 1883 (46 & 47 Vict. c. 34), s. 6 (3). As to the carriage of the royal forces, see p. 699, *post.*

(*o*) *I.e.*, as distinguished from a rural or suburban character (Cheap Trains Act, 1883 (46 & 47 Vict. c. 34), s. 2 (3)).

(*p*) *Ibid.*, s. 2 (2), (3).

(*q*) *A.-G.* v. *Furness Railway*, [1899] 2 Q. B. 267, where the company instituted a system by which third-class passengers, the regular fares for whom did not exceed 1*d.* a mile, could for an extra payment obtain tickets entitling them to travel in reserved third-class compartments not available to third-class passengers who did not make such extra payments: it was held that, where this extra payment brought the total fare paid by a passenger above 1*d.* a mile, duty was payable, as such payment was made in respect of extra accommodation incidental to the carriage of the passenger.

(*r*) Cheap Trains Act, 1883 (46 & 47 Vict. c. 34). Where a company for an extra charge supplied sleeping accommodation, beds, lavatories etc., it was held that such accommodation was incidental to the conveyance of the passenger and that duty was payable upon such extra charge (*A.-G.* v. *London and North Western Rail. Co.* (1881), 6 Q. B. D. 216, C. A.). In this case it was proved that the company was by a special Act forbidden to charge passengers more than certain specified sums per mile, which sums were to include all expenses incidental to their conveyance except duty: the company, in addition to the charges for conveyance, charged each passenger 5 per cent. to cover duty: it was held that duty was payable on the whole sum paid by the passenger.

SECT. 3. Rates and Taxes.

Accounts of fares.

1285. Every company is bound to keep, in such form as the Commissioners of Inland Revenue may require, a true account of all sums received or charged daily for the conveyance of passengers, and the prescribed duty is payable by such company on such sums without deduction. The company must also keep an account of all sums paid to, or received from, any other company in respect of the share of such other company, or of itself, of money received for the conveyance of passengers (*s*). These accounts must be made up to the end of each calendar month and must be delivered to the Commissioners of Inland Revenue within twenty days of the end of such month (*t*); they must also be certified (*u*) by the secretary, accountant, or other officer of the company to be full and true accounts; and at the time of delivery the duty which the accounts show to be payable must be paid (*a*).

Inspection of accounts.

1286. All such accounts, and the books in which they are kept, must be open at all seasonable times to the inspection of authorised officers of the Inland Revenue, who are at liberty to take copies of or extracts from any such book or account; and a penalty of £50 is incurred by any company or officer of a company who refuses to produce any book or account or to allow any officer of the Inland Revenue to take such copies or extracts (*b*).

Security.

1287. Every company must, before carrying any passengers, give security by bond to the Crown to keep the prescribed accounts, to produce the accounts and books when required by the Inland Revenue, and to pay the duties chargeable (*c*). Such bond must be taken with sufficient sureties to the satisfaction of the Commissioners of Inland Revenue, and must be renewed from time to time whenever it becomes forfeited or as may be required by the bankruptcy or death of any surety (*e*). A company which carries passengers without having given such bond, or refuses or neglects to renew the bond when necessary, is liable to a penalty of £100 and an additional penalty of £100 for every day of default (*d*). The Commissioners of Inland Revenue, however, may at their discretion dispense with this security by bond (*e*).

(*s*) Railway Passenger Duty Act, 1842 (5 & 6 Vict. c. 79), s. 4; see *Great Western Rail. Co.* v. *A.-G.* (1866), L. R. 1 H. L. 1; and see note (*b*), p. 644, *post*. As to accounts, generally, see pp. 641 *et seq.*, *post*. A company is entitled to deduct, from sums payable to another company in respect of fares, the duties payable on such sums, unless there is an express contract between the companies to the contrary (Railway Passenger Duty Act, 1842 (5 & 6 Vict. c. 79), s. 5).

(*t*) Revenue Act, 1863 (26 & 27 Vict. c. 33), s. 13.

(*u*) Cheap Trains Act, 1883 (46 & 47 Vict. c. 34), s. 7 (a). Before this provision came into force the account had to be verified by affidavit.

(*a*) Railway Passenger Duty Act, 1842 (5 & 6 Vict. c. 79), s. 4. When the Great Western Railway Company received fares for the benefit of the Midland Railway Company, it was held that the former company, as actually receiving the money, was bound to keep the accounts and pay the duty (*Great Western Rail. Co.* v. *A.-G.* (1866), L. R. 1 H. L. 1; see *A.-G.* v. *Oxford, Worcester and Wolverhampton Rail. Co.* (1862), 7 H. & N. 840).

(*b*) Railway Passenger Duty Act, 1842 (5 & 6 Vict. c. 79), s. 6.

(*c*) See p. 639, *ante*.

(*d*) Railway Passenger Duty Act, 1842 (5 & 6 Vict. c. 79), s. 7.

(*e*) Cheap Trains Act, 1883 (46 & 47 Vict. c. 34), s. 7 (b).

1288. The penalties imposed may be recovered in the same manner as other penalties incurred under the Inland Revenue Acts (*f*) are recoverable; and may be mitigated in the same way (*g*). Recovery of penalties.

SECT. 4.—*Accounts, Audit, and Statistics.*

1289. Every company the special Act of which incorporates the Companies Clauses Consolidation Acts (*h*) must (1) keep full and true accounts of all moneys received or expended; (2) publish balance sheets periodically; (3) appoint auditors, and (4) submit its accounts to such auditors (*i*). General duty as to accounts.

1290. A railway company must every year under pain of a penalty prepare an annual account in abstract showing the total receipts and expenditure of all funds for the year ending the 31st December, or on some other convenient day, with a balance sheet duly audited and certified by the directors and auditors. If required a copy of this account must be sent free of charge to the overseers of any parish and to the clerk to the county council of any county through which the railway passes; and the account must be open to the inspection of any person at seasonable hours on payment of 1*s.* (*k*). Annual abstract.

1291. A railway company (*l*) must annually prepare financial accounts and statistical returns in a prescribed form (*m*), and must submit such accounts to its auditors in that form (*n*). Financial accounts and statistical returns.

(*f*) See title REVENUE.

(*g*) Railway Passenger Duty Act, 1842 (5 & 6 Vict. c. 79), s. 24.

(*h*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), and amending Acts; see pp. 622 *et seq.*, *ante*; and see title COMPANIES, Vol. V., pp. 674 *et seq.*

(*i*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16). For the general provisions relating to the accounts and audit of a statutory company, see title COMPANIES, Vol. V., pp. 721 *et seq.*

(*k*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 107. The penalty for an infringement of the provision is £20 (*ibid.*).

(*l*) "Railway company" here means any company or person working a railway under lease or otherwise (Railway Companies (Accounts and Returns) Act, 1911 (1 & 2 Geo. 5, c. 34), s. 6).

(*m*) The form is contained in *ibid.*, Sched. I. The financial accounts are —

No. 1 (a). Nominal capital authorised and created by the company.
No. 1 (b). Nominal capital authorised, and created by the company jointly with some other company.
No. 1 (c). Nominal capital authorised, and created by some other company, on which the company either jointly or separately guarantees fixed dividends.
No. 2. Share capital and stock created, as per statement No. 1 (a), showing the proportion issued.
No. 3. Capital raised by loans and debenture stock.
No. 4. Receipts and expenditure on capital account.
No. 4 (a). Subscriptions to other companies.
No. 5. Details of capital expenditure for year ending
No. 6. Estimate of further expenditure on capital account.
No. 7. Capital powers and other assets available to meet further expenditure on capital account.
No. 8. Revenue receipts and expenditure of the whole undertaking.

(*n*) For note (*n*), see p. 643, *post.*

SECT. 4. Accounts, Audit, and Statistics.

No. 9. Proposed appropriation of net income.
No. 9 (a). Statement of interim dividends paid.
No. 10. Receipts and expenditure in respect of railway working.
Abstract A. Maintenance and renewal of ways and works.
Abstract B. Maintenance and renewal of rolling stock.
(1) Locomotives.
(2) Carriages.
(3) Wagons.
Abstract C. Locomotive running expenses.
Abstract D. Traffic expenses.
Abstract E. General charges.
Abstract F. Expenses of collection and delivery of parcels and goods.
Abstract G. Running powers. Receipts and payments in respect of running power expenses.
Abstract H. Mileage, demurrage, and wagon hire.
Abstract J. Jointly owned and jointly leased lines. Receipts and expenditure. (Where a railway is managed or worked by a joint committee or other body representing two or more railway companies, and the receipts and expenditure of that railway are separately treated under Abstract J. in the accounts and returns of the represented companies, the joint committee or body is for the purpose of this Act with respect to accounts and returns, deemed to be a separate railway company (Railway Companies (Accounts and Returns) Act, 1911 (1 & 2 Geo. 5, c. 34), s. 6 (3)).
No. 11. Receipts and expenditure in respect of omnibuses and other passenger vehicles not running on the railway.
No. 12. Receipts and expenditure in respect of steamboats.
No. 13. Receipts and expenditure in respect of canals.
No. 14. Receipts and expenditure in respect of docks, harbours and wharves.
No. 15. Receipts and expenditure in respect of hotels, and of refreshment rooms and cars where catering is carried on by the company.
No. 16. Receipts and expenditure in respect of other separate businesses carried on by the company.
No. 17. Electrical power and light account.
No. 18. General balance sheet.
The statistical returns are :—
I. Mileage of lines.
(A) Mileage of lines open for traffic.
(B) Mileage of lines authorised but not open for traffic.
(C) Mileage of lines run over by the company's engines.
II. Rolling stock.
(A) Steam locomotives and tenders.
(B) Rail motor vehicles.
(C) Trains worked by electric power.
(D) Coaching vehicles (other than electric).
(E) Merchandise and mineral vehicles.
(F) Railway service vehicles and horses for shunting.
III. Horses and road vehicles employed in the collection and delivery of parcels, goods, and passengers.
IV. Steamboats.
V. Canals.
VI. Docks, harbours, and wharves.
VII. Hotels.
VIII. Land, property, etc., not forming part of the railway or stations.
IX. Other industries (if any).
X. Maintenance and renewal of ways and works (Abstract A.).
XI. Maintenance and renewal of rolling stock (Abstract B.).
XII. Engine mileage.
XIII. Passenger traffic and receipts.
XIV. Goods traffic and receipts.
XV. (A). Tonnage of the principal classes of minerals and merchandise carried by trains.
XV. (B). Number of live stock carried by goods trains.

Signature and date of accounts and returns.

1292. The accounts and returns must be signed by the officer of the company responsible for their correctness, and, in the case of an incorporated company, by the chairman or deputy-chairman, and must be made up for the year ending the 31st December, or such other day as the Board of Trade may fix to meet the special circumstances of any company (*o*).

Copies of accounts and returns.

1293. Six copies of the accounts and returns must be forwarded to the Board of Trade within sixty days of the end of the year, and a copy must be supplied to every shareholder and debenture-holder who applies for one (*p*).

Default in rendering accounts and returns and falsification.

1294. A company which makes default in preparing or forwarding such accounts or returns is liable to a penalty not exceeding £5 a day, recoverable summarily, for every day of default (*q*). If any such account or return is false in any particular to the knowledge of any person signing it, such person is liable on conviction on indictment to a fine not exceeding £100 or to imprisonment for a term not exceeding one year with or without hard labour, and on summary conviction to a fine not exceeding £50 (*r*).

Accounts to be rendered to Registrar of Companies.

1295. A copy of the accounts relating to the nominal capital authorised, and the capital raised by loan and debenture stock (*s*), and of the general balance sheet (*t*), must be forwarded by the Board of Trade to the Registrar of Companies (*u*), and filed by him; and any person is entitled to inspect or obtain a certified copy thereof on payment of the prescribed charges (*v*).

XVI. Summary of financial results secured in comparison with those for past years.
Certificates of the responsible officers as to the upkeep of the whole of the companies' property.
Auditor's certificate.
Index.
Map.

(*n*) Railway Companies (Accounts and Returns) Act, 1911 (1 & 2 Geo. 5, c. 34), s. 1 (1). As to the exemption of certain companies (*i.e.*, light railway companies, or companies whose business as railway companies is merely subsidiary to their main business) from the obligation to prepare, and submit accounts and returns, see *ibid.*, s. 6 (2); and see title TRAMWAYS AND LIGHT RAILWAYS. The Railway Regulation Act, 1844 (7 & 8 Vict. c. 85), s. 5, also requires accounts to be kept by a railway company, but these provisions, although not repealed, seem to be superseded by the more elaborate modern requirements.

(*o*) Railway Companies (Accounts and Returns) Act, 1911 (1 & 2 Geo. 5, c. 34), s. 1 (2).

(*p*) *Ibid.*, s. 1 (3).

(*q*) *Ibid.*, s. 1 (4). As to procedure before courts of summary jurisdiction, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*

(*r*) Railway Companies (Accounts and Returns) Act, 1911 (1 & 2 Geo. 5, c. 34), s. 1 (5).

(*s*) *I.e.*, Accounts numbered 1 (a), 1 (b), 1 (c) and (3); see *ibid.*, Sched.; and see note (*m*), *supra*.

(*t*) *I.e.*, Account No. 18; see note (*m*), *supra*.

(*u*) For the definition of Registrar of Companies, see Railway Companies (Accounts and Returns) Act, 1911 (1 & 2 Geo. 5, c. 34), s. 6 (1); and see title COMPANIES, Vol. V., p. 37.

(*v*) Railway Companies (Accounts and Returns) Act, 1911 (1 & 2 Geo. 5, c. 34), s. 2, Sched.

SECT. 4. **Accounts, Audit, and Statistics.**

Alterations or additions to accounts and returns by Board of Trade.

1296. After giving public notice of its proposed alterations or additions, and giving those interested opportunity of having their objections heard, the Board of Trade may, by order, alter or add to the matters which have to be included in, or the form of, such accounts or returns. Where, however, railway companies whose aggregate capital is not less than one-third of the total aggregate capital of all railway companies in the United Kingdom give notice to the Board that they are not satisfied with the mode in which any objection has been dealt with, any such order is provisional only, and can only take effect if confirmed by Parliament. The Board may submit a Bill for confirming such order, which, in case of opposition, must be referred to a select committee (*w*) or to a joint committee of the two Houses (*x*), and the objector may appear and oppose as in the case of a private bill (*y*).

Special variation.

1297. The Board of Trade may also, on the application of any company, make, as respects that company, any special variation in the form of such accounts or returns which appears necessary to adapt the form to the particular circumstances of that company (*a*).

Annual returns of capital, traffic, and working expenditure.

1298. Every company is also bound, when required by the Board of Trade, to furnish annual returns of its capital, traffic, and working expenditure in a prescribed form, or in such other form and at such time as the Board directs (*b*).

Balance sheets.

1299. No company need prepare statements of account or balance sheets more than once a year, except where half-yearly accounts are required in connection with any guarantee of dividend under statutory powers.

Ordinary general meetings.

Neither need a company hold ordinary general meetings more than once a year; and anything which has to be done under any special Act at a general meeting of the company at any specified time may be done at the annual general meeting whenever held (*c*).

Interim dividend.

1300. The directors of an incorporated company may pay an interim dividend for the first half of any year without any audit or preparation of accounts or balance sheet for that half-year, if they believe the profits of the company are sufficient; and they may

(*w*) See title PARLIAMENT, Vol. XXI., pp. 637, 638, 686.

(*x*) See *ibid.*, pp. 639, 640.

(*y*) Railway Companies (Accounts and Returns) Act, 1911 (1 & 2 Geo. 5, c. 34), s. 3; and see title PARLIAMENT, Vol. XXI., pp. 754, 755.

(*a*) Railway Companies (Accounts and Returns) Act, 1911 (1 & 2 Geo. 5, c. 34), s. 3 (6).

(*b*) *Ibid.*, s. 5, as read with the Regulation of Railways Act, 1871 (34 & 35 Vict. c. 78), s. 9, and the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 32. If any such return is false in any particular to the knowledge of the person signing it, such person is liable on summary conviction to a penalty not exceeding £50 (Regulation of Railways Act, 1871 (34 & 35 Vict. c. 78), s. 10), and, on conviction or indictment, to imprisonment, with or without hard labour, for a term not exceeding two years, or to a fine, or to both imprisonment and fine (Perjury Act, 1911 (1 & 2 Geo. 5, c. 6), s. 5).

(*c*) Railway Companies (Accounts and Returns) Act, 1911 (1 & 2 Geo. 5, c. 34), s. 4 (1).

close their register and books of transfer for the purposes of such interim dividend in the same way as they may do for the purpose of declaring their ordinary dividend before the date of their ordinary meeting (*d*).

Certificate and rights and duties of auditors.

1301. No dividend may be declared by a company until the auditors have certified that the accounts prepared to be issued contain a full and true statement of the financial condition of the company, and that the dividend proposed is properly payable. If the directors differ from the auditors as to the propriety of paying any particular expenses out of the revenue for the period in question, such difference must, if the directors so desire, be stated in the report to the shareholders, and the company in general meeting may determine the matter. If there is no such difference the judgment of the auditors is final and binding (*e*). The certificate of the auditors is, however, not conclusive on the question whether a proposed dividend is legally payable, and an injunction may be granted to restrain a proposed illegal payment (*f*). The auditors have the right to examine the books of the company at all reasonable times and to call for such documents and information as they think fit (*g*), and may refuse to certify if such documents or information are withheld (*h*). The auditors may at any time add to their certificate, or issue independently to the shareholders, at the company's expense, any statement respecting the financial condition and prospects of the company which they think material for the information of the shareholders (*h*).

Qualification of auditor.

1302. An auditor need not be a shareholder in the company, but must not hold any office in the company or be in any manner interested in its concern, except as a shareholder (*i*).

Auditor appointed by Board of Trade and his relations to company's auditors.

1303. The Board of Trade may appoint an auditor in addition to the auditors of the company where, in pursuance of a resolution passed at a general meeting of the company, an application is made to it to do so. Such auditor must be paid by the company such remuneration as the Board directs, and has the same duties and powers as the other auditors and must report to the company. When, in consequence of the appointment of an auditor by the Board, there are three or more auditors, the company may declare a dividend on the certificate of the majority of the auditors. Where there is a difference of opinion among them, the one who so differs

(*d*) Railway Companies (Accounts and Returns) Act, 1911 (1 & 2 Geo. 5, c. 34), s. 4 (2).

(*e*) Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 30.

(*f*) *Bloxam* v. *Metropolitan Rail. Co.* (1868), 3 Ch. App. 337.

(*g*) As to the right of auditors to have access to the company's books, see *Cuff* v. *London and County Land and Building Co., Ltd.*, [1912] 1 Ch. 440, C. A. (a case on the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 112, 113); and see title COMPANIES, Vol. V., p. 268.

(*h*) Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 30.

(*i*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 102, as amended by the Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 11. As to the qualifications, duties etc. of auditors, see title COMPANIES, Vol. V., pp. 267 *et seq.*, 723 *et seq.*

SECT. 4. Accounts, Audit, and Statistics.

must issue to the shareholders, at the expense of the company, a statement as to the grounds on which he differs from his colleagues, together with all such matters as he thinks fit to bring to the notice of the shareholders respecting the financial condition and prospects of the company (*k*).

Inspectors appointed by Board of Trade.

1304. The Board of Trade has power to appoint inspectors to examine into the affairs of an incorporated company and the condition of its undertaking, and to report thereon, whenever application is made (1) in pursuance of a resolution of the directors; (2) by holders of not less than two-fifths of the issued ordinary stock; (3) by holders of not less than half the issued mortgages, debentures, and debenture stock; (4) by holders of not less than two-fifths of the issued guaranteed or preference stock, provided the issued preference capital amounts to not less than one-third of the whole share capital (*l*). The application must be made in writing and supported by such evidence as the Board may require; and the Board, before making an appointment, may require the applicants to give security for the costs of the inquiry (*m*).

Powers of inspectors.

1305. The directors, officers, and agents of the company must produce to such inspectors all books and documents in their custody, and must afford them all reasonable facilities for the inspection. The inspector also may examine any officer or agent of the company upon oath (*n*).

Result of inspection.

Expenses.

1306. The result of the inspection must be printed at the expense of the company and delivered to the Board of Trade, and to the company and to any shareholder who applies therefor; and all expenses incident to the inspection must be borne by the applicant, unless the Board directs such expenses or any part of them to be paid by the company (*o*).

Inspectors appointed by the company.

1307. A company may appoint inspectors for similar purposes, by resolution at an extraordinary meeting, and inspectors so appointed have the same powers and duties as if they had been appointed by the Board of Trade, and must report in such manner as the company in general meeting directs. The directors, officers, and agents of the company have the same duties in regard to such inspectors as to inspectors appointed by the Board (*p*).

Shareholders' address book.

1308. Every incorporated company must print copies of the shareholders' address book of the company corrected up to 1st December in every year, with an asterisk against the names of those who are qualified to act as directors. After a fortnight from the date

(*k*) Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 12.
(*l*) *Ibid.*, s. 6.
(*m*) *Ibid.*, s. 7.
(*n*) *Ibid.*, s. 8. To refuse to produce any book or document required, or to afford facilities for inspection, or to answer any question relating to the affairs of the company, renders the person refusing liable to a penalty of £5 for every day such refusal continues (*ibid.*).
(*o*) *Ibid.*, s. 9.
(*p*) *Ibid.*, s. 10.

mentioned, copies must be sold, on application, at a price not exceeding 5*s.* to any shareholder and to the holder of any mortgage debenture or debenture stock (*q*).

SECT. 5.—*Protection of Rolling Stock.*

Protection from distress.

1309. Where rolling stock (*r*) is in a "work," that is, on a siding on the premises of any colliery, quarry, mine, manufactory, warehouse, wharf, pier, or jetty (*s*), it is not liable to distress for rent payable by the tenant (*t*) of such premises, unless it is the property of such tenant, provided it has upon it a metal plate or other conspicuous brand or mark indicating the actual owner thereof (*u*).

Order for restoration.

1310. If any such rolling stock is distrained upon, an order may be obtained from a court of summary jurisdiction for its restoration or for payment of its value (*a*).

Tenants' interest.

The tenant's interest, if any, in the rolling stock is not protected from distress; and if the rolling stock is distrained upon, a court of summary jurisdiction may, in case of difference, settle how such interest is to be disposed of (*b*).

Appeal to quarter sessions.

There is an appeal to quarter sessions from any order of a court of summary jurisdiction under these provisions (*c*).

Part II.—Construction and Repair of Railways.

SECT. 1.—*Plans and Sections.*

Provisions of Clauses Act.

1311. In exercising the powers, given to a company by any special Act passed since the 8th May, 1845, to construct a railway,

(*q*) Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 34. A penalty not exceeding £20 is incurred by the company for any breach of this provision (*ibid.*).

(*r*) For the meaning of the term "rolling stock," see Railway Rolling Stock Protection Act, 1872 (35 & 36 Vict. c. 50), s. 2; title DISTRESS, Vol. XI., p. 140.

(*s*) Railway Rolling Stock Protection Act, 1872 (35 & 36 Vict. c. 50), s. 2; and see *Eaton Estate and Mining Co.* v. *Western Waggon and Property Co.* (1886), 54 L. T. 735; title DISTRESS, Vol. XI., p. 140, note (*l*).

(*t*) The term "tenant" includes a lessee, sub-lessee, or other person having an interest in the premises under a lease or agreement or by use and occupation, or being otherwise liable to pay rent in respect thereof (*ibid.*).

(*u*) Railway Rolling Stock Protection Act, 1872 (35 & 36 Vict. c. 50), s. 3. As to the protection of rolling stock against being taken in execution on a judgment obtained against the railway company, see p. 764, *post.*

(*a*) Railway Rolling Stock Protection Act, 1872 (35 & 36 Vict. c. 50), s. 4.

(*b*) *Ibid.*, s. 5.

(*c*) *Ibid.*, s. 6. No order of the court may be quashed for want of form, or removed into a superior court by *certiorari* or otherwise (*ibid.*, s. 7). As to appeals from courts of summary jurisdiction to quarter sessions, see title MAGISTRATES, Vol. XIX., pp. 642 *et seq.*

SECT. 1. Plans and Sections.

the company is subject to the provisions and restrictions contained in the Railways Clauses Consolidation Act, 1845 (*d*).

Deposit of plans, sections, and book of reference.

1312. By the standing orders of both Houses of Parliament (*e*), whenever a Bill is promoted for the construction of a railway, plans and sections, together with a book of reference thereto, must be deposited at the office of the clerk of the peace of any county through which the railway is proposed to be made (*f*). These plans, sections, and book must comply with the requirements of the standing orders of the two Houses; and in particular all lands which it is proposed to take or use must be described, and the maps must define the limits of lateral deviation from the proposed works which the company ask power to make, and must show all proposed tunnels, bridges, viaducts and level crossings, all diversions of highways, navigable rivers, canals or railways, and all junctions (*g*). The sections must show the surface, the level of the proposed works, the heights of embankments, and the depths of cuttings; they must also show a datum horizontal line, which must be the same throughout the whole length of the work, or any branch of it, and be referred to some fixed point chosen with reference to an ordnance bench mark; and proposed alterations in the water level of any canal, or in the level or inclination of any carriage road, must also be shown (*h*). An ordnance map must also be deposited, with the proposed line of railway delineated thereon (*i*).

Incorporation of plans and sections in special Act.

1313. Unless these plans and sections are referred to and incorporated in the special Act, they cannot be regarded in subsequently construing that Act (*j*), and the mere deposit of plans not subsequently referred to nor incorporated in such Act imposes no obligation upon the company (*k*). Accordingly, if the special Act gives the

(*d*) 8 & 9 Vict. c. 20, s. 6. The provisions of this Act as to construction apply also, except as mentioned, to a railway constructed under the powers of the Railways Construction Facilities Act, 1864 (27 & 28 Vict. c. 121), see *ibid.*, s. 31. In this part of the title, unless the contrary appears, the expression "the company" means the company authorised by a special Act to construct a railway; and the expression "the railway" means the railway and works authorised by that Act to be constructed; see Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 2.

(*e*) As to the procedure with regard to railway and other private Bills in Parliament, see title PARLIAMENT, Vol. XXI., pp. 727 *et seq.*

(*f*) See Standing Orders of the House of Lords (Private Business), 1911, No. 24; Standing Orders of the House of Commons (Private Business), 1911, No. 24; title PARLIAMENT, Vol. XXI., p. 732.

(*g*) Standing Orders of the House of Lords (Private Business), 1911, Nos. 40—43; Standing Orders of the House of Commons (Private Business), 1911, Nos. 40—43.

(*h*) *Ibid.*, Nos. 47—55.

(*i*) *Ibid.*, No. 24. As to plans and sections, see title PARLIAMENT, Vol. XXI., pp. 732, 733; and as to the money deposit to be made, see *ibid.*, pp. 735, 736.

(*j*) *North British Rail. Co.* v. *Tod* (1846), 12 Cl. & Fin. 722, H. L., following the principle laid down in *Heriot's Hospital* (*Feoffees*) v. *Gibson* (1814), 2 Dow. 301, H. L.; see also *Squire* v. *Campbell* (1836), 1 My. & Cr. 459; *Beardmer* v. *London and North Western Rail. Co.* (1849), 1 Mac. & G. 112.

(*k*) *R.* v. *Caledonian Rail. Co.* (1850), 16 Q. B. 19; *A.-G.* v. *Great Eastern Rail. Co.* (1872), 7 Ch. App. 475.

company power to take more land of a certain owner than was comprised in the notice given to him of the company's intention to apply for powers, the company may take all the land allowed by the Act (*l*). There is, however, always a presumption that the company intended to adhere to the plans and that the legislature intended them to be adhered to (*m*).

Errors and omissions in plan.

1314. If there is any omission, misstatement or erroneous description of any lands, or of the owners, lessees or occupiers of any lands, described in the plans or books of reference mentioned in the special Act (*n*), the company must apply to two justices for the correction thereof after giving ten days' notice of such application to the owners of the lands affected. On the justices being satisfied that a mistake has been made, they must give a certificate certifying the particulars of any such omission and in what respect any such matter has been misstated or erroneously described, and this certificate must be deposited with the clerk of the county council (*o*) and the parish clerk of the parish in which the lands are situated, and kept by them with the other documents to which they relate, which are to be deemed to be corrected in accordance with such certificate (*p*). The company may not commence its works until it has deposited with the clerk of the county council (*o*) and the parish clerk of the parish in which any land affected is situated a plan and section of all alterations from the original plan and section as have been approved of by Parliament, on the same scale and containing the same particulars as the original plans and sections (*q*).

Certificate of justices.

Deposit of altered plan and section.

Inspection and certified copies.

1315. All persons interested have the right to inspect any of the original or altered plans or sections, and to make copies of, or

(*l*) *Re Huddersfield Corporation and Jacomb* (1874), 10 Ch. App. 92. Where land shown on a plan is partly within and partly outside the limits of deviation, and its boundaries are not completely shown, the land may be taken if the plans, on reasonable examination, are sufficient to indicate that such land may be required (*Wrigley* v. *Lancashire and Yorkshire Rail. Co.* (1863), 4 Giff. 352; *Dowling* v. *Pontypool, Caerleon, and Newport Rail. Co.* (1874), L. R. 18 Eq. 714; *Finck* v. *London and South Western Rail. Co.* (1890), 44 Ch. D. 330, C. A.; *Protheroe* v. *Tottenham and Forest Gate Rail. Co.*, [1891] 3 Ch. 278, C. A.); see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 23.

(*m*) *Ware* v. *Regent's Canal Co.* (1858), 3 De G. & J. 212.

(*n*) This refers to some omission in a plan, *e.g.*, the number of a plot of land, or to some error, *e.g.*, a wrong acreage, or to the omission of the name of some owner of land. Promoters cannot know accurately who the owners are, therefore the omission of some of their names from a book of reference does not prevent the company from constructing their works on the land described (*Kemp* v. *West End of London and Crystal Palace Rail. Co.* (1855), 1 K. & J. 681).

(*o*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 83; see title LOCAL GOVERNMENT, Vol. XIX., p. 343.

(*p*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 7. This does not apply to a railway constructed under the Railways Construction Facilities Act, 1864 (27 & 28 Vict. c. 121), s. 31. Alterations in the case of such a railway may be made with the consent of the Board of Trade (*ibid.*, s. 32).

(*q*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 8. Cross-sections of the works need not be shown (*R.* v. *Caledonian Rail. Co.* (1850), 16 Q. B. 19).

SECT. 1. Plans and Sections.

extracts from, them; and every clerk of the county council or parish clerk having custody of such documents is guilty of an offence, and liable to a penalty not exceeding £5, recoverable summarily, if he refuses facilities for such inspection (*r*). A true copy of any such plan or book of reference or of any alteration or correction therein, certified by the officer having custody thereof, is evidence of the contents thereof in any court of justice (*s*).

SECT 2.—*Deviation.*

Limits to lateral deviation.

1316. In constructing the railway, the company may deviate laterally from the line delineated on the deposited plans, provided that no such deviation extend beyond the limits of deviation shown on such plans, nor more than 10 yards from the said line in passing through any town (*t*), village or land continuously built upon, nor more than 100 yards from the said line elsewhere (*a*).

Nature of deviation; how measured.

Lateral deviation means the shifting of the work in its integrity from one site to another which may be deemed more suitable (*b*). It is measured by the amount of alteration from the deposited plan of the middle line of the railway (*c*) which may be actually on the line of deviation (*d*).

Rights of adjoining owners.

The line must not be deviated so as to extend into the lands of any person whose name is not mentioned in the books of reference, without the previous consent of such person, unless his name has been omitted by mistake and the mistake has been duly rectified

(*r*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 9; Parliamentary Documents Deposit Act, 1837 (7 Will. 4 & 1 Vict. c. 83), s. 3; and as to procedure before courts of summary jurisdiction, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*

(*s*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 10. The clerk of the county council is bound to give such certificate to any person interested who requires it (*ibid.*).

(*t*) The word "town" is not to be interpreted in its strictly legal sense. It means here any space where dwelling-houses are contiguous and continuous, or nearly so; and includes any open space (such as a park) surrounded by continuous houses (*Elliott* v. *South Devon Rail. Co.* (1848), 2 Exch. 725; see *Carington (Lord)* v. *Wycombe Rail. Co.* (1868), 3 Ch. App. 377; *London and South Western Rail. Co. (Directors, etc.)* v. *Blackmore* (1870), L. R. 4 H. L. 610).

(*a*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 15. This deviation of 100 yards applies only to the line of railway itself. The company may take and use land for collateral purposes beyond the limits of deviation, provided such land is included in the plans etc. (*Doe* d. *Armistead* v. *North Staffordshire Rail. Co.* (1851), 16 Q. B. 526; see *Doe* d. *Payne* v. *Bristol and Exeter Rail. Co.* (1840), 6 M. & W. 320; and see the text, *infra*). It is not necessary that the plans should show the particular works to be carried out within the limits of deviation (*Weld* v. *London and South Western Rail. Co.* (1863), 8 L. T. 13). This provision does not apply to the widening of an existing line (*Finck* v. *London and South Western Rail. Co.* (1890), 44 Ch. D. 330, C. A.); nor to a junction with an existing line (*Cardiff Railway* v. *Taff Vale Railway*, [1905] 2 Ch. 289). This provision does not apply to a railway made under the Railways Construction Facilities Act, 1864 (27 & 28 Vict. c. 121), s. 31.

(*b*) *Herron* v. *Rathmines and Rathgar Improvement Commissioners*, [1892] A. C. 498; see also S. C. (1890), 27 L. R. Ir. 179, C. A.

(*c*) *Finck* v. *London and South Western Rail. Co.*, *supra.*

(*d*) *Cardiff Railway* v. *Taff Vale Railway*, *supra*; so that half the railway may be outside the line of deviation.

and certified (*e*), or as provided in the special Act (*f*). Land within the limits of deviation may be taken when reasonably required for the purposes of constructing the works of the railway (*g*), and an injunction will not be granted against the use of powers to deviate unless such powers are being used capriciously and so as to cause unnecessary inconvenience to the public (*h*); neither will an injunction against deviation be granted to any person unless he is injured thereby (*i*).

Vertical deviation.

1317. The company may not construct the railway so as to deviate from the levels of the railway, as referred to the datum line (*j*) marked on the section and described in the special Act, to any extent exceeding in any place 5 feet, or in passing through a town (*k*), village, street or land continuously built upon, 2 feet, without the previous consent in writing of the owners and occupiers of the land in which such deviation is intended. The consent of the authority having control of any street or highway or public sewer affected by such deviation, or of the proprietors of any canal, navigation, gasworks or waterworks so affected, is also required. If there is no authority having control of any such street or highway, then, before making any such deviation, it is necessary for the company to obtain the consent in writing of two justices for the district sitting in petty sessions for the purpose of hearing the application (*l*). Where a vertical deviation is made in excess of these powers in land acquired, no injunction will be granted to a party who is not injured (*m*).

Notice of deviation.

Before making any such deviation exceeding 5 or 2 feet, as the case may be, and having obtained the necessary consent, the company must give notice of the intended deviation by advertisement in newspapers (*n*), at least three weeks before commencing

(*e*) In manner already mentioned; see p. 649, *ante*.

(*f*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 15.

(*g*) *Sadd* v. *Maldon, Witham, and Braintree Rail. Co.* (1851), 6 Exch. 143.

(*h*) *A.-G.* v. *Great Western Rail. Co.* (1866), 14 W. R. 726.

(*i*) *Lee* v. *Milner* (1837), 2 Y. & C. (EX.) 611; and see title INJUNCTION, Vol. XVII., p. 235.

(*j*) See p. 648, *ante*.

(*k*) As to the meaning of the word "town," see note (*t*), p. 650, *ante*.

(*l*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 11. When the consent of the justices is required, fourteen days' notice of the holding of such petty sessions must be given through the means of some newspaper circulating in the county, and also by being affixed to the door of the church of the parish in which such deviation is intended, or if there is no such church, in such place as notices are usually fixed (*ibid.*). A vertical deviation not exceeding 5 feet from the datum line (see p. 648, *ante*) is within the powers of the company, although the deviation may exceed 5 feet with reference to the surface (*North British Rail. Co.* v. *Tod* (1846), 12 Cl. & Fin. 722, H. L.). As to the diversion of highways generally, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 69 *et seq.*; and see pp. 663 *et seq.*, *post*.

(*m*) *Holyoake* v. *Shrewsbury and Birmingham Rail. Co.* (1848), 5 Ry. & Can. Cas. 421; and see title INJUNCTION, Vol. XVII., p. 235.

(*n*) The advertisement must be inserted once at least in two newspapers, or twice at least in one newspaper, circulating in the district or neighbourhood where the deviation is intended to be made (Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 10), s. 12).

SECT. 2. Deviation.

the work. The owner of any lands prejudicially affected (*o*) by such deviation then may, before the commencement of the work, and after giving ten days' notice to the company, apply to the Board of Trade to decide whether, having regard to the interests of the applicant, the proposed deviation is proper to be made. The Board of Trade may either disallow or authorise or modify the deviation, and may, to that effect, grant a certificate which is binding on the parties (*p*).

Deviation from line or level of arch, tunnel, or viaduct.

1318. A company in whose special Act the Railways Clauses Act, 1863 (*q*), Part I., is incorporated may, subject to the foregoing limitations (*r*), and so that the nature of the work is not altered, deviate from the line or level of any arch, tunnel or viaduct described in the deposited plans or sections; and may substitute any other engineering work for any such arch, tunnel or viaduct, provided it obtains a certificate authorising such substitution from the Board of Trade (*s*). If, however, the Railways Clauses Act, 1863 (*q*), Part I., is not incorporated in the company's special Act, any such arch or viaduct upon which it is intended to carry the railway must be made according to the plans without deviation, and any such tunnel must be made at the place indicated on the plans, unless the owner, lessees and occupiers of the land in which it is intended to be made consent that it shall not be so made (*t*).

Limitations to deviations of gradients, tunnels, or other works.

1319. The company may not deviate from or alter the gradients, curves, tunnels or other engineering works (*u*) described in the plans and sections except to the following extent:—(1) Subject to what has been already stated with regard to altering levels (*x*), it may increase the gradient up to 10 feet per mile in gradients not exceeding 1 in 100, and up to 3 feet per mile in steeper gradients, or to any further extent certified by the Board of Trade to be consistent with public safety and not prejudicial to the public interest. It may diminish the gradient to any extent,

(*o*) As to when a person is "prejudicially" or "injuriously" affected, see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 44.

(*p*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 12.

(*q*) 26 & 27 Vict. c. 92.

(*r*) *I.e.*, those contained in the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 11, 12, 15; see pp. 650 *et seq.*, *ante*.

(*s*) Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 4.

(*t*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 13; see *Little* v. *Newport, Abergavenny and Hereford Rail. Co.* (1852), 12 C. B. 752. But having deviated from the line where a tunnel is marked on the plans the company is not bound to make a tunnel in the deviated line (*ibid.*; *A.-G.* v. *Tewkesbury and Great Malvern Rail. Co.* (1863), 8 L. T. 682, C. A.). Where its special Act gave a company power to stop up all streets within a certain area, but the plans showed the railway as crossing one of such streets by an arch, it was held that the company might stop up that street notwithstanding the plan and the provisions of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 13 (*A.-G.* v. *Great Eastern Rail. Co.* (1873), L. R. 6 H. L. 367; see also *Temple* v. *Flower* (1872), 26 L. T. 657).

(*u*) The term "engineering works" here includes a bridge which forms part of the line of railway (*A.-G.* v. *Tewkesbury and Great Malvern Rail. Co.*, *supra*).

(*x*) See the text, *supra*.

SECT. 2. Deviation.

(2) The company may diminish the radius of a curve described in the plans to any extent which shall leave a radius of not less than half a mile or to any further extent similarly certified by the Board of Trade. (3) The company may make a tunnel not marked in the plans instead of a cutting, or a viaduct instead of a solid embankment, if authorised by a similar certificate of the Board of Trade (*a*).

SECT. 3.—*Authorised Works.*

Purpose for which works are authorised.

1320. Subject to the provisions and restrictions of its special Act and any Act incorporated therewith and of the Railways Clauses Consolidation Act, 1845 (*b*), the company may, for the purpose of constructing the railway and the accommodation works connected therewith (*c*), execute certain specified works which are necessary for making, maintaining, altering or repairing, and using the railway, provided it does as little damage as can be (*d*), and makes full satisfaction to all parties interested for damage done in exercise of its powers (*e*).

(*a*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 14.

(*b*) 8 & 9 Vict. c. 20.

(*c*) All works which the company is empowered to execute, whether accommodation works or works collateral to the construction of the railway, are within these provisions (*Wilkinson* v. *Hull etc. Railway and Dock Co.* (1882), 20 Ch. D. 323, C. A.; *Beauchamp (Lord)* v. *Great Western Rail. Co.* (1868), 3 Ch. App. 745; *Stockton and Darlington Rail. Co.* v. *Brown* (1860), 9 H. L. Cas. 246: see *Beardmer* v. *London and North Western Rail. Co.* (1849), 1 Mac. & G. 112. As to accommodation works, see p. 666, *post.*

(*d*) This means damage in the manner of exercising the company's powers (*Fenwick* v. *East London Rail. Co.* (1875), L. R. 20 Eq. 544; *R.* v. *East and West India Docks and Birmingham Junction Rail. Co.* (1853), 2 E. & B. 466; and see *Swansea Corporation* v. *Harpur* (1912), 107 L. T. 6, C. A.). Therefore an injunction will be granted against carrying out authorised works in such a manner as to cause unnecessary damage (see *Coats* v. *Clarence Rail. Co.* (1830), 1 Russ. & M. 181; *Manser* v. *Northern and Eastern Rail. Co.* (1841), 5 Jur. 983; *Biscoe* v. *Great Eastern Rail. Co.* (1873), L. R. 16 Eq. 636; *Arnold* v. *Furness Rail. Co.* (1874), 22 W. R. 613; *Roberts* v. *Charing Cross, Euston and Hampstead Rail. Co.* (1903), 87 L. T. 732). The damage aimed at is damage to individuals (*R.* v. *East and West India Docks and Birmingham Junction Rail. Co., supra*). Where there are two modes of constructing works, a company is as a rule bound to adopt that course which will do the least amount of injury to individuals (*Freehold General Land Investment Co., Ltd.* v. *Metropolitan District Rail. Co.* (1866), 14 L. T. 96); and see pp. 723 *et seq., post.*

(*e*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 16. Hence the right of action by any person injured by the exercise of the authorised powers is taken away unless special damage is sustained, and the right to compensation is substituted (*Watkins* v. *Great Northern Rail. Co.* (1851), 16 Q. B. 961); and see titles NEGLIGENCE, Vol. XXI., pp. 375 *et seq.*, 423, 424; NUISANCE, Vol. XXI., pp. 516 *et seq.* Where a railway company acting under its statutory powers bought the reversion of premises subject to a lease containing a covenant for quiet enjoyment, it was held that no action would lie against the company for breach of this covenant by the execution of works within its powers (*Anderson* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (1898), 14 T. L. R. 317). A company may be indicted for a public nuisance in respect of acts not authorised (*R.* v. *Great North of England Rail. Co.* (1846), 9 Q. B. 315); it may also be proceeded against by information at the suit of the Attorney-General; see Railway Regulation Act, 1844 (7 & 8 Vict. c. 85), s. 17;

SECT. 3. **Authorised Works.**

Works must be reasonably necessary.

1321. Only those works may be executed which are reasonably necessary for the authorised purposes; and the fact that certain works will effect a saving of expense to the company is not sufficient to constitute such necessity (*f*); but the court does not as a rule interfere with a company in the *bonâ fide* exercise of its discretion to execute authorised works, on the ground merely that other equally authorised works would be less inconvenient or cause less damage to individuals (*g*).

Authorised works.

1322. The works which the company is authorised to execute are as follows:—

(1) It may make or construct in, upon, across, under or over any lands (*h*), or any streets, hills, valleys, roads, railroads or tramroads, rivers (*i*), canals, brooks, streams or other waters, such temporary or permanent inclined planes, tunnels (*j*), embankments, or viaducts, bridges (*k*), roads, ways, passages, conduits, drains,

see pp. 628, *ante*, 740, *post;* and see title NUISANCE, Vol. XXI., pp. 550 *et seq.* The right to a mandatory injunction is not taken away by the fact that, under the special Act, some other remedy against the company is provided (*R.* v. *Norwich and Brandon Rail. Co.* (1845), 3 Dow. & L. 385); and it is no answer to an application for a mandatory injunction to a company to carry out prescribed work that it cannot do so without stopping the construction of the railway altogether (*A.-G.* v. *Mid-Kent Rail. Co. and South Eastern Rail. Co.* (1867), 3 Ch. App. 100; see title INJUNCTION, Vol. XVII., p. 241); nor that the powers of the company have expired (*R.* v. *Birmingham and Gloucester Rail. Co.* (1841), 2 Q. B. 47). But a mandamus to compel a company to carry out prescribed works may be refused where the funds of the company are exhausted (*Re Bristol and North Somerset Rail. Co.* (1877), 3 Q. B. D. 10); and see title CROWN PRACTICE, Vol. X., p. 107.

(*f*) *R.* v. *Wycombe Rail. Co.* (1867), L. R. 2 Q. B. 310; *Pugh* v. *Golden Valley Rail. Co.* (1880), 15 Ch. D. 330, C. A.; *Fenwick* v. *East London Rail. Co.* (1875), L. R. 20 Eq. 544; *Morris* v. *Tottenham and Forest Gate Rail. Co.*, [1892] 2 Ch. 47.

(*g*) *R.* v. *East and West India Docks and Birmingham Junction Rail. Co.* (1853), 2 E. & B. 466, 474; *Wilkinson* v. *Hull etc. Railway and Dock Co.* (1882), 20 Ch. D. 323, C. A.; *Fenwick* v. *East London Rail. Co., supra; R.* v. *South Eastern Rail. Co.* (*Directors etc.*) (1853), 4 H. L. Cas. 471; see *Roderick* v. *Aston Local Board* (1877), 5 Ch. D. 328, C. A.

(*h*) Until the company has acquired the ownership it has no power to execute these works (*Rangeley* v. *Midland Rail. Co.* (1868), 3 Ch. App. 306). *E.g.*, a company cannot compel an owner to grant it merely an easement over land (*Pinchin* v. *London and Blackwall Rail. Co.* (1854), 5 De G. M. & G. 851, C. A.). As to what land, and what interests therein, may be taken, and the purposes for which such may be taken, see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 22, 23. The company is sole judge of what it requires for the purposes of its authorised works, and, if acting *bonâ fide*, the courts will not interfere with its discretion to acquire land within its powers for such purposes (*Stockton and Darlington Rail. Co.* v. *Brown* (1860), 9 H. L. Cas. 246; *Beauchamp* (*Lord*) v. *Great Western Rail. Co.* (1868), 3 Ch. App. 745); and see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 248.

(*i*) "Rivers" includes navigable rivers. Hence a company may construct a railway on the bed of a navigable river (*Abraham* v. *Great Northern Rail. Co.* (1851), 16 Q. B. 586).

(*j*) See pp. 682, 685, 686, *post*.

(*k*) For the requirements as to permanent bridges, see Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 46, 49—51; and see pp. 655 *et seq.*, *post*. The statutory requirements as to bridges do not apply to temporary bridges merely erected to facilitate the execution of the

piers, arches, cuttings and fences as it thinks proper, provided such works are executed within the lands described in the plans or mentioned in the books of reference or any correction thereof (*l*).

(2) It may alter the course of any rivers not navigable, brooks, streams, and watercourses, and of any branches of navigable rivers which are not themselves navigable, within such lands, for the purpose of constructing and maintaining tunnels, bridges, passages or other works over or under the same as it thinks proper.

(3) It may alter or divert, temporarily or permanently, the course of any such rivers or streams of water, roads, streets or ways (*m*), or may raise or sink the level of the same in order more conveniently to carry the same over or under or by the side of the railway as it thinks proper.

(4) It may make drains or conduits into, through or under any lands adjoining the railway for the purpose of conveying water from or to the railway.

(5) It may erect and construct such houses, warehouses, offices and other buildings, yards, stations, wharves, engines, machinery, apparatus and other works and conveniences as it thinks proper.

(6) It may from time to time (*n*) alter, repair, or discontinue any of the above-mentioned works and substitute others in their stead (*o*).

SECT. 4.—*Bridges.*

Line crossing main road or public highway.

1323. If the line of the railway crosses any main road (*p*) or public highway (*q*), then (*r*) either such road must be carried over

permanent works (*London and Birmingham Rail. Co.* v. *Grand Junction Canal Co.* (1835), 1 Ry. & Can. Cas. 224; *Priestley* v. *Manchester and Leeds Rail. Co.* (1840), 2 Ry. & Can. Cas. 134).

(*l*) As to plans and books of reference, see pp. 647 *et seq.*, *ante*.

(*m*) As to diversion of roads, see pp. 663 *et seq.*, *post*.

(*n*) These powers of altering, repairing, and discontinuing may be exercised after the period fixed by the special Act for completing the works has expired. Hence, when in 1895 the defendants pulled down offices and built new ones on a site acquired under an Act of 1865, the powers under which expired in 1868, it was held that the plaintiff was not entitled to an injunction against interference with ancient lights, but was left to his remedy for compensation (*Emsley* v. *North Eastern Rail. Co.*, [1896] 1 Ch. 418, C. A.).

(*o*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 16.

(*p*) The words in the Act are "turnpike road," but "turnpike" roads as such no longer exist. Most roads which were "turnpike" roads are now "main" roads. If they are not main roads, they are probably "ordinary highways." A few roads, however, which were originally made under turnpike Acts, have ceased to be highways; see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 12—16. In this part of this title the expression "main" road is used wherever the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 21), speaks of "turnpike" road.

(*q*) This applies only to roads which the public have a legal right to use at the date when the bridge was constructed (*Caledonian Railway* v. *Glasgow Corporation*, [1909] A. C. 138). "Highway" means a carriageway. If not required so to do by its special Act, a company is not obliged to build a bridge when the railway crosses a public footpath. Hence, where the railway was carried across a footpath on an embankment 20 feet high so that the public had to ascend the embankment by steps, cross the line on the level, and descend by steps on the other side,

(*r*) For note (*r*), see next page.

SECT. 4. Bridges.

the railway or the railway over such road (*s*) by means of a bridge (*t*) constructed as hereafter described (*u*); and such bridge, with its approaches (*a*) and all other necessary works connected with it, must be constructed and maintained for all subsequent time (*b*) at the expense of the company (*c*).

a mandamus to compel the company to construct a bridge was refused (*Dartford Rural Council* v. *Bexley Heath Rail. Co.*, [1898] A. C. 210). Where a proposed and partially made new road was not referred to in the plans, and the railway was made cutting off the new road from a highway, it was held that the company could not be compelled to unite the new road with the highway (*Gawthern* v. *Stockport, Disley, and Whaley Bridge Rail. Co.* (1857), 3 Jur. (N. S.) 573).

(*r*) *I.e.*, unless otherwise provided by the special Act (Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 46). As to level crossings, see pp. 660 *et seq.*, *post.*

(*s*) The company has, unless otherwise provided in its special Act, an option either to take the railway over the road or the road over the railway, and the court does not interfere with the exercise of this option. Hence a mandamus will not be granted requiring the company to do a specified one of these two things, unless it is impossible to do the other (*R.* v. *South Eastern Rail. Co.* (*Directors etc.*) (1853), 4 H. L. Cas. 471). Where the company has power to cross a road on the level, such power is permissive only, and it may, if it chooses, cross under or over the road by means of a bridge (*Breynton* v. *London and North Western Rail. Co.* (1846), 10 Beav. 238; *Dover Harbour* (*Warden and Assistants*) v. *London, Chatham and Dover Rail. Co.* (1861), 3 De G. F. & J. 559). As to level crossings, see further, pp. 660 *et seq.*, *post.*

(*t*) A bridge is a "building" within the meaning of a covenant by the company not to erect any building exceeding certain dimensions within certain limits (*Lloyd* v. *London, Chatham and Dover Rail. Co.* (1865), 2 De G. J. & Sm. 568, C. A.). If the plans show a skew bridge, probably the company would be restrained from constructing a square bridge if inconvenient to the public (*A.-G.* v. *Dorset Central Rail. Co.* (1860), 3 L. T. 608). Where any difference arises as to construction of a bridge, the Board of Trade, on the application of any party, may decide the matter, and may give a certificate as to the mode of construction (Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 66; see p. 744, *post*). As to apportionment of expenses of construction of works ordered by the Board of Trade or the Railway and Canal Commissioners, see p. 661, *post*.

(*u*) See pp. 657 *et seq.*, *post.*

(*a*) As to the liability of a company, where the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), does not apply, to keep "approaches" in repair, see *Hertfordshire County Council* v. *Great Eastern Railway*, [1909] 2 K. B. 403, C. A.; see p. 663, *post.*

(*b*) Where the road is carried over the railway the company is under a perpetual obligation to maintain in good repair, not only the fabric of the bridge, but also the approaches, and the roadway over the bridge and approaches; and this obligation is not affected by the provisions of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 56. As to the restoration of roads interfered with, see p. 665, *post*; *North Staffordshire Rail. Co.* v. *Dale* (1858), 8 E. & B. 836; *Leech* v. *North Stafford Rail. Co.* (1860), 29 L. J. (M. C.) 151; S. C., *sub nom. Newcastle-under-Lyne and Leek Turnpike Roads* (*Trustees*) v. *North Staffordshire Rail. Co.* (1860), 5 H. & N. 160; *Lancashire and Yorkshire Rail. Co.* v. *Bury Corporation* (1889), 14 App. Cas. 417. This obligation covers the metalling of the roadway (*North of England Rail. Co.* v. *Langbaurgh* (1871), 24 L. T. 544). Where, by a company's special Act passed before 1845, it was bound to keep in repair all bridges, it was held that it was bound to keep in repair the roadway of the bridge over the railway, even though it had up to then been repaired by the parish (*R.* v. *South Eastern Rail. Co.* (1875), 32 L. T.

(*c*) For note (*c*), see next page.

SECT. 4. Bridges.

1324. Where the railway is carried over the road the bridge must satisfy the following requirements:

Bridge over road.

(1) The width of the arch must leave a space thereunder of not less than 35 feet if over a main road (*d*), 25 feet if over a public carriageway, and 12 feet if over a private road (*e*).

858). A public street in a town is a "public highway" within this provision, and if it is carried over a railway by a bridge the company must maintain the roadway over the bridge and the approaches; but the company is not bound to maintain the roadway of what was a private street when the bridge was built (*Caledonian Railway* v. *Glasgow Corporation*, [1909] A. C. 138). Where a company's special Act, passed before 1845, provided that "where any bridge shall be erected over the railway, the road over such bridge shall be formed and shall at all times be continued of such width as to leave a clear and open space between the fences of not less than 25 feet," it was held that a perpetual obligation was thereby imposed on the railway company to repair the bridge and the road over it along with the approaches and fences (*A.-G.* v. *Midland Rail. Co.* (1909), 25 T. L. R. 547, C. A.). Where a company had power to carry an old road across a railway on the level, and instead of doing so it built a bridge over the railway 347 yards east of the place where the level crossing ought to have been, and made approaches thereto from points on the road through private property by permission of the owners, and the old road then became obliterated and disused, it was held that the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 46, did not apply to this bridge or the approaches, and that the company was not bound to keep them in repair (*London and North Western Rail. Co.* v. *Ogwen District Council* (1899), 80 L. T. 401). Where the railway is carried over the road the company is under no obligation to keep the approaches in repair, even where it has lowered the level of the old highway (*London and North Western Rail. Co.* v. *Skerton* (*Surveyor*) (1864), 5 B. & S. 559; following *Fosberry* v. *Waterford and Limerick Rail. Co.* (1862), 13 I. C. L. R. 494); and when the railway is crossed by a highway at a level crossing, the road being raised to the higher level of the railway, the company is not bound to keep the approaches to the crossing in repair (*West Lancashire Rural Council* v. *Lancashire and Yorkshire Railway* (1903), 72 L. J. (K. B.) 675; but see note (*a*) p. 663, *post*).

(*c*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 46. Where a new and wider bridge was constructed over a railway by a tramway company under statutory powers, the tramway company agreeing to discharge any liability of the railway company as to repair of the carriageway, and the local authority subsequently required the railway company to repair the whole of the roadway, it was held that any extra expense occasioned by the widening must be borne by the tramway company (*Teddington Urban District Council* v. *London and South-Western Rail. Co.* (1910), 102 L. T. 328). As to crossing highways other than public carriage roads, see p. 662, *post*.

(*d*) See note (*p*), p. 655, *ante*. An injunction will not be granted against a company reducing the width of a road under a bridge, where the bridge satisfies the statutory requirements as to space (*A.-G.* v. *London and Southampton Rail. Co.* (1837), 9 Sim. 78).

(*e*) By the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 13, it is provided that where in any place it is intended to carry the railway on an arch or arches, or other viaduct, as marked on the plan and section, the same shall be made accordingly; hence, where the plans showed an arch of 45 feet over road, but the company proposed to cross by an arch of only 35 feet, an injunction was granted to restrain it from so doing (*A.-G.* v. *Tewkesbury and Great Malvern Rail. Co.* (1863), 8 L. T. 682, C. A.). Where the company contracted to carry the railway over a street by an arch 42 feet wide, and there was no reference to the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), in the contract, it was held that the company was not entitled to narrow the street to the dimensions

SECT. 4. Bridges.

(2) The clear height of the arch from the surface of the road must not be less than 16 feet for a space of 12 feet if over a main (*f*) road, and 15 feet for a space of 10 feet if over a public carriageway; and in each case the clear height at the springing of the arch must not be less than 12 feet (*g*); and the clear height of the arch for a space of 9 feet must not be less than 14 feet over a private carriage road (*h*).

Bridge over railway. Fences.

1325. Where the road is carried over the railway, there must be a good and sufficient fence (*i*) on each side of the bridge of not less than 4 feet in height, and on each side of the immediate approaches of not less than 3 feet (*k*).

Width of bridge.

1326. Where the road is carried over the railway, the road over the bridge must be of a clear width between the fences of 35 feet in the case of a main (*l*) road, 25 feet in the case of a public carriage road, and 12 feet in the case of a private road (*k*).

When, however, the average available width for carriages within 50 yards of the point where a road crosses the railway is less than the width prescribed for bridges over or under a railway, the width of the bridge need not be greater than the average width of such road (*m*); provided that in the case of a main (*l*) road or public

specified in the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 49 (*Clarke* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (1861), 1 John. & H. 631). In a contract with a company the Act should be expressly referred to if the company desires to take advantage of its provisions (*ibid.*). There is no statutory provision as to the length of the roadway under the railway, this depending on the width of the railway; but where a company covenanted to erect and maintain a bridge over a road leading to C.'s land 35 feet long, an injunction was granted restraining the company from widening the railway so as to make the bridge 55 feet long and thus darkening the road (*Edinburgh and Glasgow Rail. Co.* v. *Campbell* (1863), 9 L. T. 157, H. L.).

(*f*) See note (*p*), p. 655, *ante*.

(*g*) A footpath under an arch may be on a higher level than the carriage road, and there need not be the same headway over the footpath as is required over the carriage road (*Manchester and Leeds Rail. Co.* v. *R.* (1842), 3 Ry. & Can. Cas. 633, Ex. Ch., reversing on this point *R.* v. *Manchester and Leeds Rail. Co.* (1841), 2 Ry. & Can. Cas. 711); and see *A.-G.* v. *Furness Rail. Co.* (1878), 38 L. T. 555 (where, a roadway under a bridge being so low that the road became flooded in wet weather, and the company having raised the road, and in doing so reduced the headway to less than 15 feet, an injunction was granted restraining it from maintaining the bridge with less than 15 feet headway).

(*h*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 49.

(*i*) The fence must be sufficient to make the bridge reasonably safe for any person (including a young child) lawfully using it (*Lay* v. *Midland Rail. Co.* (1875), 34 L. T. 30; see also first trial of S. C. (1874) 30 L. T. 529). As to special liability to fence, generally, see title BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., pp. 129 *et seq.* As to negligence in regard to a statutory duty, see title NEGLIGENCE, Vol. XXI., pp. 420 *et seq.* As to nuisance arising from ruinous fences, see titles NUISANCE, Vol. XXI., p. 515; BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., pp. 126—128.

(*k*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 50.

(*l*) See note (*p*), p. 655, *ante*.

(*m*) But where a company was obliged by its special Act to "restore" a road crossing its railway as it was before, and the company used the

carriage road it is not less than 20 feet wide (*n*). But, if at any time after the construction of the railway the average available width of such road is increased beyond the width of the bridge, the company is bound at its own expense to increase the width of the bridge (*o*) to such extent, not exceeding the legal limits, as the highway authorities may require (*n*).

Gradients of roads.

1327. The ascent or descent, as the case may be, according as the road is taken over or under the railway, must not be a steeper gradient than 1 in 30 if the road is a main (*p*) road, 1 in 20 if it is a public carriage road, or 1 in 16 if it is a private carriage road not being a tramroad or a railroad; if the road is a tramroad or a railroad, then the gradient must not be steeper than as prescribed in the special Act, or than as it existed before the special Act was passed if the special Act contains no provision on the point (*q*).

If, however, the mesne gradient of any road within 250 yards of the point of crossing the railway, or of any road which has to be altered, or for which another road is substituted, is steeper than the gradient prescribed, then the gradient of a road over or under the railway need not be less steep than such mesne gradient (*r*).

Bridges over navigable tidal waters.

1328. Where the company is authorised or required to construct a bridge over a navigable tidal water, and the special Act makes no express provision as to the span or spans of such bridge, the Board of Trade must direct what headway and waterway is to be provided (*s*).

road for approaches to a bridge over the railway, it was held that the company was bound to make the approaches as wide as the old road (*R.* v. *Birmingham and Gloucester Rail. Co.* (1841), 2 Q. B. 47).

(*n*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 51.

(*o*) This only refers to the actual bridge itself. The provision does not extend to the pieces of road forming the approaches to the bridge (*Rhondda Urban Council* v. *Taff Vale Railway*, [1908] 1 K. B. 239, C. A.). Where the average available width for the passage of carriages is more than 35 feet, a main road under the arch may be narrowed to 35 feet. Where such width is less than 35 feet, the arch need not be wider than the road, provided it is not less than 20 feet wide; but, if the road is afterwards widened, the company must widen the arch in proportion up to the prescribed maximum of 35 feet (*R.* v. *Rigby* (1850), 14 Q. B. 687). In measuring the average available width of the road, footpaths are not to be taken into account (*ibid.*).

(*p*) See note (*p*), p. 655, *ante*.

(*q*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 49, 50. Where a company's special Act contained a provision forbidding a certain road to be carried over a bridge with a gradient of more than 1 in 30, and it was found that this could not be done without encroachment on the property of A. (which the company had no power to make), the company made a slope of 1 in 20. A mandatory injunction was granted requiring the company to make a slope of not more than 1 in 30, and it was held that it was no answer to say that this was not possible without stopping the railway (*A.-G.* v. *Mid-Kent Rail. Co. and South-Eastern Rail. Co.* (1867), 3 Ch. App. 100). As to mandatory injunctions, generally, see title INJUNCTION, Vol. XVII., pp. 199, 200.

(*r*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 52.

(*s*) Railways Clauses Act, 1863 (26 & 27 Vict. c 92), s. 14.

SECT. 5. Level Crossings.

SECT. 5.—*Level Crossings* (*t*).

Gates.

1329. Where the company has powers under its special Act to cross any main road (*u*) or other public carriage road (*a*) on the level (*b*), the company must erect, and at all times maintain, good and sufficient gates across such road on each side of the railway (*c*). The gates must be of such dimensions and so constructed as when closed to fence in the railway and prevent cattle and horses passing along the road from getting on the railway (*d*).

Lodge for gate-keeper.

The company must also erect, and permanently maintain, a lodge at the crossing for the person in charge of the gates, and are liable to a penalty for failing to do so (*e*).

(*t*) As to level crossings, see, further, pp. 694—696, *post;* title CARRIERS, Vol. IV., p. 49. As to the duty to take care at level crossings, see also title NEGLIGENCE, Vol. XXI., pp. 370 *et seq.*, 413, 414.

(*u*) See note (*p*), p. 655, *ante.*

(*a*) These obligations to erect gates, and to provide for persons to look after them, stated in the text, *supra*, do not apply to a private railway on private property used for the owner's own purposes and not for the carriage of passengers (*Matson* v. *Baird* (1878), 3 App. Cas. 1082).

(*b*) No compensation can be claimed for inconvenience caused to an individual by an authorised level crossing (*Wood* v. *Stourbridge Rail. Co.* (1864), 16 C. B. (N. S.) 222; see *Caledonian Rail. Co.* v. *Ogilvy* (1856), 2 Macq. 229, H. L., considered in *Metropolitan Board of Works* v. *McCarthy* (1874), L. R. 7 H. L. 243, 256). Where a company is authorised to cross a road on the level it may, if it thinks fit, cross by a bridge; see note (*s*), p. 656, *ante.*

(*c*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 47; see also the Railway Regulation Act, 1842 (5 & 6 Vict. c. 55), s. 9 (reciting the Highway (Railway Crossings) Act, 1839 (2 & 3 Vict. c. 45)).

(*d*) There is an absolute obligation laid upon the company by the statute to fence the line against cattle straying on the highway as well as against cattle lawfully travelling on the highway (*Charman* v. *South-Eastern Rail. Co.* (1888), 21 Q. B. D. 524, C. A.; *Fawcett* v. *York and North Midland Rail. Co.* (1851), 16 Q. B. 610; *Dickinson* v; *London and North Western Rail. Co.* (1866), Har. & Ruth. 399). In *Charman* v. *South-Eastern Rail. Co., supra*, the gates at a level crossing were themselves efficient, but there was a small swing gate alongside the large gate on each side of the railway for the use of foot passengers; the posts of one of these small gates were rotten. The plaintiff's horses strayed from his farm, went along the road to the crossing, where they got on to the line through one of the small gates, owing to its defective state, and were killed. In an action for damages against the company for the loss of the horses, it was held that there was evidence of a breach by the company of its obligation to fence the railway from the road, and that it was liable, whether the horses were lawfully on the highway or not; see also *Parkinson* v. *Garstang and Knott End Railway*, [1910] 1 K. B. 615; titles BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., p. 131; NEGLIGENCE, Vol. XXI., pp. 377, 378, 422 *et seq.*

(*e*) Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 6. The maximum penalty is £20 and £10 a day for every day during which the offence continues (*ibid.*). The offence of failing to erect or maintain such a lodge applies to any turnpike or main (see note (*p*), p. 655, *ante*) road or carriage road crossed on the level by the railway, and is not limited to such similar words as are specifically mentioned in the special Act: an occupation road may in fact be a public carriage road (*R.* v. *Longe* (1897), 66 L. J. (Q. B.) 278). The Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 6, must be read as an extension of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 47 (*R.* v. *Longe, supra*). As to employment of gate-keeper to open and shut gates, see p. 694, *post.*

The roadway over the railway must be constructed and maintained so as to be fit for the passage of carriages and other usual traffic across the line (*f*).

Construction of roadway.

1330. Although the company has power under its special Act to cross any such road on the level, if that power was conferred upon it since the 28th July, 1863, the Board of Trade may, if it thinks the public safety so demands, at any time require the company at its own expense to carry the road either under or over the railway by a bridge instead of crossing it on the level, or else to execute such other work as the Board may think best adapted, in the circumstances, for removing or diminishing the danger (*g*). When the Board of Trade certifies that the public safety requires that additional lands should be taken for this purpose, the company may take such lands as are specified in the certificate of the Board, subject to the provisions of the Lands Clauses Consolidation Act, 1845 (*h*); and the Board before issuing such certificate must cause at least three months' notice to be given to any person entitled to claim compensation in respect of the taking of such lands (*i*). Where the company thus substitutes a bridge for a level crossing, the provisions with regard to the erection and maintenance of a lodge are no longer applicable (*j*).

Substitution of bridge for level crossing by order of Board of Trade.

Whenever the Board of Trade, or the Railway and Canal Commissioners (*k*), order a company to provide an approach, bridge, subway, or work of similar character, under the powers of any general or special Act, they may apportion the expense of constructing such work between the company and the applicants for the order, by agreement with the latter; and any local authority which has power to levy rates may enter into such agreement. In such case, any question as to the persons by whom or the proportions in which the expenses of complying with the order are to be defrayed may be settled by the Commissioners (*l*).

Apportionment of expense of construction.

1331. Where a public or private road or tramway crosses a railway on the level and the company is willing at its own expense to take such road under or over the railway by a bridge, the Board of Trade may, on the application of the company and after hearing parties

Substitution of bridge for dangerous crossing on application of company.

(*f*) If a carriage is injured through a crossing not being in proper order (*e.g.*, where the rails are too high above the surface of the road), the company is liable in damages to the owner (*Oliver* v. *North Eastern Rail. Co.* (1874), L. R. 9 Q. B. 409; see *Bell* v. *Caledonian Rail. Co.* (1902), 4 F. (Ct. of Sess.) 431).

(*g*) Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 7. This provision only applies to a railway constructed under powers granted by an Act passed after the 28th July, 1863 (*ibid.*, ss. 3, 7). Where the Board made an order under this provision which was not obeyed, the court refused a mandamus to compel the company to carry out the order, on proof that the funds of the company were exhausted and they had no power to raise more (*Re Bristol and North Somerset Rail. Co.* (1877), 3 Q. B. D. 10).

(*h*) 8 & 9 Vict. c. 18.

(*i*) Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 8.

(*j*) *Ibid.*, s. 7.

(*k*) As to the Railway and Canal Commissioners, see p. 753, *post*.

(*l*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 16.

SECT. 5. Level Crossings.

interested and on being satisfied that the crossing is dangerous, give the company authority to carry out the proposed work (*m*).

Crossing a highway other than a public carriage road.

1332. Where a railway crosses a highway which is not a public carriage road, the company may carry it across such highway on the level with the consent of two justices in petty sessions (*n*). This consent may only be given on the justices being satisfied that the proposed level crossing is consistent with a due regard to the public safety (*o*); and any party aggrieved by the determination of the justices has a right to appeal to quarter sessions against such determination (*p*).

Approaches, handrails, or fences.

Where the company constructs its railway on the level across a highway which is not a public carriage road (*q*), they must make, and at all times maintain, convenient approaches, ascents and descents, with handrails or other fences; with good and sufficient gates on each side of the railway, if the highway is a bridle-way, or with either gates or stiles if it is a footway (*r*). If the company fails in this duty it may, provided it has at least ten days' notice, be ordered by two justices to carry out the required works within a specified time (*s*).

Common law duty.

1333. Where a company is authorised to cross a highway on the level by an Act which does not incorporate the Railways Clauses Consolidation Act, 1845 (*t*), and it does not otherwise provide, it is

(*m*) Railway Regulation Act, 1842 (5 & 6 Vict. c. 55), s. 13.

(*n*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 46; see pp. 732 *et seq.*, *post*.

(*o*) *Ibid.*, s. 59. When the company intends to apply for such consent, it must, at least fourteen days before the petty sessions, give notice of its application by advertisement in a newspaper circulating in the county, and also by notice fixed to the door of the parish church (*ibid.*).

(*p*) *Ibid.*, s. 60. As to appeals to quarter sessions, see title MAGISTRATES, Vol. XX., pp. 642 *et seq.*

(*q*) *I.e.*, either by the consent of justices or under the powers given to the company by the special Act.

(*r*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 61. Wherever the railway crosses a footpath on the level, there must be either a gate or a stile on each side of the railway where the footpath crosses (*Williams* v. *Great Western Rail. Co.* (1874), L. R. 9 Exch. 157). Where plaintiff's horse strayed on to a public footpath crossing a railway on the level, and passed through a gate erected by the company, and was killed, it was held that, as the fastening of the gate was defective, the company had failed in its statutory duty to maintain a good and sufficient gate, and was liable for the loss; and held also, that the company's duty was one owed to the public at large and not only to persons lawfully using the footpath (*Parkinson* v. *Garstang and Knott End Railway*, [1910] 1 K. B. 615); and see, further, title NEGLIGENCE, Vol. XXI., pp. 377, 378, 420 *et seq.*

(*s*) The penalty for default is £5 for every day, beyond the time limited by the order, during which the company fails to obey the order, and the justices may order the whole or any part of the penalty to be applied in executing the work (Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 62). Justices have no power under this provision to order the erection of handrails or fences on a road which is a public carriage road and highway, as the provision only applies to footpaths and bridleways and highways other than public carriage roads (*R.* v. *Schofield* (1893), 69 L. T. 313). As to recovery of penalties, see pp. 734 *et seq.*, *post*.

(*t*) 8 & 9 Vict. c. 20.

bound at common law not only to construct such works as may be necessary to give the public the full use of the highway, but also to maintain those works in a proper condition for the use of the public (*a*).

SECT. 6.—*Diversion of Roads.*

Power to divert.

1334. The power given to the company to alter or divert a road (*b*) refers to the course of the road (*c*), and enables it to alter that course permanently as well as temporarily for the purposes of construction (*d*). The company may, however, only divert a road where the diversion is reasonably necessary in order to construct the railway (*e*), and it is not justified in diverting merely to save itself expense (*f*). The diversion of a road under its powers does not of itself vest the soil of the old road in the company (*g*).

Substituted road for road rendered useless.

1335. If the company in the exercise of its powers finds it necessary to cross, cut through, raise, sink, or use any part of any road, public or private, whether it is a carriage road, horse road, tramroad, or railway, so as to render it impassable for, or dangerous or extraordinarily inconvenient (*h*) to, passengers or carriages, it must, before

(*a*) *Hertfordshire County Council* v. *Great Eastern Railway*, [1909] 2 K. B. 403, C. A. In this case the company derived its powers under an Act of 1836. It had made the railway on a slightly higher level than the highway, and in order to bring the road to the level of the railway had raised the road by inclined "approaches" under its powers. Held that, the special Act being silent on the matter, the company was under an obligation to keep in repair the roadway upon the whole length of the approaches.

(*b*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 16; see p. 655, *ante*. As to the diversion of highways, generally, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 69 *et seq.*

(*c*) Power to "alter" does not authorise a company to change the nature of the road, *e.g.*, by laying stone blocks on a highway to facilitate traffic from a station to a wharf: the word refers to the course of the road (*London and Brighton Rail. Co.* v. *Cooper* (1841), 2 Ry. & Can. Cas. 312).

(*d*) *Phillipps* v. *London, Brighton and South Coast Rail. Co.* (1862), 7 L. T. 663; *A.-G.* v. *Ely, Haddenham, and Sutton Rail. Co.* (1869), 4 Ch. App. 194.

(*e*) *R.* v. *Wycombe Rail. Co.* (1867), L. R. 2 Q. B. 310; *Pugh* v. *Golden Valley Rail. Co.* (1880), 15 Ch. D. 330, C. A. If the company diverts a road unnecessarily by agreement with owners of the land through which such diverted road passes, such diversion is not a diversion within this provision (*London and North Western Rail. Co.* v. *Ogwen District Council* (1899), 80 L. T. 401).

(*f*) *Ibid.* In *R.* v. *Wycombe Rail. Co.*, *supra*, the proposed line of railway crossed a highway at a bend in two places, and the company had no power by its Act to cross on the level or to divert. Instead of crossing by two bridges the company proposed to avoid the necessity of crossing at all by diverting and straightening the road at the bend, its only reason for this course being the saving of expense, and it was held that the proposed diversion was not necessary and not within the company's powers. But where a railway meets a tortuous ill-made road, it is not always necessary that the railway should cross the road at every turn, and the company may divert the road by carrying it parallel to the railway until it reaches a point where in the interests of the traffic it is necessary to cross (*A.-G.* v. *Ely, Haddenham, and Sutton Rail. Co.*, *supra*, *per* Lord HATHERLEY, L.C.).

(*g*) *Salisbury* (*Marquis*) v. *Great Northern Rail. Co.* (1858), 5 C. B. (N. S.) 174.

(*h*) As to what conduct is "dangerous or extraordinarily inconvenient,"

SECT. 6. **Diversion of Roads.**

commencing operations (*i*), cause a sufficient road be made (*j*) instead of the road to be interfered with (*k*), and must maintain such substituted road in a state as convenient (*l*) as the road interfered with, or as nearly as may be (*m*).

Penalty for default in making substituted road.

If the company does not cause another sufficient road to be made before it interferes with an existing road, it is liable to a penalty of £20 a day for every day during which the substituted road is not made after the existing road is interrupted. The penalty is recoverable by action in the High Court, and, in the case of a public road, is payable to the highway authority (*n*) or the persons having the management thereof, to be applied for the purposes thereof, or, in the case of a private road, is payable to the owner of the private road (*o*).

see *A. G.* v. *Widnes Rail. Co.*, *Widnes Rail. Co.* v. *Widnes Local Board* (1874), 30 L. T. 449.

(*i*) An injunction will be granted against obstructing a road until a sufficient substituted road is ready for use (*Kemp* v. *London and Brighton Rail. Co.* (1839), 1 Ry. & Can. Cas. 495; *A.-G.* v. *London and South Western Rail. Co.* (1849), 13 Jur. 467; *A.-G.* v. *Great Northern Rail. Co.* (1850), 4 De G. & Sm. 75); but where a highway has been abandoned by the public, an injunction against obstructing it without substitution may be refused to a plaintiff who wishes to use it for private purposes (*Freeman* v. *Tottenham and Hampstead Junction Rail. Co.* (1865), 11 L. T. 702).

(*j*) Where an existing road was alleged to be as convenient as any new substituted road could be it was held that the company was not thereby relieved of this obligation (*A.-G.* v. *Great Northern Rail. Co.* (1850), 4 De G. & Sm. 75). Where an agreement was made between plaintiffs and a company that the former should withdraw opposition to a Bill on condition that there should be a reference to arbitration to define the line of approach from a main road, which it was intended to divert to the plaintiff's premises, and an award was made defining the line of approach, it was held that the company having afterwards found it necessary to divert the road further and so to alter the line of approach, was not precluded from doing so (*Wood* v. *North Staffordshire Rail. Co.* (1849), 1 Mac. & G. 278).

(*k*) The provision applies to a permanent as well as to a temporary diversion of road (*A.-G.* v. *Barry Docks and Rail. Co.* (1887), 35 Ch. D. 573; *A.-G.* v. *Ely, Haddenham, and Sutton Rail. Co.* (1869), 4 Ch. App. 194). A company may permanently divert a road to a place where there is an authorised level crossing, provided the road so diverted is more convenient than the old road crossing by a bridge (*A.-G.* v. *Ely, Haddenham, and Sutton Rail. Co.*, *supra*). Where a company had power to convert an existing tramroad into a railway, it was held that such conversion was not an interference with the tramroad within the meaning of this provision, and no road need be substituted for the tramroad (*Tanner* v. *South Wales Rail. Co.* (1855), 5 E. & B. 618).

(*l*) A road with very sharp curves is not "as convenient" (*A.-G.* v. *London and South Western Rail. Co.* (1849), 13 Jur. 467); and see note (*u*), *infra*.

(*m*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 53. It is a question of fact for a jury whether a company has made a new road which under all the circumstances is as reasonably convenient a substitute as can be made (*R.* v. *Scott* (1842), 3 Q. B. 543).

(*n*) See title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 24 *et seq.*

(*o*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 54. If a company does not properly construct the required substituted road, the highway authorities are not justified in obstructing the passage of the road, but should apply for a mandamus to compel the company to carry out the statutory requirements (*London and Brighton Rail. Co.* v. *Blake* (1840), 2 Ry. & Can. Cas. 322). The tenant or lessee of land over which an obstructed private road passes is an "owner" within the section (*Mann* v.

SECT. 6. Diversion of Roads.

A company is also indictable as for a public nuisance if it obstructs a highway without first constructing a substituted road as required (*p*).

Indictable nuisance.

Where a person, who is entitled to a right of way over any road, suffers special damage through the company interfering with such road without first supplying a sufficient substituted road, he has a right of action for such special damages without prejudice to his right (if any) to sue for and recover the penalty (*q*).

Right of action for special damage.

1336. When a road has been interfered with, the company must restore it as nearly as possible to as good a condition as it was in before the interference (*r*), if this can be done compatibly with the construction and use of the railway. If it cannot be so restored compatibly with the construction and use of the railway, the company must cause the new or substituted road to be put into a permanently substantial condition as nearly as possible equally convenient with the former road. If the road interfered with is a main (*s*) road it must be restored, or the substituted road completed, within six months of the date when the company first commenced operations on the road interfered with; if it is not a main road, the period is twelve months; but in either case the time may be extended by the consent in writing of the highway authority (*t*) or other persons having the management of the road (*u*). The company is liable to a penalty of £5 a day for failing to restore the road

Restoration of road interfered with and completion of substituted road.

Great Southern and Western Rail. Co. (1858), 9 I. C. L. R. 105, where the Irish Court of Exchequer refused to follow *Collinson* v. *Newcastle and Darlington Rail. Co.* (1844), 1 Car. & Kir. 546, which was said to have been overruled on appeal, though the case on appeal was never reported; see Walford, Law of Railways, p. 71. The penalty is not apportionable. One of several owners of any one section of the road interfered with may recover and retain the whole penalty, which, however, is payable only once in respect of one section; but each owner of several sections of the road is entitled to the full penalty (*Llewellyn* v. *Vale of Glamorgan Railway*, [1897] 2 Q. B. 239).

(*p*) *R.* v. *Scott* (1842), 3 Q. B. 543; see *R.* v. *Birmingham and Gloucester Rail. Co.* (1842), 3 Q. B. 223; *R.* v. *Great North of England Rail. Co.* (1846), 9 Q. B. 315; and see titles HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 151 *et seq.*; NUISANCE, Vol. XXI., pp. 516 *et seq.*, 574.

(*q*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 55. This right of action exists only where special damage can be proved. No action will lie for obstruction of a private right of way where there is no special damage (*Watkins* v. *Great Northern Rail. Co.* (1851), 16 Q. B. 961); but the provision applies both to public and private roads (*Llewellyn* v. *Glamorgan Vale Railway*, *supra*).

(*r*) A substituted road should be as wide as the road interfered with (*R.* v. *Birmingham and Gloucester Rail. Co.* (1841), 2 Q. B. 47).

(*s*) See note (*p*), p. 655, *ante*.

(*t*) See title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 24 *et seq.*

(*u*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 56. Where a railway was taken across a highway at a higher level than the road, and permanent inclined planes were made to carry the road over the railway by a level crossing, it was held that the company was not liable under the provision to keep in repair the portions of the highway so raised, but only to restore them (*West Lancashire Rural Council* v. *Lancashire and Yorkshire Railway* (1903), 72 L. J. (K. B.) 675). Where, however, this provision is not incorporated, the company may be liable to keep such roadway in repair (*Hertfordshire County Council* v. *Great Eastern Railway*, [1909] 2 K. B. 403, C. A.; see note (*a*), p. 663, *ante*); and, as to the duty to maintain approaches over roads other than public carriage roads, see p. 662, *ante*.

SECT. 6. Diversion of Roads.

Penalties.

interfered with, or to complete the substituted road, within the times prescribed or agreed. The penalty is recoverable summarily and is payable to the highway authority or other persons having the management of the road (*x*) interfered with, or, in the case of a private road, to the owner thereof (*a*); and the justices may order the whole or any part of such penalty to be laid out in executing the work which should have been done (*a*).

SECT. 7.—*Accommodation Works.*

Works and land required for works.

1337. The company is obliged to make and maintain the works mentioned in this section of the title (*b*) for the accommodation of the owners and occupiers of lands adjoining the railway (*c*). Lands required for the purpose of such works are lands required for the purpose of the railway (*d*); and, in deciding what lands are so required, the court will not interfere with the discretion of the company provided it acts *bonâ fide* (*e*).

Remedy for non-performance.

1338. The company may be compelled by judgment for specific performance to make accommodation works which it has agreed to make (*f*), whether such agreement was made in consideration of the withdrawal of opposition to a Bill in Parliament (*g*) or as part

(*x*) Where a road was dedicated to the public by the owner thereof, but had not been taken over by the local authority, it was held that, as the owner was not legally liable to repair the road, he was not a person "having the management of the road" and could not recover these penalties (*R.* v. *Wilson* (1852), 18 Q. B. 348). As to the meaning of "owner," see note (*o*), p. 664, *ante*. As to recovery of penalties before justices, see pp. 732 *et seq.*, *post*.

(*a*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 57.

(*b*) See the text, *infra*, and pp. 668 *et seq.*, *post*.

(*c*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 68.

(*d*) Whether the company is obliged or merely empowered to construct the works; see *Beauchamp* (*Lord*) v. *Great Western Rail. Co.* (1868), 3 Ch. App. 745; *Wilkinson* v. *Hull etc. Railway and Dock Co.* (1882), 20 Ch. D. 323, C. A.; and see note (*c*), p. 653, *ante*.

(*e*) *Stockton and Darlington Rail. Co.* v. *Brown* (1860), 9 H. L. Cas. 246, 256; *Beauchamp* (*Lord*) v. *Great Western Rail. Co.*, *supra*; *Wilkinson* v. *Hull etc. Railway and Dock Co.*, *supra*.

(*f*) *Wilson* v. *Furness Rail. Co.* (1869), L. R. 9 Eq. 28; see *Storer* v. *Great Western Rail. Co.* (1842), 2 Y. & C. Ch. Cas. 48. In *Firth* v. *Midland Rail. Co.* (1875), L. R. 20 Eq. 100, such an agreement was made and not carried out, but subsequently a substituted agreement was made to pay such a sum as should be approved by A. in satisfaction of the original agreement, and A. having died without having approved of any sum, it was held that specific performance of the substituted agreement could not be decreed, but specific performance of the original agreement was granted; see also *Powell* v. *South Wales Rail. Co.* (1855), 1 Jur. (N. S.) 773. Where works are constructed otherwise than according to a company's obligation, an injunction will not be granted to compel the company to alter them when the plaintiff stands by and does not take action with reasonable promptitude (*Wintle* v. *Bristol and South Wales Union Rail. Co.* (1862), 6 L. T. 20); and see, further, title INJUNCTION, Vol. XVII., pp. 235, 247 *et seq.*

(*g*) *Raphael* v. *Thames Valley Rail. Co.* (1867), 2 Ch. App. 147. It is no answer to a claim for specific performance of such an agreement that the carrying out of the agreement would interfere with the traffic of the railway or be inconvenient to the public (*ibid.*). As to the nature of the remedy of specific performance, see, generally, title SPECIFIC PERFORMANCE.

of the consideration for the conveyance of land taken (*h*). The company may also be compelled to perform personal services covenanted to be performed in connection with such works (*i*).

When works need not be constructed.

1339. The company need never construct accommodation works so as in any way to prevent or obstruct the working of the railway; nor in cases where it agrees with the owners and occupiers (*j*) of the land to pay compensation instead of such works, provided such agreed compensation has been paid (*k*).

Settlement of differences and enforcement of duty to complete works.

1340. If any difference arises respecting the kind, number, dimensions, or sufficiency (*l*) of the accommodation works to be constructed, or respecting the maintenance thereof, the difference must be determined by two justices, who must also appoint the time within which the works must be commenced and executed by the company (*m*). The High Court, accordingly, does not interfere in such differences, a special tribunal being given jurisdiction

(*h*) *Sanderson* v. *Cockermouth and Workington Rail. Co.* (1850), 2 H. & Tw. 327; *Edinburgh and Glasgow Rail. Co.* v. *Campbell* (1863), 9 L. T. 157, H. L. Where works are to be made under an agreement which does not refer to the company's Act, specific performance may be decreed of works more extensive than the Act requires (*Clarke* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (1861), 1 John. & H. 631).

(*i*) Thus, where a company covenanted to make and maintain certain crossings connecting a timber property with a wharf and to convey timber across the railway to the wharf, it was held that specific performance would be granted of the covenant for the personal service of conveyance (*Fortescue* v. *Lostwithiel and Fowey Rail. Co.*, [1894] 3 Ch. 621); and as to specific performance, generally, see title SPECIFIC PERFORMANCE. Such a covenant is binding on another company to whom the undertaking of the first company has been transferred by Act of Parliament subject to the obligations and liabilities of the old company (*ibid.*; see also *Jersey* (*Earl*) v. *Great Western Rail. Co.* (1893), reported [1894] 3 Ch. 625, n., C. A.).

(*j*) Both owners and occupiers of adjoining lands must be satisfied. Therefore the acceptance of compensation in lieu of works by the owner of land does not affect the rights of the occupying tenant (*Corry* v. *Great Western Rail. Co.* (1881), 7 Q. B. D. 322, C. A.).

(*k*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 68. An owner or occupier accepting compensation has no right against the company for not constructing and maintaining works (*Corry* v. *Great Western Rail. Co.*, *supra*). When it is referred to arbitration to determine the price of the land, compensation for severance and the works to be made, and the money has been paid and the works completed, the owner has no further claim in respect of damage then capable of being ascertained and taken into account; but it is otherwise as to damage arising afterwards from works of the company in another place which could not have been foreseen by the arbitrator (*Lawrence* v. *Great Northern Rail. Co.* (1851), 16 Q. B. 643).

(*l*) The justices have no jurisdiction to decide whether a party is entitled to accommodation works, but only to decide questions as to kind, number, dimensions and sufficiency (*R.* v. *Waterford and Limerick Rail. Co.* (1852), 2 I. C. L. R. 580).

(*m*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 69. Justices can only order works with reference to the land as used at the time of the application (*R.* v. *Brown* (1867), L. R. 2 Q. B. 630; *R.* v. *Midland and South Western Junction Rail. Co., Ex parte Brown* (1867), 8 B. & S. 456; and see p. 672, *post*). Hence, when the question was raised whether works which had been made long before were accommodation works or

SECT. 7. Accommodation Works.

to deal with them (*n*). If the company fails to commence the works ordered within fourteen days of the time appointed, or fails to proceed diligently with the works in a sufficient manner, the aggrieved party may himself execute such works and recover the expenses from the company, any dispute as to expenses being settled by two justices; but no person may obstruct or injure the railway or the works connected with it for a longer time, nor use them in any other manner, than is unavoidably necessary for the execution or repair of the accommodation works (*o*).

Accommodation works: Gates and bridges.

1341. The accommodation works which the company is bound to make include such convenient gates, bridges (*p*), arches, culverts, and passages as are necessary (*q*) for the purpose of making good any interruptions caused by the railway to the use of the lands through which it is made; and these works must be made forthwith after the part of the railway passing over such lands has been laid out or formed or during the formation thereof (*r*).

Compulsory purchase and compensation in lieu of communication.

1342. If a piece of land severed by the railway from other land of the same owner is of less extent than half an acre or of less value than the expense of making a crossing or communication between the portions of land severed, and if such owner has no other land adjoining the severed piece, the company may require the owner to sell the piece; and, on the occasion of assessing the compensation payable to the owner, the compensation jury or arbitrator must, if required by either party, ascertain the value of the severed piece and also what would be the expense of making a communication (*s*).

not, it was held that the answer depended on the state of things when they were made (*R.* v. *Fisher* (1862), 3 B. & S. 191).

(*n*) *Hood* v. *North Eastern Rail. Co.* (1870), L. R. 11 Eq. 116. But when a dispute arises as to sufficiency of works to be made under an agreement, the court may interfere (*Sanderson* v. *Cockermouth and Workington Rail. Co.* (1850), 2 H. & Tw. 327; and see note (*h*), p. 667, *ante*).

(*o*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 70. As to procedure before justices, see pp. 732 *et seq.*, *post*.

(*p*) A bridge to carry another railway over the railway being constructed for the purpose of conveying traffic, not only to the property of the owner of the severed land, but to the property of other persons, is not an accommodation work within the Act (*Rhondda and Swansea Railway* v. *Talbot*, [1897] 2 Ch. 131, C. A.).

(*q*) The word "necessary" refers to the obligation on the company to establish communication between the severed portions of land, and does not compel the company to do work in any particular way, its discretion not being controllable as to the mode of making sufficient communications (*Wilkinson* v. *Hull etc. Railway and Dock Co.* (1882), 20 Ch. D. 323, C. A.).

(*r*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 68. The court refused to make an order on a company to make "all necessary and convenient crossings" when the owner had agreed with the company that the company should make such accommodation works as the owner's agent should notify in writing, and no notification had been given (*Darnley (Earl)* v. *London, Chatham and Dover Rail. Co. (Proprietors, etc.)* (1867), L. R. 2 H. L. 43). Where a private Act obliged a company in case any road or communication was "injured" to provide another sufficient road or communication, it was held that "injured" did not only apply to the physical harm to a communication, but also to the inconvenience caused to plaintiff's business by interruption (*Bell* v. *Hull and Selby Rail. Co.* (1840), 6 M. & W. 699).

(*s*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 94; see

Communications need be made only with reference to the use of the land at the time of constructing the railway, and the company is not bound to consider any prospective or different use (*t*). Hence a compensation jury valuing agricultural land as prospective building land may estimate the damage to such land by severance without regard to the obligation on the company to make a crossing which could only be ordered with reference to the present use of the land, and would be useless as access to building land (*u*).

Right of way of owner of severed land over communication.

1343. The owner of the severed land has such a right of way over the crossing or other communication as corresponds with the actual or immediately contemplated user of the land at the time when it was taken; but he is not entitled to use it so as substantially to increase the burden of the easement by altering or enlarging its character (*v*). Such right of way is destroyed by a sale of one of the severed pieces of land to a purchaser who does not buy the rest of the land and to whom such right is not given by the conveyance (*w*).

Right of owners and occupiers to cross railway pending the making of communications.

1344. Until the company has made the required communications, the owners and occupiers of severed lands, and any other person whose right of way may be affected, may, with carriages, horses, and other animals, cross the railway directly where their lands are intersected, but only for the purpose of occupying such lands, or for the exercise of such right of way, and so as not to obstruct or damage the railway; but any such owner or occupier who has received or agreed to receive compensation in lieu of such communications has no right to cross the railway (*x*).

title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 39, 91. As to costs of such inquiry where the company has made no offer, see *ibid.*, p. 75; and see *Cobb* v. *Mid Wales Rail. Co.* (1866), L. R. 1 Q. B. 342.

(*t*) *Rhondda and Swansea Railway* v. *Talbot*, [1897] 2 Ch. 131, C. A.; *R.* v. *Brown* (1867), L. R. 2 Q. B. 630; *R.* v. *Midland and South Western Junction Rail. Co., Ex parte Brown* (1867), 8 B. & S. 456.

(*u*) *R.* v. *Brown*, *supra*.

(*v*) *Great Western Railway* v. *Talbot*, [1902] 2 Ch. 759, C. A., approving *Great Northern Rail. Co.* v. *M'Alister*, [1897] 1 I. R. 587. In the last-mentioned case it was held that an owner, having obtained a crossing suitable for his land when used for agricultural purposes, was not entitled to use the crossing for the purpose of conveying minerals quarried from the land; see also *Neath Coal Co.* v. *Ynisarwed Resolven Colliery Co.* (1875), 10 Ch. App. 450; *Taff Vale Railway* v. *Gordon Canning*, [1909] 2 Ch. 48; and see, further, title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 288. A company may, however, by the terms of its Act be obliged to make and maintain crossings, not only with regard to the use of the land when the railway is made, but also when such land becomes used as building land (*United Land Co.* v. *Great Eastern Rail. Co.* (1875), 10 Ch. App. 586; see also *Finch* v. *Great Western Rail. Co.* (1879), 5 Ex. D. 254).

(*w*) *Midland Rail. Co.* v. *Gribble*, [1895] 2 Ch. 827, C. A.

(*x*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 74. An owner of land who has received compensation on the footing of total severance without communications has no right to cross the railway, and is a trespasser if he does so (*Manning* v. *Eastern Counties Rail. Co.* (1843), 12 M. & W. 237). As to trespass, see also pp. 720 *et seq.*, *post*.

SECT. 7.
Accommodation Works.

Fencing, gates, and stiles.

1345. The company must also make and maintain (*a*) sufficient (*b*) posts, rails, hedges, ditches, mounds, or other fences, together with all necessary gates and stiles, for separating the land taken for the use of the railway from the adjoining lands not taken, for protecting such lands from trespass, and for preventing the cattle (*c*) of the owners or occupiers of such lands from straying thereout by reason of the railway (*d*).

Nature of obligation to fence.

This obligation to fence under the statute binds the company to the same extent as if it was bound to fence by prescription at common law (*e*). It is, however, an obligation solely to the owners or occupiers of land adjoining land taken by the company, and not to other persons (*f*). Where the land taken adjoins a highway,

(*a*) The obligation is not only to erect, but to maintain for all time (*Page* v. *Great Eastern Rail. Co.* (1871), 24 L. T. 585; *Dixon* v. *Great Western Rail. Co.*, [1897] 1 Q. B. 300, C. A.). The obligation is absolute, and is not affected by the provisions of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 70), s. 73 (see p. 672, *post*), as to additional works (*Dixon* v. *Great Western Rail. Co.*, *supra*).

(*b*) The fences, gates and like works must be sufficient to resist the ordinary acts of cattle (*Page* v. *Great Eastern Rail. Co.*, *supra*), and to prevent them from getting on to the line from the adjoining land (*Bessant* v. *Great Western Rail. Co.* (1860), 8 C. B. (N. S.) 368; and see note (*c*), *infra*). Where cattle get on to the line from adjoining land through a defect in the fence which the company is bound to maintain, the company is liable for the consequential damage (*Sharrod* v. *London and North Western Rail. Co.* (1849), 4 Exch. 580), but, even where there is a breach of duty by the company, the owner of cattle cannot recover if his own negligence has contributed to the loss (*Ellis* v. *London and South Western Rail. Co.* (1857), 2 H. & N. 424; *Haigh* v. *London and North Western Rail. Co.* (1859), 1 F. & F. 646). As to contributory negligence, see title NEGLIGENCE, Vol. XXI., pp. 445 *et seq.*

(*c*) The term "cattle" includes pigs, and so a fence sufficient as against horses, cows and sheep, but not as against pigs, is not a sufficient fence (*Child* v. *Hearn* (1874), L. R. 9 Exch. 176).

(*d*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 68; and see title BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., p. 131. By the Railway Regulation Act, 1842 (5 & 6 Vict. c. 55), s. 10, it was provided that a company should be under the same obligation to erect and maintain fences as if every part of such fences had been ordered to be made by justices; see p. 667, *ante*. In *Manchester, Sheffield and Lincolnshire Rail. Co.* v. *Wallis* (1854), 14 C. B. 213, however, it was held that the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 68, 69, were substituted for the Railway Regulation Act, 1842 (5 & 6 Vict. c. 55), s. 10.

(*e*) *Manchester, Sheffield and Lincolnshire Rail. Co.* v. *Wallis*, *supra*; *Wiseman* v. *Booker* (1878), 3 C. P. D. 184; *Ricketts* v. *East and West India Docks and Birmingham Junction Rail. Co.* (1852), 12 C. B. 160; see title BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., p. 129. As to evidence of negligence in performing the duty to fence, see title NEGLIGENCE, Vol. XXI., pp. 361, 435 *et seq.*; see, generally, *ibid.*, pp. 409, 410, 420 *et seq.*

(*f*) *Buxton* v. *North Eastern Rail. Co.* (1868), L. R. 3 Q. B. 549. Hence the obligation to fence under the statute has nothing to do with a company's duty to its passengers (*ibid.*). The duty of the company is to persons off the line to prevent them or their cattle getting on the line; it is not towards passengers or persons on the line (*Harrold* v. *Great Western Rail. Co.* (1866), 14 L. T. 440). Where the close of A. adjoined the railway, and the cattle of B., by straying, got on to the close of A., and thence on to the line through the insufficiency of the fence between A.'s close and the railway, it was held that the company was not responsible for damage to B.'s

the company must fence the railway against the cattle of persons lawfully using the highway (*g*), but not as against cattle straying thereon unlawfully (*h*). All gates must be so constructed as to open away from the railway. The fences must be made forthwith after the taking of the lands if the owners so require, and the other works as soon as conveniently may be (*i*).

Works to carry away water.

1346. The company must also make and maintain all necessary arches, tunnels, culverts, drains, or other passages sufficient at all times to carry away the water from the lands near or affected by the railway as clearly as before the making of the railway, or as nearly so as may be; and such works must be made from time to time as the railway works proceed (*k*).

Watering-places.

1347. The company must also make and maintain proper watering-places for cattle where they are deprived of access to their former watering-places (*l*) by reason of the railway. Such watering-places must be made so as to be at all times supplied with water as sufficiently as before the railway was made and as if it had not been made, or as nearly so as may be; and the company must

cattle, as it owed no duty to him (*Ricketts* v. *East and West India Docks and Birmingham Junction Rail. Co.* (1852), 12 C. B. 160). Where a piece of land belonging to the company and adjoining B.'s land was let to A., and B.'s horses ate A.'s vegetables through the insufficiency of the fence, it was held that B. was not liable to A., as it was the duty of the company to fence (*Wiseman* v. *Booker* (1878), 3 C. P. D. 184). The duty of the company extends to licensees of occupiers (*Dawson* v. *Midland Rail. Co.* (1872), L. R. 8 Exch. 8). "The statute is for the benefit of all persons lawfully using the adjoining land" (*ibid.*, *per* BRAMWELL, B.); and see, further, title NEGLIGENCE, Vol. XXI., pp. 391 *et seq.* The duty, however, is only to fence the railway from land belonging to other persons, and there is no duty under the statute to fence from premises belonging to the company (*Marfell* v. *South Wales Rail. Co.* (1860), 8 C. B. (N. S.) 525; *Roberts* v. *Great Western Rail. Co.* (1858), 4 C. B. (N. S.) 506).

(*g*) *Midland Rail. Co.* v. *Daykin* (1855), 17 C. B. 126. Such persons lawfully driving cattle on the highway are occupiers of the highway within the meaning of the statute (*ibid.*; *Manchester, Sheffield and Lincolnshire Rail. Co.* v. *Wallis* (1854), 14 C. B. 213). As to the duty with regard to gates at level crossings, see pp. 660, *ante*, 694, *post*.

(*h*) *Manchester, Sheffield and Lincolnshire Rail. Co.* v. *Wallis*, *supra*. Such cattle are not the property of persons occupying the highway (*ibid.*: see *Ricketts* v. *East and West India Docks and Birmingham Junction Rail. Co.* (1852), 12 C. B. 160); and see title ANIMALS, Vol. I., p. 377. As to the offence of permitting cattle to trespass on a highway, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 166.

(*i*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 68.

(*k*) *Ibid.* The drains which the company is bound to provide are such as are required at the time when the land is taken and not such as may be required at some later date, when the land may be put to different uses (*R.* v. *Fisher* (1862), 3 B. & S. 191). All such drains are vested in and remain under the control and management of the company, and other parties will be restrained from connecting sewers or drains with them (*London and North Western Rail. Co.* v. *Runcorn Rural Council*, [1898] 1 Ch. 561, C. A.). In *Powell* v. *South Wales Rail. Co.* (1855), 1 Jur. (N. S.) 773, a company was ordered to construct an agreed drain.

(*l*) The court will not order more to be done than the Act requires (*York and North Midland Rail. Co.* v. *Milner* (1846), 15 L. J. (Q. B.) 379, Ex. Ch.).

SECT. 7. Accommodation Works.

make all necessary watercourses and drains for the purpose of carrying water to them (*m*).

Accommodation works by adjoining owners.

1348. If the owners or occupiers of lands affected by the railway consider the works made by the company and directed by justices insufficient for the commodious use of their lands, they may at any time at their own expense make such further works as they think necessary and as are agreed to by the company or, in case of difference, authorised by two justices (*n*). Such works, however, if the company so desires, must be constructed under the superintendence of the company's engineer and according to plans and specifications approved by him, but the company has no right to require works to be made at greater expense than that incurred by the company in similar cases (*o*).

Limit to time in which works may be required.

1349. After the expiration of five years, or of such other period as may be prescribed, from the completion of the works and the opening of the railway, the company cannot be compelled to make any further or additional (*p*) accommodation works for the use of owners or occupiers of land adjoining the railway (*a*).

(*m*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 68. Where the company covenanted in the conveyance of land taken to "procure a supply of water as good as the supply cut off," it was held that the covenant referred to one act only, *i.e.*, such an act as in the ordinary course would secure a continuous supply, not to a series of acts by which the company should secure a supply for ever (*Re Gray and Metropolitan Rail. Co.* (1881), 44 L. T. 567).

(*n*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 30), s. 71. Proceedings under this provision can, however, only be taken where the accommodation works made by the company are insufficient according to the state of things at the time when such works are constructed (*Rhondda and Swansea Railway* v. *Talbot*, [1897] 2 Ch. 131, C. A.); and an owner or occupier who has contracted out of his right to have works cannot proceed under this provision (*ibid.*; see also *Corry* v. *Great Western Rail. Co.* (1881), 7 Q. B. D. 322, C. A.). In the conveyance of land to a company there was an agreement by which the landowner had the right to make a tunnel under the line at any time at his own expense to connect severed parts of his lands; it was held that this was a valid agreement for further accommodation works under this provision; that the agreement was a personal contract of the company, and not contrary to the rule against perpetuities (see title PERPETUITIES, Vol. XXII., pp. 319, 320, 331); that the benefit of the agreement could be assigned to a lessee of part of the severed lands; and that the agreement was not void for uncertainty, but that the landowner or his assigns might select the site of the tunnel (*South Eastern Railway* v. *Associated Portland Cement Manufacturers* (1900), *Ltd.*, [1910] 1 Ch. 12, C. A.).

(*o*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 72.

(*p*) This provision only applies where works are demanded which are additional to works already constructed (*Dixon* v. *Great Western Rail. Co.*, [1897] 1 Q. B. 300, C. A.).

(*a*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 73. Where a culvert was made in 1853, and injury was caused to land by flooding in 1879, an action for damages was brought, in which it was alleged that the culvert had been constructed in an insufficient way. No application had been made to justices within the five years, nor had any previous complaint been made; and it was held that, as the damage was caused by the alleged non-compliance with an Act of Parliament which in fact had been complied with at the time of the making of the works, the action would not

SECT. 8.—*Works by the Sea and Tidal Waters.*

SECT. 8. Works by the Sea and Tidal Waters.

Consent of Board of Trade to works constructed on the seashore or over bays or navigable waters.

1350. The company may not construct any work on the shore of the sea, or of any creek, bay, arm of the sea or navigable river communicating with the sea within reach of the flow of the tide, nor may it construct any railway or bridge across any creek, bay, arm of the sea or navigable river within reach of the flow of the tide, without the consent of the Board of Trade (*b*), and then only according to such plans and such restrictions and regulations as the Board approves; and the like consent is required to any alteration or extension of such work, railway, or bridge (*c*). If these provisions are contravened the Board may abate and remove any offending structure, restore the site to its former condition, and recover the expense as a penalty (*d*) from the company.

Warning lights.

1351. Where the company is authorised to construct, alter or extend any such works it must, during the whole time that the works are being executed, exhibit and keep burning from sunset to sunrise such lights, if any, as the Board of Trade requires or approves; and when the work is completed it must also always maintain, exhibit, and keep burning from sunset to sunrise, for the guidance of ships, such lights as the Board from time to time requires or approves (*e*).

lie (*Colley* v. *London and North Western Rail. Co.* (1880), 5 Ex. D. 277, followed in *Ryan* v. *Great Southern and Western Rail. Co.* (1892), 32 L. R. Ir. 15, distinguishing *Corry* v. *Great Western Rail. Co.* (1881), 7 Q. B. D. 322, C. A.). In each of the two last cited cases a cow had fallen into a ditch, constructed by the company many years before as a fence between the railway and adjoining lands, and the action was for damages for the loss of the cow. In *Ryan* v. *Great Southern and Western Rail. Co.*, *supra*, there had never been any rail between the ditch and the land, and the plaintiff was held not to be entitled to recover; whereas in *Corry* v. *Great Western Rail Co.*, *supra*, the company had supplied such a rail and allowed it to become rotten, so that the cow broke through, and the plaintiff was held to be entitled to recover (*Ryan* v. *Great Southern and Western Rail. Co.*, *supra*); the Irish Court of Appeal explained that in *Corry* v. *Great Western Rail. Co.*, *supra*, the company had taken upon itself to define the extent of its obligations by erecting the rail, and having done so it was obliged to maintain the rail and was answerable for the consequence of not having done so. But where a bridge was made over a brook, under the powers of a company's special Act, in 1847, and flooding of the plaintiff's land occurred in 1899 owing to its improper construction, it was held that the bridge was not an accommodation work, that the principle of *Colley* v. *London and North Western Rail. Co.*, *supra*, did not apply, and that the plaintiff was entitled to damages (*Ferrand* v. *Midland Rail. Co.* (1901), 17 T. L. R. 427).

(*b*) The jurisdiction of other departments of the Government named in the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 17, are transferred to the Board of Trade; see the Harbours Transfer Act, 1862 (25 & 26 Vict. c. 69), ss. 6, 8; Crown Lands Act, 1866 (29 & 30 Vict. c. 62), ss. 7—29; title CONSTITUTIONAL LAW, Vol. VII., pp. 142, 145, 146.

(*c*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 17.

(*d*) As to the mode of recovering a penalty, see pp. 734 *et seq.*, *post.*

(*e*) Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 13. The penalty for neglecting these duties is a sum not exceeding £20 for each night in which the company is in fault (*ibid.*).

SECT. 8.
Works by the Sea and Tidal Waters.

Construction of means of access between land and tidal waters.

1352. Where the railway cuts off access between the land and a tidal water or tidal lands, the company must make during construction, and, after completion, permanently maintain, and allow the public to use free of charge, such footways and carriage roads over, under or across the railway as the Board of Trade from time to time directs or approves (*f*). No owner or occupier, however, who has agreed to receive and has been paid compensation for severance from such tidal water or lands is entitled to have any such access provided; nor can the company be required to make any communication in such manner as to interfere with the working or using of the railway (*g*). The expense of making and maintaining a communication required after the railway is constructed must be borne by the person requiring it (*h*).

Deviation only with consent or authority of Board of Trade.

1353. Where the company is authorised to construct a railway skirting a public navigable tidal river or channel it may not make any deviation from the continuous centre line marked on the plan deposited with the Board of Trade, even within the limits of deviation shown, in such manner as to diminish the navigable space, without the consent or express authority of the Board (*i*).

Abatement or removal of work.

1354. If any work constructed by the company on or across tidal lands or tidal water is abandoned or suffered to fall into decay, the Board of Trade may abate and remove the work and restore the site to its former condition at the expense of the company (*k*).

SECT. 9.—*Temporary Use of Land.*

Use of private roads.

1355. The company, within the time limited for completing the railway, may enter upon and use any existing private road (*l*), provided it is within the prescribed limits, or, if no limits be prescribed, not more than 500 yards from the centre of the railway as shown on the plans, and provided it is formed of hard material and

(*f*) Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 16. Where a level crossing is allowed, the manner of the making and the watching thereof is subject to the approval of the Board (*ibid.*).

(*g*) *Ibid.* As to severance of the lands of any owner, see pp. 668, 669, *ante*.

(*h*) Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 16. The expense of watching a level crossing made under this provision must also be borne by the person requiring it (*ibid.*).

(*i*) *Ibid.*, s. 17. Where there is any contravention of this provision the Board may abate and remove the work and restore the site to its former condition at the expense of the company, and may recover such expenses as a penalty (see pp. 734 *et seq.*, *post*), or as a debt to the Crown (Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 17).

(*k*) *Ibid.*, s. 18. The expense is recovered as stated in note (*i*), *supra*. Where a special Act provided that the company "shall remove" the ruins and *débris* of the Tay Bridge, which was blown down in 1879, and all obstructions to navigation caused by that bridge, to the satisfaction of the Board of Trade, it was held that the obligation to remove was absolute, and that the Board had no discretionary power to dispense with any part of the obligation (*North British Rail. Co.* v. *Perth* (*Provost*) (1885), 10 App. Cas. 579).

(*l*) These provisions do not apply to a railway constructed under the Railways Construction Facilities Act, 1864 (27 & 28 Vict. c. 121); see *ibid.*, s. 31.

is not an avenue or ornamental road, nor an approach to a mansion-house.

Before so doing, the company must give the owners and occupiers three weeks' notice of its intention, stating in such notice the time during which and the purposes for which it intends to occupy the road; and it must pay to the owners and occupiers such compensation, either in a gross sum or by half-yearly instalments, as may be agreed, or in default of agreement as may be settled by two justices in the manner in which the Lands Clauses Consolidation Act, 1845 (*m*), directs claims for compensation not exceeding £50 to be settled (*n*).

Notice of intention to use and occupy.

Within ten days after the service of such notice the owners and occupiers may by notice in writing to the company object to any such road being used on the ground that other roads, which the company has power to use, or some public road, would be more fitting to be used; and thereupon such proceedings may be taken as are described later (*o*).

Notice of objection.

1356. The company may also within the time limited for completing the railway, without making any previous payment, tender or deposit, enter upon any lands which are not more than 200 yards from the centre of the railway as shown on the plans, or within other prescribed limits, if any, provided such lands are not a garden, orchard or plantation attached or belonging to a house, nor a park or ground ornamentally planted, and not within 500 yards, or other prescribed distance, of the mansion-house of the owner of such lands.

Temporary possession of land without previous payment.

The company may occupy such lands as long as may be necessary (*p*) for the construction or repair of the railway or works, and may use them for the following purposes: (1) for taking earth or soil by side cuttings therefrom; (2) for depositing soil thereon; (3) for obtaining materials therefrom for the construction or repair of the railway or works; or (4) for forming roads (*q*) thereon to, or from, or by the side of, the railway (*r*). The company may, in exercise of these powers, deposit on such lands, and manufacture and work thereon, all kinds of material used in constructing the railway, and may dig and take from such lands any clay, stone, gravel, sand or other things required for constructing the railway or such roads as above mentioned, and may erect on such lands workshops, sheds or other temporary buildings for the purposes above mentioned (*s*); but no stone or slate quarry, brickfield or other like

Purposes for which lands may be occupied.

(*m*) 8 & 9 Vict. c. 18, s. 22; see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 69.

(*n*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 30.

(*o*) *Ibid.*, s. 31; see pp. 676, 677, *post*.

(*p*) The mere saving of expense does not constitute necessity within the meaning of this provision (*Morris* v. *Tottenham and Forest Gate Rail. Co.*, [1892] 2 Ch. 47).

(*q*) This power temporarily to occupy lands for the purpose of forming "roads" does not include taking earth for the purpose of forming railroads (*Morris* v. *Tottenham and Forest Gate Rail. Co.*, *supra*).

(*r*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 32.

(*s*) These purposes are those numbered (1), (2), (3), and (4) in the text, *supra*, and no others. Therefore the company has no power under this

SECT. 9. **Temporary Use of Land.**

place, which at the time of the passing of the special Act is being commonly worked or used for getting materials therefrom for profit, may be taken or used under these powers (*t*). No protection is given to the company if it commits any nuisance or does any injury to the property of any person other than the person whose lands are affected (*u*).

Notice to owners and occupiers.

Where lands are required for spoil banks, or side cuttings, or for obtaining materials, the company must give the owners and occupiers three weeks' notice in writing of its intention to enter for such purposes, and when they are wanted for any other of the purposes above mentioned, ten days' like notice, except in the case of accident to the railway requiring immediate repairs (*a*). Such notice must contain a statement of the right of the owner and occupier to require the company to purchase the lands as hereafter mentioned (*a*) or to receive compensation, as the case may be (*b*).

Notice of objection by owners and occupiers.

In any case where a notice of three weeks is required, the owner or occupier may, within ten days of the service of such notice, give notice in writing to the company of his objection to the company making use of the lands, either (1) on the ground that the lands or materials are essential to the beneficial enjoyment of other neighbouring lands belonging to such owner, or (2) on the ground that other near lands would be more fitting to be used by the company; and thereupon the following proceedings (*c*) may be taken (*d*).

Procedure on hearing of objections.

1357. Where the objection is on the first of the above grounds (*e*), the owner may summon the company to appear before two justices, and if the justices after inquiry are satisfied that he has established his objection for some special reason they may, by writing under their hands, order that the lands proposed to be taken, or a specified part thereof, or the materials therein, shall not be taken or used by the company, because of the said special reason, which must be stated in the order (*f*).

provision to erect and work a mortar-mill (*Fenwick* v. *East London Rail. Co.* (1875), L. R. 20 Eq. 544).

(*t*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 32.

(*u*) *Ibid.*; see *Fenwick* v. *East London Rail. Co.*, *supra*.

(*a*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 33. The notice must be served personally on the owner and on the occupier, or left at his last usual place of abode. If the owner or his last place of abode cannot be found, or he is out of the United Kingdom, the notice to him must also be left with the occupier, or, if there is no occupier, it must be affixed on some conspicuous part of the lands (*ibid.*, s. 34). The notice should specify for which of the purposes the company intends to use the road (*Poynder* v. *Great Northern Rail. Co.* (1847), 16 Sim. 3).

(*b*) See pp. 677, 678, *post*.

(*c*) See the text, *infra*.

(*d*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 35.

(*e*) See the text, *supra*.

(*f*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 36. The summons may be granted by any justice, and must name a place and a time for hearing within the three weeks; see the text, *supra*. If the company does not appear, the justices may proceed in its absence on proof of the service of the summons (Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 36).

SECT. 9. Temporary Use of Land.

Where the objection is on the second ground (*g*), and the company refuses to use such other lands alleged to be more fitting for its use, the company and the owners and occupiers of such other lands may be summoned, and, on the hearing, the justices may summarily determine which of the lands in question shall be used by the company and may authorise it to occupy and use the same accordingly (*h*). If, however, on the inquiry in this case, the justices form the opinion that lands of some other person not summoned would be more fitting to be taken for the purpose of the company than the lands proposed, they may adjourn the inquiry and summon such other person to attend at such adjourned hearing, and may finally determine which lands shall be used, and authorise the company to occupy and use them (*i*).

Security for payment of compensation.

1358. Before entering on any lands for any of the purposes of spoil banks or for side cuttings, or for obtaining materials or forming roads, the company must, if required by the owners or occupiers, seven days at least before the expiration of the notice to take the lands (*k*), give sureties, by the bond of two approved persons, for the payment of any compensation which may become payable (*l*).

Fences and gates.

1359. Before using any such lands, the company must also, if so required by the owner or occupier, separate them by a sufficient fence and the necessary gates from the adjoining lands, and must, in the case of private roads temporarily occupied (*m*), put up fences and gates to prevent the straying of cattle. In case of difference as to the necessity for such fences and gates two justices may decide what is necessary (*n*).

Manner of working lands.

1360. Where land is taken for the purpose of getting materials for the construction or repair of the railway, or the accommodation works, the company must work the land in the manner directed by the manager or agent of the owner of the land, or in case of disagreement as any justice shall determine (*o*).

Power to compel company to purchase lands.

1361. In all cases where the company is empowered to enter upon lands for the purposes of making spoil banks or side cuttings thereon, or for obtaining materials therefrom for the construction or

(*g*) See p. 676, *ante;* and as to the applicability of the procedure to objections under the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 31, see p. 675, *ante*.

(*h*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 37. The provisions as to the issue and hearing of this summons are similar to those described in note (*f*), p. 676, *ante*, but the time for its return is a time not more than fourteen days after the application nor less than seven days from the service of the summons (*ibid.*).

(*i*) *Ibid.*, s. 38. This summons is returnable not less than seven days from service nor more than fourteen days from the inquiry (*ibid.*).

(*k*) As to such notice, see p. 676, *ante*.

(*l*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 39.

(*m*) See p. 674, *ante*.

(*n*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 40.

(*o*) *Ibid.*, s. 41.

SECT. 9. **Temporary Use of Land.**

repair of the railway, the owners or occupiers or other persons interested (*p*), at any time during the possession of the lands by the company and before compensation in respect of temporary occupation has been accepted, may by notice in writing (*a*) require the company to purchase the lands or the interests in the lands of the person giving the notice, and thereupon the company is bound to purchase such lands or interests therein (*b*).

Compensation and rent for temporary occupation.

1362. In any of the cases above referred to (*c*), where the company is not required to purchase the lands, and in all other cases where, under its powers, it takes temporary possession of lands, it must, if required, within one month after entry, pay the occupier the value of any crop or dressing which may be on the land, and full compensation for any other damage of a temporary nature which it may do, and must also pay during its occupation a half-yearly rent to the owner or occupier as the case may require, such rent being determined by two justices in case of difference. Further, within six months after the company ceases to occupy such lands, it must pay to all persons interested compensation for all permanent loss, damage or injury sustained by reason of the exercise of the statutory powers, including the full value of all materials taken (*d*).

Entry upon lands in case of urgency.

1363. In case any accident or slip happens, or is feared, to any cutting, embankment or other work, the Board of Trade may empower the company to enter upon any lands adjoining the railway to do the necessary work of repair or prevention (*e*). In case of necessity, however, the company may in such case enter without authority from the Board of Trade, but within forty-eight hours of making such entry it must report the circumstances to the Board, and the Board, if it thinks such entry is unnecessary in the interests of public safety, may order the company to withdraw (*e*). Such work of repair or prevention (*f*) must be done with all possible dispatch and with as little injury as possible to the land, and full compensation must be paid to the owners and occupiers (*e*).

(*p*) *I.e.*, such persons as under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), have such estates and interests in the land as would enable them to sell and convey the lands to the company (Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 42); see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 33.

(*a*) The notice must set out the particulars of the estate and interest of the person giving it, and the amount of his claim in respect thereof (Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 42).

(*b*) *Ibid.*

(*c*) See the preceding paragraph, *supra*. It will be noticed that the provisions of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 42, 43, do not refer to lands entered upon for the purpose of forming roads under *ibid.*, s. 32; see p. 675, *ante*.

(*d*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 43. The amount of and application of the purchase-money and compensation payable under the provisions set out in the preceding paragraphs are, by *ibid.*, s. 44, determined as provided by the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18); see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 76 *et seq.*

(*e*) Railway Regulation Act, 1842 (5 & 6 Vict. c. 55), s. 14.

(*f*) For the purpose of such repair or prevention, or where it is necessary for the public safety to increase the width of embankments, and do such

SECT. 10.—*Interference with Water and Gas.*

SECT. 10. Interference with Water and Gas.

1364. For the purpose of constructing the railway the company may alter the position of watercourses, water pipes or gas pipes, whether they belong to houses near the railway or are mains for the supply of water or gas to the inhabitants, and may remove any other obstruction to the construction of the railway, provided the work is carried out with as little detriment and inconvenience as the circumstances will permit, and is done under the superintendence of the undertakers supplying the water or gas, and of the authorities having control over the roads or streets, or their surveyor, if they or he think fit to attend after receiving not less than forty-eight hours' notice (*g*).

Power to alter position of pipes.

No mains or pipes or other water or gas works may, however, be removed or displaced, or anything done to impede the passage of water or gas until good and sufficient substitutes necessary and proper for continuing the existing supply have been first made by the company and are ready for use to the satisfaction of the engineer or surveyor of the undertakers, or in case of disagreement as a justice shall direct (*h*). If the company interrupts the supply of water or gas it is liable to a penalty of £20 for every day the supply is so interrupted, which penalty goes to the poor of the parish as the overseers direct (*i*).

Substituted pipes.

Penalty for interruption of supply.

The company may not lay down any water or gas pipes contrary to the regulations of any Act of Parliament relating to the undertakers, nor may it lower any road without leaving a covering of at least 18 inches over such pipes (*k*). The company must make good all damage done to the property of any such undertakers by the execution of such works, and must pay full compensation for any loss or damage caused by such interference with mains, pipes, or other water or gas works, or with the private water pipes of any person (*l*). Where it is necessary to construct the railway or any works over any water or gas main, the company must construct and maintain a proper culvert over such main so as to leave it accessible for repairs (*a*).

Duties to be observed in laying substituted pipes.

SECT. 11.—*Miscellaneous Works.*

SUB-SECT. 1.—*Stations.*

1365. It is within the power of the company to construct such stations (*b*), warehouses, offices, and other buildings for the purposes

Power to construct stations and buildings.

like work, the Board may also empower the company to take lands permanently if necessary, although the company's time for exercising its compulsory powers has expired (Railway Regulation Act, 1842 (5 & 6 Vict. c. 55), s. 15); see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 155.

(*g*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 18. For other instances of like powers, see title GAS, Vol. XV., p. 358; and see title WATER SUPPLY.

(*h*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 19. This does not apply to private service pipes (*ibid.*).

(*i*) *Ibid.*, s. 23.

(*k*) *Ibid.*, s. 20.

(*l*) *Ibid.*, s. 21. As to recovery of compensation before two justices, see pp. 732 *et seq.*, *post*.

(*a*) *Ibid.*, s. 22.

(*b*) By the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20),

SECT. 11. Miscellaneous Works.

of the railway as it thinks fit (*c*); and when an Act empowers a company to make or alter, enlarge and complete a railway and works on lands described, the company may build stations on such lands (*d*).

Acquisition of land for additional stations.

1366. The company may, by private contract, acquire lands adjoining or near the railway, in addition to those which may be taken compulsorily, for the purpose of providing additional stations, yards, wharves, and places for dealing with passengers, goods or cattle, for the erection of weighing machines, offices, warehouses, and other buildings and conveniences, for making roads or ways to the railway, or for any other purpose which may be requisite or convenient for the formation or use of the railway (*e*).

Erection of particular kind of station or at a particular place.

1367. When a company erects a station it may be compelled to erect it so as to afford reasonable facilities for the traffic—for example, so as to provide a covered station for passengers at a junction (*f*). The court may order specific performance of an agreement to erect a station at a particular place; but where the agreement is not precise as to the use to be made of the station, and the station is not required in the interests of the public, the party complaining may be left to his remedy in damages (*g*); and an

s. 3, the word "railway" as used in the Act is defined to mean the railway and works by the special Act authorised to be constructed. A station is included in the word "works" (*Cother* v. *Midland Rail. Co.* (1848), 2 Ph. 469; see *Crawford* v. *Chester and Holyhead Rail. Co.* (1847), 11 Jur. 917). By the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 3, the term "railway" as used in that Act is defined to include every station belonging to such railway, and used for public traffic. As to meaning of "station," see *Eton College* (*Provost*) v. *Great Western Rail. Co.* (1839), 1 Ry. & Can. Cas. 200; and see *Gordon* v. *Cheltenham and Great Western Union Rail. Co.* (1842), 2 Ry. & Can. Cas. 800.

(*c*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 16; see note (*h*), p. 654, *ante*.

(*d*) *London and Blackwall Rail. Co.* v. *Limehouse District Board of Works* (1851), 3 K. & J. 123. Where a railway company had power to "make and maintain" a railway, it was held that it had power to make any reasonable improvements, such as a flight of steps, to improve the access to a station (*Sevenoaks, Maidstone and Tunbridge Rail. Co.* v. *London, Chatham and Dover Rail. Co.* (1879), 11 Ch. D. 625).

(*e*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 45.

(*f*) *Re Caterham Rail. Co. and London, Brighton and South Coast Rail. Co. and South Eastern Rail. Co.* (1851), 1 C. B. (N. S.) 410.

(*g*) *Wilson* v. *Northampton and Banbury Junction Rail. Co.* (1874), 9 Ch. App. 279. Where a company covenanted to build a station on purchased land to be used for ever as a "first class station," and the station was built in 1842, the court refused in 1870 to compel the company to build a larger station, the existing station not having been earlier objected to (*Hood* v. *North Eastern Rail. Co.* (1870), 5 Ch. App. 525). When the Salisbury and Dorset Railway Company covenanted to erect a station at a certain place and that its trains should stop there, and a subsequent Act empowered the London and South Western Railway Company to take a lease of the railway and to work it, and made it liable for the duties and obligations of the Salisbury and Dorset Railway Company, it was held that the London and South Western Railway Company was not bound to build the station, but that, after the station had been built by the Salisbury and Dorset Railway Company, the London and South Western Railway Company might be compelled to stop trains there (*Churchill* v. *Salisbury and Dorset Rail. Co.* (1875), 23 W. R. 894, C. A.).

injunction will be granted against erecting a station in a place where the company is forbidden by its special Act or has covenanted not to have a station (*h*).

Operation of London Building Act.

1368. The provisions of the London Building Act, 1894 (*i*), with regard to the construction of buildings and temporary and wooden buildings, do not apply to any building or structure situated upon a railway, or within the railway or station premises, and used for the purposes of or in connection with the traffic of the company (*j*). Nor do the provisions of that Act (*i*) with regard to the position of new buildings with reference to streets, or to lines of building frontage, or to the height of buildings, affect the exercise of any powers conferred on a company by any special Act for railway purposes (*k*).

SUB-SECT. 2.—*Sidings and Branch Railways.*

Construction of openings and communications.

1369. Any person may construct on land adjoining a railway a siding or branch railway for the purpose of bringing vehicles on to and from the railway, and the company must when required, at the expense of such person, make the necessary openings and communications between such siding and the railway in places where they can be made with safety to the public and without injury to the railway or inconvenience to the traffic (*l*).

(*h*) Where the special Act of a company forbade a cattle station to be "at" a certain station, it was held that a cattle station 140 yards from the passenger platform was an infringement of the Act, and a mandatory injunction was granted ordering the company to remove it (*Price* v. *Bala and Festiniog Rail. Co.* (1884), 50 L. T. 787).

(*i*) 57 & 58 Vict. c. ccxiii.; see title METROPOLIS, Vol. XX., pp. 470 *et seq.* As to whether some additional use takes railway buildings out of these exemptions, see *North Kent Rail. Co.* v. *Badger* (1858), 4 Jur. (N. S.) 454.

(*j*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), ss. 86, 201 (8). As to wooden structures erected on a company's premises, see *Elliott* v. *London County Council*, [1899] 2 Q. B. 277.

(*k*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), ss. 13, 20, 31, 47, 48; see *Lewis and Solome* v. *Charing Cross, Euston and Hampstead Railway*, [1906] 1 Ch. 508. Any building (not being a hotel) belonging to a railway company, upon railway premises, and used for railway purposes, is also exempt from the provisions of the London Building Acts (Amendment) Act, 1905 (5 Edw. 7, c. ccix.), s. 30. As to exemptions of certain underground London railways, see *ibid.*, ss. 32, 38.

(*l*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 76. As to the provisions of *ibid.*, s. 92, by which any person is entitled to use a railway with engines and carriages upon payment of the tolls lawfully demandable, see *Powell Duffryn Steam Coal Co.* v. *Taff Vale Rail. Co.* (1874), 9 Ch. App. 331; *Spillers and Bakers, Ltd.* v. *Great Western Railway*, [1910] 1 K. B. 386, C. A.; see also p. 720, *post.* The Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 76, applies only to communications required by the owner of the siding for the purpose of using the railway with his own rolling stock, and does not entitle a person who makes a siding to demand communication with the railway in order that he may obtain facilities for his traffic (*Lancashire Brick and Terra Cotta Co.* v. *Lancashire and Yorkshire Railway*, [1902] 1 K. B. 651, C. A.). In considering a demand for such communication, difficulties which would be caused to the working of the traffic of the railway must be considered (*ibid.*). This decision must be read as subject to the provisions of the

SECT. 11. Miscellaneous Works.

Places for openings and communications.

In case of any dispute as to the proper place for any such openings and communications, the Board of Trade decides the matters in difference (*m*). But in the case of a passenger railway (*n*), if the Board is of opinion that such openings and communications cannot be made without seriously endangering the public safety, and that an arrangement can be made with due regard to existing rights of property, it may order such powers to be exercised only subject to such conditions as it may direct (*o*). The company need not make any such opening in any place where it would interfere with any specific purpose for which that place has been set apart, nor upon any inclined plane (*p*) or bridge or in any tunnel (*q*).

Construction of branch railway.

1370. No such branch railway may run parallel to the railway (*r*). The persons making and using such branch railway are bound to construct, and from time to time, as need may require, to renew, the offset plates and switches (*s*) according to the most improved plan adopted by the company and under the direction of its engineer (*t*).

Railways (Private Sidings) Act, 1904 (4 Edw. 7, c. 19). A private railway on private property used only for the owner's own purposes and not for passenger traffic is not a railway within these provisions (*Matson* v. *Baird* (1878), 3 App. Cas. 1082). Lands within the limits of deviation may be taken to make a siding giving access to the railway (*Re Yorkshire, Doncaster and Goole Rail. Co., Re Dylar's Estate* (1855), 1 Jur. (N. S.) 975). For form of agreement between a railway company and a trader for construction and manufacture of a siding, see Encyclopædia of Forms and Precedents, Vol. XI., pp. 138 *et seq.*

(*m*) Railway Regulation Act, 1840 (3 & 4 Vict. c. 97), s. 19. All provisions in railway Acts empowering justices to decide such disputes are repealed (*ibid.*, s. 18). As to the jurisdiction of the Railway and Canal Commissioners, see p. 753, *post.*

(*n*) No railway is a passenger railway within this provision if two-thirds or more of its gross annual revenue is derived from mineral traffic (Railway Regulation Act, 1842 (5 & 6 Vict. c. 55), s. 12).

(*o*) *Ibid.*

(*p*) The expression "inclined plane" means an incline which is so great as to make the insertion of a connection unreasonable. An incline of 1 in 96 or 98 is not unreasonable (*Lancashire Brick and Terra Cotta Co.* v. *Lancashire and Yorkshire Railway*, [1902] 1 K. B. 381; reversed on another point, [1902] 1 K. B. 651, C. A.; see note (*q*), p. 659, *ante*).

(*q*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 76. A company is not bound to make any such junction at a station, but if it does assent to such junction its assent is not in the nature of a licence, and therefore cannot be revoked (*Bell* v. *Midland Rail. Co.* (1859), 3 De G. & J. 673, C. A.). An existing siding is presumed to have been made under the powers of this provision (*Portway* v. *Colne Valley and Halstead Rail. Co.* (1891), 7 Ry. & Can. Tr. Cas. 102).

(*r*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 76.

(*s*) As to the meaning of "offset plates and switches" in 1845, see *Woodruff* v. *Brecon and Merthyr Tydfil Junction Rail. Co.* (1884), 28 Ch. D. 190, C. A.

(*t*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 76. Where the plaintiff had by a special Act the right to use a certain siding, and the company later doubled its line, the Board of Trade required it to provide at the junction proper interlocking and signalling apparatus (see p. 693, *post*). The company thereupon called on the plaintiff to bear the cost of carrying out the requirements of the Board, and, on his refusal, it removed the junction points. The court granted an injunction restraining the company from interrupting the communication, as the plaintiff had

Facilities for junction of private sidings or branch railways.

1371. The reasonable facilities which every company is bound to afford under the Railway and Canal Traffic Act, 1854 (*u*), includes reasonable facilities for the junction of private sidings or branch railways with any railway of the company (*a*). Any order, however, made under this provision by the Railway and Canal Commissioners may be reviewed, rescinded or varied at any time on the application of any party to the order, but the applicant must first show, in manner provided by the rules (*b*), that there is a *primâ facie* case for such application (*c*).

Where any Act contains provisions relating to private branch railways or sidings, the Commissioners may hear and determine a complaint as to a contravention of the enactment as if it were a complaint as to a denial of reasonable facilities (*d*).

Specific performance.

1372. Where the company has agreed to construct a private siding, the court will grant specific performance of such agreement (*e*).

the right to such communication and there was nothing obliging him to pay for the apparatus ordered (*Woodruff* v. *Brecon and Merthyr Tydfil Junction Rail. Co.* (1884), 28 Ch. D. 190, C. A.).

(*u*) 17 & 18 Vict. c. 31, s. 2; see title CARRIERS, Vol. IV., pp. 65 *et seq.*

(*a*) Railways (Private Sidings) Act, 1904 (4 Edw. 7, c. 19), s. 2. It is doubtful whether this provision applies to a private siding proposed only and not yet in existence. An application to the Railway and Canal Commissioners to allow a connection between such proposed siding and a railway was refused on the ground that such connection would cause serious inconvenience to the traffic, and that therefore the connection was not a "reasonable" facility (*Greenwood (John) & Sons, Ltd.* v. *Cheshire Lines Committee* (1908), 13 Ry. & Can. Tr. Cas. 169). In a case decided in 1881 the Railway and Canal Commissioners refused to order a junction to be made where it was not practicable to work such junction (*Dublin Whiskey Distillery Co., Ltd.* v. *Midland Great Western Railway of Ireland Co.* (1881), 4 Ry. & Can. Tr. Cas. 32). As to rebates on sidings rates, see title CARRIERS, Vol. IV., pp. 87 *et seq.*

(*b*) *I.e.*, rules to be made for the purpose under the powers conferred by the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 20; Railways (Private Sidings) Act, 1904 (4 Edw. 7, c. 19), s. 3. A rule, dated 24th January, 1905, has been made by the Railway and Canal Commissioners to the effect that no such application may be filed without the consent of the Commissioners, and that an affidavit verifying the statements in the application proposed to be filed must be left at the Commissioners' office with a copy of such proposed application.

(*c*) Railways (Private Sidings) Act, 1904 (4 Edw. 7, c. 19), s. 3.

(*d*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 9. Where a company took up and removed the rails connecting the plaintiff's siding with the railway, the Railway and Canal Commissioners decided that the company was wrong in so acting, and ordered it at its own expense to restore the communications (*Portway* v. *Colne Valley and Halstead Rail. Co.* (1891), 7 Ry. & Can. Tr. Cas. 102). On the construction of the special Act the company may have a discretion whether or not it will make a branch railway (*Great Western Rail. Co.* v. *R.* (1853), 1 E. & B. 874, Ex. Ch.).

(*e*) *Greene* v. *West Cheshire Rail. Co.* (1871), L. R. 13 Eq. 44; *Todd & Co.* v. *Midland Great Western Railway of Ireland Co.* (1881), 9 L. R. Ir. 85; see *Firth* v. *Midland Rail. Co.* (1875), L. R. 20 Eq. 100; *Dowling* v. *Pontypool, Caerleon and Newport Rail. Co.* (1874), L. R. 18 Eq. 714. Under an agreement by a company to make and maintain a siding communicating with its railway, together with all necessary approaches thereto, it was held that the company was not bound to provide sheds or any conveniences other than approaches (*Lytton* v. *Great Northern Rail. Co.* (1855), 4 W. R. 441). An undertaking by a company to "make and maintain and uphold

Miscellaneous Works.

Junctions between railways.

1373. Where the company is authorised to make a junction with the railway of any other company, it must carry out the work of effecting such junction under the superintendence and to the reasonable satisfaction of the engineer of that other company; and any difference as to the mode of effecting the junction is determined by a referee appointed by the Board of Trade at the cost of the company making the junction (*f*).

Restricted powers of company making the junction.

1374. The company making the junction may not purchase land of the other company which it is authorised to use, enter upon or interfere with for the purposes of the junction (*g*), except by agreement or under powers conferred by the special Act; it may only acquire an easement over such land (*h*). Neither may it take or enter upon any land belonging to the other company, or alter or interfere with the railway or works of that company, further or otherwise than is necessary in order to make the authorised junction and communications, unless with the previous consent in writing of that company in every instance (*i*).

Erection of signals and conveniences.

1375. The company with whose railway the junction is made may from time to time erect such signals and conveniences incident to a

in full efficiency" a siding does not oblige the company to provide servants, but only applies to the structure of the siding (*Kennedy* v. *Glasgow and South-Western Rail. Co.* (1905), 8 F. (Ct. of Sess.) 13). Where a siding and communication were made for plaintiff by a company without formal agreement and used by the plaintiff for two and a half years, and the company then stopped the communication on the parties failing to come to terms, it was held that the plaintiff had acquired a right to the communication by the acquiescence of the company, and the company was ordered to restore the communication (*Laird* v. *Birkenhead Rail. Co.* (1859), John. 500). As to what circumstances will justify a company in terminating a siding agreement, see *Richard* v. *Great Western Rail. Co.* (1900), 11 Ry. & Can. Tr. Cas. 133; and, further, as to the duration and construction of such an agreement, see *Portsmouth* (*Earl*) v. *London and South-Western Rail. Co.* (1902), 18 T. L. R. 793, C. A.

(*f*) Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 9. As to the exercise of authority by the Board of Trade, see p. 744, *post.* Where the plaintiff company was empowered by a special Act to make a junction with the defendant company's railway, the latter being required to give facilities for effecting such junction, it was held that the plaintiff company was entitled to make its junction and to carry its rails over a piece of land belonging to the defendant company, even after the time for exercising its compulsory powers had expired (*Great Northern Rail. Co.* v. *East and West India Docks and Birmingham Junction Rail. Co.* (1852), 7 Ry. & Can. Cas. 356). For form of grant by one railway company to another of the right to make a junction, see Encyclopædia of Forms and Precedents, Vol. XI., pp. 144 *et seq.*

(*g*) The words "for the purposes of the junction" include the construction of all works necessary for effecting the junction (*Dublin and Drogheda Rail. Co.* v. *Navan and Kingscourt Rail. Co.* (1871), 5 I. R. Eq. 393; see *Oxford, Worcester and Wolverhampton Rail. Co.* v. *South Staffordshire Rail. Co.* (1852), 1 Drew. 255).

(*h*) Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 10. A railway company may not acquire the freehold of land belonging to another railway company unless express and definite powers so to do are given in its special Act.

(*i*) Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 11.

junction on the lands of either company as may be necessary to avoid damage to or interference with the traffic (*k*); and all the expenses of erecting, maintaining and working such signals and conveniences must at the end of every half-year be repaid to it by the company making the junction, and in default are recoverable by action (*l*).

Junction with light railway.

1376. Any junction, which is authorised, of a light railway with a railway must be made so as to avoid interference with lines used for passenger traffic, so far as is reasonably practicable in the opinion of the Board of Trade (*m*).

SUB-SECT. 4.—*Subsoil and Tunnels.*

Limited interest in mines and minerals.

1377. Unless a railway company expressly purchases the mines and minerals (*n*) beneath land acquired by it under its powers for the construction of a railway, it does not become entitled to any such mines and minerals, except in so far as it is necessary to dig them or carry them away in the process of construction (*o*).

Mines and minerals within prescribed limit.

No mines or minerals lying under, or within the distance prescribed by the special Act, or, if no distance is prescribed, within forty yards from the railway, may, however, be worked by the owners thereof if the company is willing to pay compensation for them (*p*).

Right of support.

A railway company has no right to the support (*q*) of such mines or minerals if it has not purchased them; and, if it is unwilling to pay compensation for them, the owners, after due notice, may work the mines, provided they do so in a proper manner (*r*).

Mines and minerals outside prescribed limits.

1378. Although, within the prescribed limits (*s*), the company has thus a right to pay compensation and so obtain the support of the

(*k*) Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 12. It may also from time to time appoint and remove the necessary persons required for working the signals and points, and the expense of employing such persons is recoverable from the other company as stated in the next paragraph (*ibid.*).

(*l*) Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 12. To support an action for expenses it is not enough to show that liability has been incurred; proof is necessary that the expenses have actually been paid (*Carmarthen and Cardigan Rail. Co.* v. *Manchester and Milford Rail. Co.* (1873), L. R. 8 C. P. 685).

(*m*) Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 23; see title TRAMWAYS AND LIGHT RAILWAYS.

(*n*) As to the meaning of "mines" and "minerals," see titles COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 55; MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 501—503.

(*o*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 77; and see title MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 544, 545—550.

(*p*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 78; see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 51—53.

(*q*) As to the nature of the right of support generally, see title MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 570 *et seq.*

(*r*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 79; *Great Western Rail. Co.* v. *Bennett* (1867), L. R. 2 H. L. 27; and see, further, title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 49, 52.

(*s*) See the text, *supra.*

SECT. 11. Miscellaneous Works.

mines and minerals, outside those limits the owners may work the mines without restriction (*t*), subject to the company's common law right to lateral support from minerals outside the prescribed limits (*u*).

Support from non-mineral soil.

1379. With regard to soil which is not mineral, the company's right to lateral or vertical support is its right at common law.

Rights of company with regard to improper working of mines.

1380. In order to ascertain whether any mines lying under or near the railway are being worked so as to injure the railway, the company may, on giving twenty-four hours' written notice, enter and inspect the workings of the mines (*a*). If, on such inspection, it is found that such mines are being worked improperly, the company may require the persons working them to make proper provision for the safety of the railway; and if such persons refuse so to do the company may itself execute the necessary works and recover the cost from such persons by action (*b*).

Power to make tunnel.

1381. Unless a company has special powers so to do (*c*), it cannot use the subsoil of land for the purpose of making a tunnel without acquiring the freehold of the surface (*d*).

Rights with regard to surface.

A title to the surface of land lying over a tunnel may be acquired by possession subject to the right of the company to so much of the subjacent and superincumbent soil as is necessary for the safety and use of the tunnel (*e*).

SUB-SECT. 5.—*Gauge.*

Standard gauge.

1382. Unless there is in the special Act of the company any provision defining the gauge of its railway, the railway must be constructed on a gauge of 4 feet 8½ inches (*f*), but nothing in this

(*t*) *London and North Western Railway* v. *Howley Park Coal and Cannel Co.*, [1911] 2 Ch. 97, 110, 130, C. A. The Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 77—85, are a code of law as to the rights of a company to mines and minerals (*London and North Western Railway* v. *Howley Park Coal and Cannel Co.*, *supra*, at pp. 108, 126).

(*u*) *London and North Western Railway* v. *Howley Park Coal and Cannel Co.*, *supra*, at pp. 110, 130. In this case it was held that a railway company which purchases a stratum of minerals lying under its railway in lieu of paying compensation acquires no additional right of support from subjacent or adjacent strata to that purchased. For the common law as to right of support, see titles EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 319 *et seq.*; MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 570 *et seq.*

(*a*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 83. To refuse to allow such inspection is an offence punishable by a fine not exceeding £20 (*ibid.*, s. 84).

(*b*) *Ibid.*, s. 85.

(*c*) *E.g.*, the powers contained in the Charing Cross, Euston and Hampstead Railway Act, 1893 (56 & 57 Vict. c. ccxiv.), one of many other like Acts.

(*d*) *Sparrow* v. *Oxford, Worcester and Wolverhampton Rail. Co.* (1852), 2 De G. M. & G. 94, C. A.; *Ramsden* v. *Manchester, South Junction, and Altrincham Rail. Co.* (1848), 1 Exch. 723; *Pinchin* v. *London and Blackwall Rail. Co.* (1854), 5 De G. M. & G. 851, C. A.; *Falkner* v. *Somerset and Dorset Rail. Co.* (1873), L. R. 16 Eq. 458; *Re Metropolitan District Rail. Co. and Cosh* (1880), 13 Ch. D. 607, C. A.; and as to the construction of tunnels, see, further, p. 654, *ante*. As to deviation from line or level of tunnels, see p. 652, *ante*.

(*e*) *Midland Railway* v. *Wright*, [1901] 1 Ch. 738.

(*f*) Railway Regulation (Gauge) Act, 1846 (9 & 10 Vict. c. 57), ss. 1, 2.

provision prevents the maintenance and repair of a railway lawfully constructed on any other gauge, or forbids the renewal of rails on such railway (*g*).

No alteration of the gauge of any railway used for the conveyance of passengers may be made (*h*); and where a railway used for the conveyance of passengers is constructed or altered contrary to the above provisions, the company responsible is liable to a heavy penalty (*i*), and the Board of Trade may enter upon the railway and restore the site to its former condition (*k*).

Alteration of gauge of passenger railway.

SUB-SECT. 6.—*Screens.*

1383. Where a highway authority (*l*) apprehends danger to passengers on a main road (*m*), in consequence of horses being frightened by the sight of engines or carriages travelling on a railway, it may, after giving fourteen days' notice to the company, apply to the Board of Trade, and if the Board is of opinion that works in the nature of a screen might obviate or lessen the danger it may certify the necessary works to be done by the company and the time within which the works are to be executed (*n*). If such certificate is not obeyed the company is liable to a penalty of £5 for every day during which the works remain uncompleted after the period appointed for completion, and the justices who impose such penalty may order the whole or part of it to be laid out in executing the prescribed work (*o*).

Screens to prevent damage to passengers on road.

SUB-SECT. 7.—*Milestones.*

1384. The company must cause the length of the railway to be measured and milestones to be set up and maintained along the whole length of the line, at intervals of a quarter of a mile, and marked so as to show the distances (*p*).

Milestones.

In Ireland the gauge is 5 feet 3 inches (Railway Regulation (Gauge) Act, 1846 (9 & 10 Vict. c. 57), s. 1). Since the Great Western Railway Company abandoned its broad gauge lines, so that there are now no lines in use in England having more than 4 feet 8½ inches gauge, many cases on the subject have lost all importance.

(*g*) Railway Regulation (Gauge) Act, 1846 (9 & 10 Vict. c. 57), s. 1.

(*h*) *Ibid.*, s. 4.

(*i*) *Ibid.*, s. 6. By *ibid.*, s. 8, the penalty is recoverable as for an infringement of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20); see pp. 734 *et seq.*, *post.*

(*k*) Railway Regulation (Gauge) Act, 1846 (9 & 10 Vict. c. 57), s. 7.

(*l*) As to highway authorities, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 24 *et seq.*

(*m*) As to the meaning of "main" road, see note (*p*), p. 655, *ante.*

(*n*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 63. Apart from any order by the Board under this provision there is no obligation on a company to screen the railway from a road (*Simkin* v. *London and North Western Rail. Co.* (1888), 21 Q. B. D. 453, C. A.); and see p. 725, *post.*

(*o*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 64. As to recovery of penalties before justices, see pp. 734 *et seq.*, *post.*

(*p*) *Ibid.*, s. 94. No tolls can be demanded or taken by the company at any time when such milestones are not set up and maintained. Any person wilfully defacing or destroying any such milestones is liable to a penalty not exceeding £5 (*ibid.*, s. 95); see note (*a*), p. 688, *post.*

SECT. 11. Miscellaneous Works.

SUB-SECT. 8.—*Tolls.*

List of tolls.

1385. A list of all the tolls authorised by its special Act and exacted by the company must be published, at the station where they are payable, by being painted on a toll-board or printed on paper and affixed to such board and exhibited in a conspicuous position (*a*).

SUB-SECT. 9.—*Penalties.*

Publication of particulars of offences.

1386. The company must publish, by painting on a board, or by printing on paper pasted on a board, short particulars of the offences for which any penalty is imposed by its special Act, or by the Railways Clauses Consolidation Act, 1845 (*b*), or by any bye-law of the company affecting the public. Such board must be exhibited at the principal place of business of the company, and if any penalty is of local application, then also in such locality, and no penalty is recoverable unless such board is kept and maintained in a legible condition (*c*).

SECT. 12.—*Repairs.*

Making good damage to road.

1387. If in the course of making the railway the company uses or interferes with any road, it must from time to time make good any damage done to such road; and any question as to the damage done or the repairs to be done must be settled by two justices (*d*). The justices may order such repairs as they deem proper to be done within such time as they think reasonable (*e*); and they may inflict

(*a*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 93. No tolls can be demanded or taken unless this board is exhibited, and it is an offence punishable as mentioned in note (*p*), p. 687, *ante*, to pull down, deface or destroy such board (*ibid.*, s. 95). The tolls referred to in the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 93, 95, are tolls properly so called, *i.e.*, payment for the use of the line, and not carriers' charges (*Brown* v. *Great Western Rail. Co.* (1882), 9 Q. B. D. 744, C. A.); compare p. 635, *ante*. A charge for stopping is not a toll, and need not be published on the toll-board (*Pryce* v. *Monmouthshire Canal and Rail. Cos.* (1879), 4 App. Cas. 197).

(*b*) 8 & 9 Vict. c. 20.

(*c*) *Ibid.*, s. 143. To pull down or injure or deface any such board is an offence for which a penalty not exceeding £5, in addition to the expenses of restoration, may be inflicted (*ibid.*, s. 144). As to recovery of penalties, see pp. 734 *et seq.*, *post*.

(*d*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 58. By *ibid.*, s. 3, it is provided that in the Act "justices" means justices "who shall not be interested in" the matter they have to decide. This is merely declaratory of the common law, and where the parties waive any objection on the ground of interest the justices have jurisdiction (*Wakefield Local Board of Health* v. *West Riding and Grimsby Rail. Co.* (1865), L. R. 1 Q. B. 84). As to bias, see title MAGISTRATES, Vol. XIX., pp. 553, 554.

(*e*) The order need not specify particulars of the damage done or what repairs are to be done. It is sufficient if the length of road damaged is specified and the company is ordered to make good all damage (*London and North-western Rail. Co.* v. *Wetherall* (1851), 15 Jur. 247). Where a company had used a road by carting upon it quantities of materials for the railway, and in the opinion of justices damage had thereby been done, it was held that the company was liable to repair the road although the materials were conveyed in the carts of contractors (*West Riding and Grimsby Rail. Co.* v. *Wakefield Local Board of Health* (1864), 5 B. & S. 478). Where

on the company a penalty not exceeding £5 a day for disobedience to such order (*f*).

Repair of work maintainable by company.

1388. Where the company is required by statute to maintain or keep in repair any bridge (*g*), fence (*h*), approach, gate or other work (*i*) executed by it, two justices may, on complaint being made that such work is out of repair (*k*), and on ten days' notice being given to the company, order the company to put the work into complete repair within a specified time (*l*). If the company fails to obey the order, the justices may impose on it a penalty of £5 a day for every day it so fails, and may order the whole or any part of the penalty to be applied in such manner as they think fit in putting the work into repair (*l*).

SECT. 13.—*Obstruction of Company.*

Obstruction of lawful exercise of company's powers.

1389. Any person who wilfully obstructs any person acting under the authority of the company in the lawful exercise of its power in setting out the line of the railway, or pulls up or removes any stakes driven into the ground for such purpose, or defaces or destroys any marks made for such purpose, is liable to a penalty not exceeding £5 for every such offence (*m*).

a company pulled down a county bridge and erected another in its place under an agreement with the trustees of the bridge to keep in repair portions of the approaches formerly repaired by the trustees, it was held that the trustees were left to their remedy under the agreement, and that a mandamus to justices under this provision would not lie (*Ex parte Exeter Road Trustees* (1852), 16 Jur. 669).

(*f*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 58. The penalty must be paid to the road authority for the purposes of the road, if it is a public road, or to the owner if it is a private road. In determining any question of this kind the justices should make allowance for any tolls which may have been paid by the company in respect of its use of the road (*ibid.*). The same two justices who made the order for repairs, and no others, can impose the penalty for disobeying such order (*R.* v. *Rawson and Horton* (1866), 15 L. T. 179).

(*g*) See p. 656, *ante*.

(*h*) See pp. 655, 658, 662, 670, 677, *ante*.

(*i*) This includes in some cases a roadway; see note (*b*), p. 656, *ante*; and see pp. 653 *et seq.*, *ante*.

(*k*) The complaint may be made by the surveyor of roads (see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 25, note (*b*)) or by any two householders of the parish or district where any work said to be out of repair is situated (Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 65).

(*l*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 65. Where a special Act incorporated this Act, so far as it related to the mode of crossing roads and the construction of bridges, it was held that *ibid.*, s. 65, was incorporated as well as *ibid.*, s. 145 (see p. 735, *post*); see *Bristol and Exeter Rail. Co.* v. *Tucker* (1862), 13 C. B. (N. S.) 207. If the special Act gives a different remedy, and a complete remedy, in case of works being out of repair, the operation of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 65, is taken away; but if the legislature take away such special remedy, the remedy under the general Act is revived (*London, Chatham and Dover Rail. Co.* v. *Wandsworth Board of Works* (1873), L. R. 8 C. P. 185). Where liability to repair is imposed by an Act previous to 1845 the procedure referred to in the text, *supra*, is not available (*Taff Vale Rail. Co.* v. *Davies* (1868), 19 L. T. 278).

(*m*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 24. As to recovery of penalties, see pp. 734 *et seq.*, *post*.

Part III.—Equipment and Working of Railways.

SECT. 1. Rolling Stock.

SECT. 1.—*Rolling Stock.*

Consumption by engines of their own smoke.

1390. Every locomotive steam engine which uses coal, or other smoke-emitting fuel, must be so constructed as to consume its own smoke, and the company is liable to a penalty of £5 a day for using on its railway any engine not so constructed (*n*). The company may be convicted of this offence if an engine is constructed on the principle of consuming its own smoke but fails to do so as far as practicable on any occasion through default on the part of the company or its servant (*o*).

Approval of engines by company.

1391. No locomotive or other engine, or other description of moving power, may be brought upon or used on a railway unless it has first been approved of and certified as fit by the company (*p*), and if an engine used on the railway becomes unfit to be used or out of repair, the company may require it to be removed or may forbid its use until it has been repaired to the company's satisfaction. Any difference between the owners of such engine and the company must be settled by arbitration (*q*).

Unlawful use of engine.

Any person who brings or uses upon the railway a locomotive or other engine, or any moving power, without having obtained a certificate of fitness from the company, or who, after notice to remove such engine from the railway, does not remove it from the

(*n*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 114. It is impossible for an engine entirely to consume its own smoke, and this provision is relaxed by that stated in the text, *infra* (*London County Council* v. *Great Eastern Railway*, [1906] 2 K. B. 312). As to recovery of penalties, see pp. 734 *et seq.*, *post.*

(*o*) Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 19, which provision overrules *Manchester, Sheffield and Lincolnshire Rail. Co.* v. *Wood* (1859), 2 E. & E. 344; and see, further, title NUISANCE, Vol. XXI., p. 545.

(*p*) The party wishing to run an engine on the railway must give the company fourteen days' notice within which time its engineer must examine and report on the engine; if it is approved, a certificate of fitness must be given (Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 115). The courts enforce this provision by injunction, notwithstanding the fact that railway companies usually rely upon each other as to the fitness of engines run, and notwithstanding the fact that inspection if insisted on may cause inconvenience to traffic, and even where the company claiming the right is merely desirous of impeding the traffic of a competing company (*Midland Rail. Co.* v. *Ambergate, Nottingham and Boston and Eastern Junction Rail. Co.* (1853), 10 Hare, 359).

(*q*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 115; see pp. 716 *et seq.*, *post.* If the difference arises between two railway companies, the Railway and Canal Commissioners are the arbitrators (Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 8); see pp. 753 *et seq.*, *post.* Where the N. company objected to an engine used by the E. company, on the ground that it was too wide and too heavy for its line, this difference accordingly was referred to the Commissioners, who decided that the engine was not unfit (*East and West Junction Rail. Co.* v. *Northampton and Banbury Junction Rail. Co.* (1876), 2 Ry. & Can. Tr. Cas. 293). For form of arbitration clauses in an agreement giving running powers, see Encyclopædia of Forms and Precedents, Vol. XI., p. 155.

railway, or who, after notice not to use it on the railway, uses it without having repairs done to the company's satisfaction, is liable to a penalty not exceeding £20, recoverable by the company, and in any such case the company may remove the engine from the railway (*r*).

Regulations as to construction and condition of carriages.

1392. Every company must make regulations in writing under its common seal as to the construction and condition of carriages to be used on its railways. These regulations must apply as well to the carriages of the company as to those of other companies or persons using the railway, and a copy thereof must be supplied by the secretary to any person applying for it (*s*).

Unlawful use of carriage.

No carriage may be used on the railway which does not comply in construction and condition with these regulations, and any dispute between the company and the owner of a carriage as to condition or construction must be settled by arbitration (*t*). If a carriage not complying with such regulations is used upon the railway, the owner or person having the charge of it is liable to a penalty not exceeding £10, recoverable by the company; and the company may remove such carriage from the railway (*a*).

Registration of carriages.

Owners of carriages using the railway must supply the company with their names and addresses and with particulars of the numbers, weights, and gauges of the vehicles, and, if required by the company, they must paint these particulars conspicuously on the carriages, and permit the company at any time to weigh, measure, or gauge the carriages (*b*). If these provisions are not complied with, the company may refuse to allow the carriages to be brought on the railway, or if they are on the railway, may remove them (*c*).

Carriages improperly loaded.

1393. If any carriage using the railway is improperly loaded so as to be dangerous to the traffic, or if any carriage or goods obstruct the working of the railway, the company may unload the carriage and remove the carriage or goods so as to prevent collision or obstruction, and may detain them till the expense of such unloading, removal or detention is paid (*d*), without being liable for any damage

(*r*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 116. This provision does not affect the common law right of a company to distrain upon an engine *damage feasant*, the remedy given being cumulative; therefore, an engine wrongfully on the line, or impeding the traffic, may be seized and impounded (*Ambergate, Nottingham and Boston and Eastern Junction Rail. Co.* v. *Midland Rail. Co.* (1853), 2 E. & B. 793). As to the nature of this remedy, see title ANIMALS, Vol. I., pp. 379 *et seq.* As to recovery of penalties, see pp. 734 *et seq.*, *post*.

(*s*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 118. There is no statutory limit to the weight of a carriage or to the load which may be carried thereon; see Railway Regulation Act, 1842 (5 & 6 Vict. c. 55), s. 16. Where another company having running powers objects that such regulations are unreasonable, the burden is upon it to show that they are unreasonable (*Rhymney Rail. Co.* v. *Taff Vale Rail. Co.* (1860), 29 Beav. 153).

(*t*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 117; see note (*q*), p. 690, *ante*.

(*a*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 119.

(*b*) *Ibid.*, s. 120.

(*c*) *Ibid.*, s. 121.

(*d*) *Ibid.*, s. 122.

SECT. 1. Rolling Stock.

or loss so caused, provided proper care is exercised, and without being liable for the safe custody of the carriage or goods unless they are wrongfully detained (*e*).

Liability of owners of engines and carriages for damages.

1394. The owners of engines and carriages used on the railway are answerable for any trespass or damage done by such engines, or by the persons employed by such owners, and such persons may be proceeded against for such damage or trespass before two justices, the owners being liable for any damages not exceeding £50 awarded by such justices (*f*). The owners, however, are entitled, where the damage was caused by the misfeasance or negligence of the persons employed, by like process to recover from such persons the amount of any damage (*g*).

Common law duty as to sound and suitable vehicles.

1395. Every railway company is bound at common law to supply vehicles which are sound and suitable for the traffic which it contracts to carry; and, unless relieved by contract, the company is liable for loss or injury directly arising from breach of this duty (*h*).

Smoking compartments.

1396. Every company, except the Metropolitan Railway Company, and unless exempted by the Board of Trade, must provide smoking compartments for each class of passengers in every passenger train on which there are more carriages than one of each class (*i*).

Communication with guard.

1397. In every passenger train which travels more than twenty miles without stopping, the company must provide and maintain in good working order such efficient means of communication between the passengers and the servants of the company in charge of the train as is approved by the Board of Trade (*k*). Any passenger who uses the communication without reasonable and sufficient cause is guilty of an offence (*l*).

Brakes on passenger trains.

1398. The Board of Trade has power to order a company within a stated time, and subject to exceptions or modifications, to provide, on all passenger trains, brakes which must be (1) instantaneous in action and capable of being applied by the driver and guards; (2) self-applying in the event of any failure in the continuity of their

(*e*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. 20), s. 123.
(*f*) *Ibid.*, s. 124.
(*g*) *Ibid.*, s. 125.
(*h*) *M'Manus* v. *Lancashire and Yorkshire Rail. Co.* (1859), 4 H. & N. 327, Ex. Ch.; see title CARRIERS, Vol. IV., pp. 35, 37, 45. But a company is not liable for injury caused by a defect in a truck belonging to it while the truck is being used by another company (*Caledonian Rail. Co.* v. *Mulholland*, [1898] A. C. 216); nor is it the duty of a company minutely to examine "foreign" trucks brought upon its railway (*Richardson* v. *Great Eastern Rail. Co.* (1876), 1 C. P. D. 342, C. A.); and see title NEGLIGENCE, Vol. XXI., p. 370, note (*c*).
(*i*) Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 20.
(*k*) *Ibid.*, s. 22. The company is liable to a penalty not exceeding £10 in case of default (*ibid.*); and see, further, titles CARRIERS, Vol. IV., p. 52; NEGLIGENCE, Vol. XXI., pp. 421, 424, 425.
(*l*) Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 22. The penalty is a fine not exceeding £5 (*ibid.*).

action; (3) capable of being applied to every vehicle whether carrying passengers or not; (4) in regular use in daily working; and (5) of durable material and easily maintained and kept in order. In making any such order the Board must have regard to the nature and extent of the traffic, and any company or person interested must be heard (*m*).

Returns and rules as to brakes on carriages and wagons.

A company must make returns to the Board of Trade every six months respecting the use of continuous brakes on its passenger trains (*n*); and under statutory powers (*o*), rules have been made regulating the brakes on goods wagons (*p*).

SECT. 2.—*Signals and Points.*

Adoption of system by order of Board of Trade.

1399. The Board of Trade may order a company within a stated time, and subject to exceptions or modifications, (1) to adopt the block system on all or any of its railways which are open for passenger traffic; or (2) to provide for the interlocking of points and signals on or in connection with such railways. In making any such order, the Board must have regard to the nature and extent of the traffic, and any company or person interested must be heard (*q*).

Returns by company.

1400. On or before the 15th February in every year a company must, under pain of a penalty, make a full and true return to the Board of Trade setting out particulars as to the use on its railways of various systems of signalling and the interlocking of points and signals, and of other devices and arrangements for avoiding collisions between trains (*r*).

Fog signals.

1401. Explosive fog signals may be kept by a company for use on the railway without a licence or without registering the premises in which they are kept (*s*).

(*m*) Regulation of Railways Act, 1889 (52 & 53 Vict. c. 57), s. 1. The Board has made orders under this provision relating to individual companies. As to raising capital to carry out the Board's requirements, see p. 632, *ante*.

(*n*) Railway Returns (Continuous Brakes) Act, 1878 (41 & 42 Vict. c. 20), s. 2. The returns must be in the form and contain the particulars specified in the Schedule to the Act or as may be prescribed by the Board; they must be signed by the prescribed officers of the company; and a penalty is provided for failing duly to make the returns, or for making or being privy to the making of any false statement therein (*ibid.*); and see Perjury Act, 1911 (1 & 2 Geo. 5, c. 6), s. 5.

(*o*) Under the Railway Employment (Prevention of Accidents) Act, 1900 (63 & 64 Vict. c. 27), s. 1 (1); see p. 750, *post*.

(*p*) Prevention of Accidents Rules, 1911 (Stat. R. & O., 1911, p. 381), also the Prevention of Accidents Rules, 1902 (Stat. R. & O. Rev., Vol. XI., Railway, p. 9); see p. 751, *post*.

(*q*) Regulation of Railways Act, 1889 (52 & 53 Vict. c. 57), s. 1. Rules have been made under this provision applying to individual railway companies.

(*r*) Railways Regulation Act (Returns of Signal Arrangements, Working etc.), 1873 (36 & 37 Vict. c. 76), s. 4. The Schedules to this Act contain the forms in which these returns are made, and also notes to the forms which are to be considered as enactments.

(*s*) 38 & 39 Vict. c. 17, s. 50; see title EXPLOSIVES, Vol. XIV., p. 364.

SECT. 3. Level Crossings.

SECT. 3.—*Level Crossings.*

Provisions for safety at level crossings.

1402. At every level crossing over a main road (*t*) or public carriage road the company must employ proper persons to open and shut the gates; and such gates must be kept constantly closed against the roads on both sides of the railway (*u*), except when horses, cattle or vehicles are crossing, and must be closed again as soon as such traffic has passed. The Board of Trade, however, when it thinks it the better course with regard to the safety of the public, may order that this rule be reversed and that the gates shall be kept closed against the railway except when trains are passing (*w*).

Duty of persons employed at crossings.

1403. The persons employed by the company to open and shut the gates are, before opening them, bound to see that the railway is safe for the purpose of crossing, and if they open the gates when it is unsafe to cross they do so at the company's peril (*a*).

Crossings over ways other than main or public carriage roads.

1404. Where the railway crosses a road or footpath which is not a main or public carriage road (*b*) there is no duty upon the company to provide persons to guard the crossing (*c*); but it must do what is

(*t*) As to the meaning of "main" road, see note (*p*), p. 655, *ante*.

(*u*) As to the duty of the company to keep the gates closed against cattle straying on the road as well as against cattle lawfully travelling thereon, see note (*d*), p. 660, *ante*. As to the erection of lodges at level crossings, see p. 660, *ante*.

(*w*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 47; see also Railway Regulation Act, 1842 (5 & 6 Vict. c. 55), s. 9. The person in charge is liable to a penalty of 40*s*. for every infringement of these regulations (Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 47. The company is liable to a penalty not exceeding £20 for not appointing and keeping a proper person to watch the crossing, and to a penalty of £10 a day while the offence continues (Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 6). A person unreasonably delayed at a level crossing by the negligence of the person in charge has a right of action for damages against the company (*Boyd* v. *Great Northern Rail. Co.*, [1895] 2 I. R. 555). As to level crossings, see, further, p. 660, *ante*; and see title CARRIERS, Vol. IV., p. 49.

(*a*) *Lunt* v. *London and North Western Rail. Co.* (1866), L. R. 1 Q. B. 277. It is the duty of the company to keep the gates closed if a train is approaching, and the fact that they are open in such circumstances is evidence of negligence (*North Eastern Rail. Co.* (*Directors etc.*) v. *Wanless* (1874), L. R. 7 H. L. 12); and see title NEGLIGENCE, Vol. XXI., pp. 422, 437, 439. The fact of the gates being open is an intimation to the public that it is safe to cross (*ibid.*; *Stapley* v. *London, Brighton and South Coast Rail. Co.* (1865), L. R. 1 Exch. 21); and this rule applies to foot passengers to whom no duty of opening or shutting gates may be due, but who see that the gates across the line are open (*Stapley* v. *London, Brighton and South Coast Rail. Co.*, *supra*). A gate must not be opened by a member of the public; and where in the absence of a servant of the company the plaintiff opened a gate himself and was injured in crossing, it was held that the damage was too remote from the negligence of the company in not having the servant at his post; the road is only a highway when the gates are opened by the company's servant (*Wyatt* v. *Great Western Rail. Co.* (1865), 34 L. J. (Q. B.) 204, followed but questioned by Lord COLERIDGE, C.J., in *R.* v. *Strange* (1889), 16 Cox, C. C. 552; but see *Wyatt* v. *Great Western Rail. Co.*, *supra*, as reported 6 B. & S. 709; 11 Jur. (N. S.) 825).

(*b*) As to the meaning of "main" road, see note (*p*), p. 655, *ante*.

(*c*) *Cliff* v. *Midland Rail. Co.* (1870), L. R. 5 Q. B. 258, explaining and

reasonably necessary in the circumstances to provide against danger to persons or cattle crossing the railway (*d*). Where the line is straight, so that there is nothing to obstruct the view, and there are no unusual circumstances which add to the danger, the company is not bound to take any steps for the protection of persons crossing the line (*e*).

Accommodation crossings.

1405. Where a level crossing is an accommodation work (*f*) to afford the owner or occupier access to land, any person who omits to

commenting upon *Bilbee* v. *London, Brighton and South Coast Rail. Co.* (1865), 18 C. B. (N. S.) 584; see *Stubley* v. *London and North Western Rail. Co.* (1865), 4 H. & N. 83; *Walker* v. *Midland Rail. Co.* (1866), 14 L. T. 796; *Newman* v. *London and South-Western Rail. Co.* (1891), 55 J. P. 375.

(*d*) If the company does anything, not contemplated by the legislature when its powers were conferred, which adds to the danger of crossing (*e.g.*, erecting a bridge which obstructs the view of the railway at the crossing), it must do what is reasonable in the circumstances to protect the public from that danger (*Cliff* v. *Midland Rail. Co.* (1870), L. R. 5 Q. B. 258). It may be reasonable in certain circumstances to whistle when a train is approaching a crossing, and the omission to do so may be evidence of negligence (*James* v. *Great Western Rail. Co.* (1867), 36 L. J. (C. P.) 255, n.; *Gray* v. *North Eastern Rail. Co. and Washington Colliery Co., Tucker and Co.* v. *Same* (1883), 48 L. T. 904); but there is no positive duty to whistle (*Newman* v. *London and South-Western Rail. Co.* (1891), 55 J. P. 375). Where a footpath crossed on the level and was not protected by any gate or stile, so that a child got on the line and was injured, it was held that this was evidence of negligence (*Williams* v. *Great Western Rail. Co.* (1874), L. R. 9 Exch. 157; see *Parkinson* v. *Garstang and Knott End Rail. Co.*, [1910] 1 K. B. 615); and see further, title NEGLIGENCE, Vol. XXI., pp. 424, 425, 435 *et seq.* Where cattle were frightened in crossing a railway owing to a negligent act on the part of the company, and ran away and got injured in another place, the company was held liable (*Sneesby* v. *Lancashire and Yorkshire Rail. Co.* (1875), 1 Q. B. D. 42, C. A.).

(*e*) *Ellis* v. *Great Western Rail. Co.* (1874), L. R. 9 C. P. 551, Ex. Ch. Persons using the crossing must, of course, exercise ordinary care and cannot take advantage of negligence on the part of the company if their injuries are due to their own contributory negligence; see *Davey* v. *London and South Western Rail. Co.* (1883), 12 Q. B. D. 70, C. A.; *Skelton* v. *London and North Western Rail. Co.* (1867), L. R. 2 C. P. 631; *Wright* v. *Midland Rail. Co.* (1884), 51 L. T. 539, reversed (1885), 1 T. L. R. 406, n., C. A.; *Brown* v. *Great Western Rail. Co.* (1885), 52 L. T. 622; *Curtin* v. *Great Southern and Western Rail. Co. of Ireland* (1887), 22 L. R. Ir. 219; and as to contributory negligence generally, see title NEGLIGENCE, Vol. XXI., pp. 445 *et seq.* In *Wakelin* v. *London and South Western Rail. Co.* (1886), 12 App. Cas. 41, the company employed a watchman by day, but not at night, at a footpath crossing provided with hand-gates; the body of a man who had been run over by a train was found on the line one morning; there was no evidence as to the cause of the accident, but nothing of a special nature had been done during the night by the trains on the line to warn persons crossing; it was held that there was no evidence of negligence on the part of the company. See also *Barrett* v. *Midland Rail. Co.* (1858), 1 F. & F. 361; *Rogers* v. *Rhymney Rail. Co.* (1872), 26 L. T. 879; *Dublin, Wicklow, and Wexford Rail. Co.* v. *Slattery* (1878), 3 App. Cas. 1155; *Smith* v. *South Eastern Rail. Co.*, [1896] 1 Q. B. 178, C. A.; and as to the responsibility of a company when it expressly or impliedly allows the public to cross the line where there is no right of way, see title CARRIERS, Vol. IV., p. 49. As to proof of negligence, see, generally, title NEGLIGENCE, Vol. XXI., pp. 435 *et seq.* As to the power of a railway company to dedicate to the public a right of way over that railway, see *Great Central Railway* v. *Balby-with-Hexthorpe Urban District Council*, [1912] 2 Ch. 110.

(*f*) As to accommodation works, see pp. 666 *et seq.*, *ante*.

SECT. 3. Level Crossings.

shut and fasten the gate as soon as he and the carriage or animals under his care have passed through commits an offence (*g*).

Crossings over main roads near stations or near shunting operations.

1406. When the railway crosses a main road (*h*) on the level adjoining a station, all trains must slacken their speed before reaching the crossing, and must not pass over it at a greater speed than four miles an hour (*i*). No shunting may take place over any level crossing over a main road (*h*) or public carriage road, nor may any rolling stock stand on such crossing (*k*).

Regulations by Board of Trade.

The Board of Trade has power from time to time to make regulations with regard to any such crossing and the speed at which trains may pass over the same, and any disregard of such regulations is an offence (*l*).

Company's duty to take care.

Apart from such regulations, however, the company is bound to conduct its traffic with due care so as not to injure persons or property on the highway (*m*).

SECT. 4.—*Movable Bridges.*

Delay of vessels and disobedience to regulations.

1407. Where a company has constructed a bridge over navigable water with an opening span, it may not detain any vessel at the bridge longer than is necessary for allowing any engine or train

(*g*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 75. The penalty is a fine not exceeding 40*s.* (*ibid.*; see also *ibid.*, s. 68; p. 670, *ante*). As the company has to keep the gate in repair, the fact that the catch of a gate is out of repair to the knowledge of the company and remains unremedied is evidence of negligence on the company's part (*Brooks* v. *London and North Western Rail. Co.* (1884), 33 W. R. 167); and see title NEGLIGENCE, Vol. XXI, p. 437. A licence to cross a railway by a private path does not include a licence to cross when trucks are on the railway, and it is not the duty of a company to warn persons against crossing when trucks are on the line (*French* v. *Hills Plymouth Co.* (1908), 24 T. L. R. 644).

(*h*) As to the meaning of "main road," see note (*p*), p. 655, *ante*.

(*i*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 48. It is immaterial whether the fact that the company disregards this rule causes any public injury or not; on the information of the Attorney-General the court will restrain the company from any infringement of the rule irrespective of any consequence of such infringement (*A.-G.* v. *London and North Western Railway*, [1900] 1 Q. B. 78, C. A.).

(*k*) Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 5.

(*l*) *Ibid.*, s. 6; Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 48. The Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 6, and the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 47 (see pp. 622, 623, *ante*), must be read together. The offence applies to any main road (see note (*p*), p. 655, *ante*) or public carriage road, and is not limited to such roads as are specifically mentioned in the special Act. The fact that a road is described on the deposited plan as an "occupation road" does not prevent it from being in fact a public carriage road (*R.* v. *Longe* (1897), 66 L. J. (Q. B.) 278). As to penalty, see note (*e*), p. 660, *ante*.

(*m*) Thus, where an engine blew off steam near a crossing so as to frighten horses waiting to pass over, it was held that there was evidence of actionable negligence on the part of the company (*Manchester, South Junction and Altrincham Rail. Co.* v. *Fullarton* (1863), 14 C. B. (N. S.) 54); but, when the wrongful act or negligence of a stranger is the effective cause of the injury, the company is not liable for damages merely because its negligence contributed to the injury (*McDowall* v. *Great Western Railway*, [1903] 2 K. B. 331, C. A., reversing S. C. [1902] 1 K. B. 618); and see, further, title NEGLIGENCE, Vol. XXI., pp. 378 *et seq.*

approaching on the railway to cross the bridge and for opening the bridge; and the company is bound to obey any regulations made by the Board of Trade for the use of such bridge. The company is liable, without prejudice to any other remedy which any person may have against it, to a penalty not exceeding £20 for delaying any vessel longer than the period prescribed, or for disobeying any such regulations (*n*).

SECT. 5.—*Electric Traction.*

Orders by Board of Trade.

1408. In order to facilitate the introduction and use of electrical power on railways upon which such power cannot be used under special Acts, the Board of Trade, upon the application of a railway company, may make orders for all or any of the following purposes:—(1) authorising a company to use electricity in addition to, or substitution for, steam; (2) authorising the company to construct the necessary generating stations and other works on its own lands; (3) authorising the company to make agreements for the supply of electrical power and plant (*o*); (4) sanctioning any modification of any working agreement between companies made necessary by the introduction of electric traction; (5) authorising the company to subscribe to any electrical undertaking which will facilitate the supply of power to the company; (6) securing the safety of the public; (7) authorising the issue of new capital (*p*) for the purpose of introducing electrical traction; (8) any other matters ancillary to the objects of the order and expedient for carrying those objects into effect (*q*).

When confirmation of order necessary.

1409. Any such order made by the Board of Trade has effect as if it were an Act of Parliament (*r*); but any such order authorising the acquisition of land, otherwise than by agreement, required for the purpose of the order must be confirmed by Act of Parliament (*s*).

Rules and regulations.

1410. The Board of Trade has under its powers (*t*) made rules (*u*) regulating the notices and advertisements which must be given by any company applying for an order, the deposit to be made by such company, the plans and books of reference to be prepared, and other

(*n*) Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 15. A company is not bound to open such a bridge for a barge with a mast so constructed as to be easily lowered; and refusing to open for such a vessel is not detention within this provision (*West Lancashire Rail. Co.* v. *Iddon* (1883), 49 L. T. 600).

(*o*) As to agreements between railway or canal companies and local authorities or companies for the supply of electricity for the purposes of traction, see the Electric Lighting Act, 1909 (9 Edw. 7, c. 34); and see title ELECTRIC LIGHTING AND POWER, Vol. XII., pp. 557, 595. As to the effect of the electrification of a railway upon a company which has running powers over that railway, see *Re Great Western Rail. Co. and Metropolitan Rail Co.* (1910), 14 Ry. & Can. Tr. Cas. 176.

(*p*) See also pp. 632, 633, *ante*.

(*q*) Railways (Electrical Power) Act, 1903 (3 Edw. 7, c. 30), s. 1 (1). This Act does not affect any powers which a company may have independently of it (*ibid.*, s. 6).

(*r*) *Ibid.*, s. 1 (2).

(*s*) *Ibid.*, s. 2.

(*t*) *I.e.*, the powers conferred upon it by *ibid.*, s. 5.

(*u*) These rules are dated 17th February, 1904 (Stat. R. & O., 1904, p. 613).

SECT. 5. **Electric Traction.**

matters. Before making an order the Board must be satisfied that the notices required by the rules have been given, and it must hear and consider any objections made to the granting of an order (*v*). The Board may also, if it thinks fit, hold a local inquiry (*a*).

Execution of statutory provisions.

1411. The Board of Trade, with the concurrence of the Treasury, may appoint persons, at remuneration, to carry out the above-mentioned provisions (*b*), and may fix the fees payable in respect of proceedings (*c*).

SECT. 6.—*Dangerous Trees.*

Removal of dangerous trees.

1412. If any tree standing near the railway is in danger of falling on the line so as to obstruct the traffic, the company may, on complaint, obtain an order from two justices that the tree be removed or otherwise dealt with, and the justices may award compensation to the owner of such tree (*d*).

SECT. 7.—*Refreshments for Passengers.*

SUB-SECT. 1.—*Refreshment Rooms.*

Licences required.

1413. Where intoxicating liquors are sold in a railway company's refreshment rooms, such rooms require a justice's licence as well as an excise licence (*e*).

Exemption from closing hour restrictions.

Such rooms are privileged as to the hours of closing (*f*); and liquor may be sold at any time to persons arriving at, or departing from, a station (*g*).

SUB-SECT. 2.—*Restaurant Cars.*

Licence required.

1414. A railway company requires no justices' licence for the sale of intoxicating liquors in a restaurant car, but must take out annually an excise licence for which a duty of £1 is payable in respect of each car (*h*).

(*v*) Railways (Electrical Power) Act, 1903 (3 Edw. 7, c. 30), s. 3 (1).

(*a*) *Ibid.*, s. 3 (2). The Board of Trade Arbitrations, etc. Act, 1874 (37 & 38 Vict. c. 40) (see p. 739, *post*), applies to any such inquiry as if it were held as an application under a special Act (Railways (Electrical Power) Act, 1903 (3 Edw. 7, c. 30), s. 3 (2)).

(*b*) See p. 697, *ante*.

(*c*) Railways (Electrical Power) Act, 1903 (3 Edw. 7, c. 30), s. 4.

(*d*) Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 24.

(*e*) As to the licensing of premises, see title INTOXICATING LIQUORS, Vol. XVIII., pp. 1 *et seq.* For form of agreement to let a refreshment room, see Encyclopædia of Forms and Precedents, Vol. XI., pp. 199 *et seq.*

(*f*) See title INTOXICATING LIQUORS, Vol. XVIII., p. 95. Such rooms are also exempt from the statutory requirements as to annual value; see *ibid.*, p. 60. As to the rate of charge thereon for compensation purposes, see *ibid.*, pp. 71, 72. As to the interest of a licensing justice in a company which is a retailer of intoxicating liquor, see *ibid.*, p. 53.

(*g*) See *Williams* v. *Macdonald*, [1899] 2 Q. B. 308; *Fisher* v. *Howard* (1864), 34 L. J. (M. C.) 42; title INTOXICATING LIQUORS, Vol. XVIII., p. 95.

(*h*) Finance (1909-1910) Act, 1910 (10 Edw. 7, c. 8), Sched. I. (E); see further title INTOXICATING LIQUORS, Vol. XVIII., p. 106, and *ibid.*, note (*j*).

SECT. 8.—*The Public Service.*

SECT. 8. The Public Service.

SUB-SECT 1.—*Royal Forces and Police.*

Arrangements to be made by railway company on proper demand.

1415. Every railway company is bound, on a proper demand being made, to make arrangements on any occasion of the public service for the conveyance of members of the navy, army, or police, all of whom in regard to this obligation are called "the forces" (*i*). These include (1) any of the officers or men of the Royal Navy or naval volunteers, and any other officers or men under the Admiralty; (2) any of the officers or men in the Army, whether regular, reserve, or auxiliary, who are subject to military law; and (3) any officers or men of a police force (*k*).

How demand is made.

The demand is made by the production of a route duly signed, in the case of the military forces as prescribed by statute (*l*); in the case of the naval forces, by a person authorised in that behalf by the Admiralty; in the case of the police forces, by a person authorised in that behalf by the police authority (*m*); or, in any case, by a person authorised by a Secretary of State (*n*).

Nature of services to be rendered by company.

1416. On the production of such a route, the railway company is bound to provide conveyance for the forces named, together with their personal luggage, and their public baggage, stores, arms, ammunition and other goods (*o*). The terms upon which these services are to be rendered by a company in respect of the forces are such as may be agreed upon between the company and the Admiralty, War Office, or police authority, as the case may be. Failing such agreement, certain fares and rates are fixed, for which the company must carry; but they are not obliged to carry explosives except on agreed terms (*p*).

Possession of railway in time of public emergency.

1417. When His Majesty in Council declares that an emergency

(*i*) Cheap Trains Act, 1883 (46 & 47 Vict. c. 34), s. 6. This Act (applied to the Territorial Force by Order in Council, 19th March, 1908) repeals the Railway Regulation Act, 1842 (5 & 6 Vict. c. 55), s. 20; the Railways Regulation Act, 1844 (7 & 8 Vict. c. 85), s. 12; and the Naval Enlistment Act, 1853 (16 & 17 Vict. c. 69), s. 18, except as regards Ireland, and except as regards any railway company which loses the benefit of this Act through failing to comply with an order of the Board of Trade to provide workmen's trains; see Cheap Trains Act, 1883 (46 & 47 Vict. c. 34), s. 10; and see p. 747, *post*.

(*k*) Cheap Trains Act, 1883 (46 & 47 Vict. c. 34), s. 6 (1); see title ROYAL FORCES. A police officer appointed by the local authority as inspector of weights and measures is not entitled, when travelling as such inspector, to the benefit of this provision (*Spencer* v. *Lancashire and Yorkshire Railway* [1898] 1 Q. B. 643). As to the police, see title POLICE, Vol. XXII., pp. 461 *et seq.*

(*l*) *I.e.*, the Army Act (44 & 45 Vict. c. 58), s. 103; see title ROYAL FORCES.

(*m*) The term "police authority" means the Home Secretary or quarter sessions, watch committee, police committee, police commissioners, or other authority having the management of a police force (Cheap Trains Act, 1883 (46 & 47 Vict. c. 34), s. 8).

(*n*) *Ibid.*, s. 6 (2).

(*o*) *Ibid.*, s. 6 (1).

(*p*) *Ibid.* For the fares and rates, see *ibid.*, s. 6. For the definition of fare, see note (*m*), p. 639, *ante*. As to the exemption from passenger duty,

SECT. 8. **The Public Service.**

has arisen, the Government may take possession of the whole or any part of any railway in the United Kingdom, or the plant and rolling stock of any such railway (*q*). The company whose property is so taken possession of is entitled to compensation, which is to be determined by arbitration (*a*), failing agreement (*b*).

Precedence for traffic for the royal forces.

In case of emergency, also, traffic for naval and military purposes may be required to be given precedence of all other traffic on a railway (*c*).

SUB-SECT. 2.—*Mails.*

Carriage of mails.

1418. Every railway company when so required by the Postmaster-General must make arrangements for the carriage of the mails, either by ordinary or by special trains, and either in vehicles supplied by the company or by the Postmaster-General as required (*d*). The remuneration of the company for such services is determined, in default of agreement, by arbitration, or, at the instance of either party, by the Railway and Canal Commissioners (*e*).

SECT. 9.—*Settlement of Disputes.*

Arbitration and costs thereof.

1419. Any dispute which, by the Railways Clauses Consolidation Act, 1845 (*f*), or the special Act of the company, is authorised or directed to be settled by arbitration, must be referred to arbitration according to the provisions of the first-mentioned Act, which are almost identical with the corresponding provisions of the Lands Clauses Consolidation Act, 1845 (*g*), except as to costs (*h*). All costs of any such arbitration are, unless otherwise provided, in the discretion of the arbitrators (*i*).

see p. 639, *ante*. As to the carriage of explosives, see titles CARRIERS, Vol. IV., p. 27; EXPLOSIVES, Vol. XIV., pp. 383 *et seq.*

(*q*) See, further, title ROYAL FORCES.

(*a*) Under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18); see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 76 *et seq.*

(*b*) Regulation of the Forces Act, 1871 (34 & 35 Vict. c. 86), s. 16; see title ROYAL FORCES.

(*c*) National Defence Act, 1888 (51 & 52 Vict. c. 31), s. 4; see title ROYAL FORCES.

(*d*) See the Railways (Conveyance of Mails) Act, 1838 (1 & 2 Vict. c. 98); the Railway Regulation Act, 1844 (7 & 8 Vict. c. 85), s. 11; the Post Office (Duties) Act, 1847 (10 & 11 Vict. c. 85), s. 16; the Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), ss. 36, 37; the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), ss. 18—20; and the Conveyance of Mails Act, 1893 (56 & 57 Vict. c. 38); and see titles CARRIERS, Vol. IV., pp. 70, 71; POST OFFICE, Vol. XXII., pp. 651—654.

(*e*) Railways (Conveyance of Mails) Act, 1838 (1 & 2 Vict. c. 98), ss. 6, 16; Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 19; Conveyance of Mails Act, 1893 (56 & 57 Vict. c. 38), s. 1.

(*f*) 8 & 9 Vict. c. 20.

(*g*) 8 & 9 Vict. c. 18, ss. 25—37. For these provisions, see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 78 *et seq.*

(*h*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 126—137.

(*i*) *Ibid.*, s. 135.

Part IV.—Arrangements Between Railway Companies.

SECT. 1.—*Running Powers.*

SECT. 1. Running Powers.

Valid agreements.

1420. A railway company may contract with any other company, being the owners or lessees or in possession of any railway, for the passage over the railway of either company of engines, wagons or carriages belonging to the other company, in consideration of the payment of such tolls and under such restrictions and conditions as may be mutually agreed; and for this purpose they may agree for the division or apportionment of the tolls taken upon their respective railways (*k*). An agreement by which one company is to have power to run over and use the line of another in consideration of an apportionment of through rates is such an agreement as is contemplated (*l*). A railway company need not be carriers over its own railway (*m*), and although it cannot delegate its powers, it may make an agreement by which another company is allowed to run over its line, to use all its offices, stations, and sidings and in effect to conduct the whole traffic in consideration of receiving a portion of the tolls, provided such agreement does not confer on the other company exclusive powers or forbid agreements with any third company (*n*). Such an agreement is not to be considered to be in effect a lease of the railway (*o*), and is good even though the owning company contemplates not using the line itself at all, provided it does not purport to surrender its powers (*p*).

(*k*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 87. For form of agreement giving running powers to one railway company over the line of another, see Encyclopædia of Forms and Precedents, Vol. XI., pp. 149 *et seq.* A railway company may agree to pay tolls to a dock company for the use of the dock, not only on goods shipped at that dock, but also on goods shipped at other docks in connection with the railway (*Taff Vale Rail. Co.* (*Directors, etc.*) v. *Macnabb* (1873), L. R. 6 H. L. 169). As to working arrangements between companies, see p. 703, *post.*

(*l*) *Llanelly Railway and Dock Co.* v. *London and North Western Rail. Co.* (1875), L. R. 7 H. L. 550. The object of the Act is to enable the trains of one company to run over the lines of another (*Simpson* v. *Dennison* (1852), 10 Hare, 51). As to through rates, see title CARRIERS, Vol. IV., pp. 72 *et seq.*

(*m*) *Shrewsbury and Birmingham Rail. Co.* v. *London and North Western Rail. Co.* (1851), 17 Q. B. 652; *Lancaster and Carlisle Rail. Co.* v. *London and North Western Rail. Co.* (1856), 2 K. & J. 293; *Hare* v. *London and North Western Rail. Co.* (1861), 2 John. & H. 80; *Midland Rail. Co.* v. *Great Western Rail. Co.* (1873), 8 Ch. App. 841; and see p. 629, *ante.*

(*n*) *Midland Rail. Co.* v. *Great Western Rail. Co., supra.* Such an agreement for running powers is no bar to similar agreements with other companies (*Great Northern Rail. Co.* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (1861), 5 L. T. 667).

(*o*) *Midland Rail. Co.* v. *Great Western Rail. Co., supra.* If an agreement is in effect a lease of the railway, and is made without statutory authority, it is *ultra vires*; see *Beman* v. *Rufford* (1851), 1 Sim. (N. S.) 550); and, generally, see p. 628, *ante.*

(*p*) *Llanelly Railway and Dock Co.* v. *London and North Western Rail. Co.* (1875), L. R. 7 H. L. 550; *Charlton* v. *Newcastle and Carlisle*

SECT. 1. Running Powers.

Invalid agreements.

1421. The consideration for an agreement giving running powers must be a share in the tolls (*q*); hence, an agreement to pay the owning company such a sum as will enable it to pay a certain dividend on its stock is *ultra vires* (*r*).

Effect of amalgamation with a third company.

1422. Where there is a valid agreement for running powers by one company over the line of another, and the first company is amalgamated with a third company, the amalgamated company is entitled to the benefit of the agreement; but only to the same extent and subject to the same conditions as existed prior to amalgamation (*s*).

Agreement is irrevocable.

1423. An agreement for running powers is presumed to be permanent and irrevocable in the absence of any specific agreement as to its termination (*a*).

Traffic regulations.

1424. A company with powers to run over the line of another must observe all reasonable rules for regulating the traffic made by the owning company (*b*). Where two companies cannot agree as to the mode of user of a station in which each has rights, the court may interfere and make regulations, but will not readily do so (*c*).

Rights of the public.

1425. Nothing in any contract for running powers may alter or affect the charges payable for carriage, and all persons are entitled to the benefit of the railways on the same terms as if no such contract had been made (*d*).

Rail. Co. and North-Eastern Rail. Co. (1859), 5 Jur. (N. S.) 1096; and see pp. 629, *ante*, 703 *et seq.*, *post*.

(*q*) See Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 87. An agreement by which one company contracts to work the line of another, and all receipts are paid into a common fund and then divided in agreed proportions, is illegal unless it is made under statutory powers.

(*r*) *Simpson* v. *Dennison* (1852), 10 Hare, 51. But an agreement by which the company obtaining running powers undertook to pay tolls on a graduated system, so that, if less than a certain amount of traffic were carried over the line, higher tolls should be paid, so as to allow the owning company to pay certain dividends, was held to be good (*Great Northern Rail. Co.* v. *South Yorkshire and River Dun Rail. Co.* (1854), 9 Exch. 642).

(*s*) *Great Central Railway* v. *Midland Railway*, [1912] 1 Ch. 206, C. A. Where two companies are the joint owners of a station and railway, and one makes an unauthorised and illegal agreement with a third company, it cannot bring traffic from that company's railway into the joint station or over the joint railway (*London, Brighton and South Coast Rail. Co.* v. *London and South Western Rail. Co.* (1858), 5 Jur. (N. S.) 801).

(*a*) *Llanelly Railway and Dock Co.* v. *London and North Western Rail. Co.* (1875), L. R. 7 H. L. 550; *Great Northern Rail. Co.* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (1851), 5 De G. & Sm. 138.

(*b*) *Rhymney Rail. Co.* v. *Taff Vale Rail. Co.* (1860), 29 Beav. 153. As to the effect of the electrification of a railway upon a company which has running powers over that railway, see *Re Great Western Rail. Co. and Metropolitan Rail. Co.* (1910), 14 Ry. & Can. Cas. 176.

(*c*) *Shrewsbury and Birmingham Rail. Co.* v. *Stour Valley Rail. Co.* (1852), 2 De G. M. & G. 866, C. A.

(*d*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 88. A company which has not got running powers cannot be compelled to run trains to an exchange station in order to take up through traffic (*London and India Docks Co.* v. *Great Eastern Rail. Co. and Midland Rail. Co.* (1904), 20 T. L. R. 371, C. A.).

SECT. 2.—*Working Agreements.*

SECT. 2. Working Agreements.

1426. No railway company has power to enter into any agreement with another company in respect to the working of its railway unless it is authorised to do so by its special Act or by a general Act (*e*).

Working agreement must be authorised by statute.

A company may not without authority delegate by agreement the powers given it by Parliament (*f*), and the court will restrain a company by injunction from so delegating its powers (*g*), and will refuse to grant specific performance of any agreement which is intended to effect such delegation (*h*). The court will also refuse to enforce any agreement which is unfair to the shareholders of one of the agreeing companies (*i*). An agreement made between two companies for the purpose of avoiding competition between them is not, however, contrary to public policy, and the companies will not on such grounds be restrained from acting upon such agreement (*k*);

Improper delegation of statutory powers.

(*e*) *Shrewsbury and Birmingham Rail. Co.* (*Directors, etc.*) v. *London and North Western Rail. Co.* (*Directors, etc.*) (1857), 6 H. L. Cas. 113, *per* Lord CRANWORTH, L. C.

(*f*) *Beman* v. *Rufford* (1851), 1 Sim. (N. S.) 550; *Winch* v. *Birkenhead, Lancashire and Cheshire Junction Rail. Co.* (1852), 5 De G. & Sm. 562; and see p. 629, *ante*. But it appears that the court now takes a view much more favourable to agreements between companies than it did at the time when these cases were decided; see *Midland Rail. Co.* v. *Great Western Rail. Co.* (1873), 8 Ch. App. 841; *Llanelly Railway and Dock Co.* v. *London and North Western Rail. Co.* (1875), L. R. 7 H. L. 550. Certain working agreements also are now expressly authorised by the Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 22; see p. 704, *post*; hence cases decided before 1864 are not reliable when it is desired to apply them to similar facts. In *Winch* v. *Birkenhead, Lancashire and Cheshire Junction Rail. Co.*, *supra*, it was held that it is illegal delegation for one company to agree with another entirely to work a portion of its railway and to hand over to it all its property and plant. Whether a company may agree with contractors to work a line for a time for an agreed remuneration has been doubted (*Johnson* v. *Shrewsbury and Birmingham Rail. Co.* (1853), 3 De G. M. & G. 914, C. A.; see *Great Northern Rail. Co.* v. *Eastern Counties Rail. Co.* (1851), 9 Hare, 306). The real point frequently seems to be whether a company has completely parted with the control of its railway.

(*g*) *Beman* v. *Rufford, supra*; *Winch* v. *Birkenhead, Lancashire and Cheshire Junction Rail. Co., supra*. No injunction against acting upon an agreement will be granted unless it is quite clear that the agreement is illegal (*South Yorkshire Railway and River Dun Co.* v. *Great Northern Rail. Co.* (1853), 3 De G. M. & G. 576, C. A.); and see title INJUNCTION, Vol. XVII., p. 218.

(*h*) *Great Northern Rail. Co.* v. *Eastern Counties Rail. Co.* (1851), 9 Hare, 306.

(*i*) *Shrewsbury and Birmingham Rail. Co.* v. *London and North Western Rail. Co.* (1853), 4 De G. M. & G. 115, C. A.

(*k*) *Hare* v. *London and North Western Rail. Co.* (1861), 2 John. & H. 80. Thus, an agreement between two companies not to compete on one portion of railway is not illegal (*Shrewsbury and Birmingham Rail. Co.* v. *London and North Western Rail. Co.* (1851), 17 Q. B. 652); although the alienation by a company of the whole of the tolls arising from the working of one portion of the railway is illegal (*Shrewsbury and Birmingham Rail. Co.* v. *London and North Western Rail. Co.* (1853), 4 De G. M. & G. 115, C. A.); and so is an agreement by a company for the regulation in the future of the traffic on a line which it has not yet got powers to construct (*Midland Rail. Co.* v. *London and North Western Rail. Co.* (1866), L. R. 2

SECT. 2. **Working Agreements.**

nor will a company be restrained from acting upon an agreement to apply to Parliament for power to enter into an agreement (*l*); although it may be restrained from spending the funds of the company in so applying (*m*). Where a company agrees not to apply to Parliament, the court will probably refuse an injunction restraining it from so doing, though the court has power to grant such an injunction (*n*).

Protection of non-contracting parties with regard to tolls, rates, and charges.

1427. Where two or more companies are authorised by a special Act, passed after the 28th July, 1863, and incorporating the Railways Clauses Act, 1863 (*o*), Part III., to agree among themselves with respect to (1) the maintenance (*p*) and management of their railways or works, or any part of any of their railways or works; (2) the use and working of, and conveyance of traffic (*q*) upon, their railways or any part thereof; or (3) the fixing, collecting and apportionment of the tolls, rates, charges, receipts and revenues (*r*) arising from traffic; such agreement must not in any manner affect the tolls, rates or charges which any of the companies are authorised to demand and receive from any person or other company; and such person or other company is entitled, notwithstanding the agreement, to the use and benefit of such railways on the same terms and conditions as if the agreement had never been made (*s*).

Eq. 524); and a mortgage by a company of its undertaking without the authority of Parliament is *ultra vires* (*South Yorkshire Railway and River Dun Co.* v. *Great Northern Rail. Co.* (1853), 3 De G. M. & G. 576, C. A.).

(*l*) *Winch* v. *Birkenhead, Lancashire and Cheshire Junction Rail. Co.* (1852), 5 De G. & Sm. 662.

(*m*) *Simpson* v. *Dennison* (1852), 10 Hare, 51; and see p. 629, *ante*.

(*n*) *Lancaster and Carlisle Rail. Co.* v. *London and North Western Rail. Co.* (1852), 2 K. & J. 293. Whether such agreement is not contrary to public policy is doubtful (*ibid.*; and see note (*s*), p. 629, *ante*).

(*o*) 26 & 27 Vict. c. 92. The date mentioned is the date of the passing of the Act.

(*p*) An agreement to "maintain" may involve an obligation to expend capital in making good defects of construction (*North Eastern Rail. Co.* v. *Scarborough and Whitby Rail. Co.* (1894), 8 Ry. & Can. Tr. Cas. 157). Under power to "maintain," a company may carry out any reasonable improvements of the railway (*Sevenoaks, Maidstone, and Tunbridge Rail. Co.* v. *London, Chatham and Dover Rail. Co.* (1879), 11 Ch. D. 625).

(*q*) Where two companies by agreement gave mutual running powers over their railways provided that local traffic should be respected, it was held that the term "local traffic" meant the traffic between two stations on the same railway (*Midland Rail. Co.* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (1870), 22 L. T. 601).

(*r*) Where two companies have power to enter into an agreement for the use and working of each other's railways, they cannot under such powers make an agreement which provides for a complete pooling of their entire traffic (*Re Great Northern Rail. Co. and Great Central Rail. Co.'s Joint Application* (1908), 24 T. L. R. 417).

(*s*) Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 22. When such special Act as is referred to in the text, *supra*, authorises such an agreement between a company and a person who is the proprietor of a railway, the provisions contained in this provision apply, *mutatis mutandis*, to such agreement (*ibid.*, s. 28). As to obtaining powers to enter into such working agreements by certificate of the Board of Trade, see pp. 636 *et seq.*, *ante*. For form of agreement for the working of an undertaking of one

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1428. Except in so far as the terms of any such agreement are authorised by any general Act, such agreement can have no operation until it is sanctioned by the shareholders of each of the companies parties thereto (*t*).

Conditions precedent to valid agreement:

Before the companies enter into any such agreement, public notice of their intention so to do must be given by advertisement; and the notice must state within what time or in what manner any person or company aggrieved by the agreement, and desiring to object thereto, may bring his objection before the Railway and Canal Commissioners (*u*).

(i.) Consent of shareholders;

(ii.) Notice;

The agreement has no operation until it is approved by the Railway and Canal Commissioners, and the Commissioners may not approve of it unless they are satisfied that it has received the required sanction of the shareholders in the companies concerned (*a*).

(iii.) Approval of Commissioners.

1429. The companies which are parties to such an agreement may appoint a joint committee composed of directors from each company, to whom may be delegated such powers of the several companies as the companies think necessary for carrying the agreement into effect (*b*).

Joint committee.

1430. Any such agreement may be revised and modified in the interests of the public by the Railway and Canal Commissioners (*c*),

Revision of agreement by Commissioners.

railway company by another, see Encyclopædia of Forms and Precedents, Vol. XI., pp. 156 *et seq.*

(*t*) Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 23. The agreement must be sanctioned by such proportion of the votes of the shareholders as is prescribed by the special Act, or, failing such provision, by three-fifths. The sanction must be given at a general meeting specially convened by circular for the purpose, and also by advertisement in newspapers once at least in each of six consecutive weeks, the last being published not less than seven days before the meeting (*ibid.*); see, further, title COMPANIES, Vol. V., p. 718.

(*u*) Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 24. The form of the notice must be approved by the Commissioners, and the advertisement must be inserted once at least in each of three successive weeks in some newspaper circulating in the county prescribed in the special Act or, in case no such county is prescribed, in the county or one of the counties in which each railway concerned is situated (*ibid.*). As to the forms of such notices and the procedure for bringing such agreement before the Commissioners, see Railway and Canal Commission Rules, 1889, r. 6, Sched. I., Form 9; Sched. IV. (Stat. R. & O. Rev., Vol. XI., Railway, p. 43).

(*a*) Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 25, as amended by the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 10. For the purposes of the provisions relating to working agreements (referred to in the text, *supra*), any alteration of an agreement by the parties thereto is deemed an agreement (Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 29).

(*b*) *Ibid.*, s. 26.

(*c*) The Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), gave this power to the Board of Trade. In *Huddersfield Corporation and Chamber of Commerce* v. *Great Northern Rail. Co. and Manchester, Sheffield and Lincolnshire Rail. Co.* (1881), 50 L. J. (Q. B.) 587, it was held that the power of revision and modification had been transferred to the Railway and Canal Commissioners by the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 10, in the case of an agreement made before 1863, under a special Act, which gave the Board of Trade a power of revision: see also *Greenock and Wemyss Bay Rail. Co.* v. *Caledonian Rail. Co.* (No. 1) (1875), 2

SECT. 2. Working Agreements.

at the expiration of the first or any subsequent period of ten years, if they are of opinion that the interests of the public are prejudicially affected thereby; and the companies may be required to publish such notices of any intended revision as the Commissioners direct (*d*). An agreement between two companies which prevents one of them from giving a through rate to, or from making an agreement with, a third company, will be revised and modified by the Commissioners in the interests of such third company (*e*).

Fiduciary capacity of working company.

1431. Where one company works the railway of another, the working company occupies a *quasi*-fiduciary position, and is bound to treat the owning company at least as well as itself, and must do its utmost to develop traffic on the railway so worked (*f*).

SECT. 3.—*Amalgamation.*

Statutory sanction necessary.

1432. An agreement by which railway companies are to be amalgamated, if made without the sanction of Parliament, is illegal, and an injunction may be granted against carrying it into effect (*g*). But when companies agree to amalgamate and to apply to Parliament for the necessary powers, one of such companies may be restrained from acting contrary to the agreement pending the application to Parliament (*h*).

Effect of amalgamation on tolls.

1433. If two or more railway companies are amalgamated under the authority of Parliament, tolls must be calculated as if such railways had originally formed one line of railway (*i*).

Ry. & Can. Tr. Cas. 132. The Commissioners have no jurisdiction to revise or modify an agreement which has been expressly approved by Parliament, and which the Board of Trade never had power to revise or modify (*ibid.*).

(*d*) Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 27. For examples of an application to approve an agreement, and approval with conditions safeguarding interests of a third company, see *Sirhowy Rail. Co. with London and North Western Rail. Co. and Great Western Rail. Co. objecting* (1875), 2 Ry. & Can. Tr. Cas. 264; *Re West Cork Rail. Co. and Ilen Valley Rail. Co., Cork and Bandon Rail. Co. objecting* (1876), 2 Ry. & Can. Tr. Cas. 334.

(*e*) *Huddersfield Corporation and Chamber of Commerce* v. *Great Northern Rail. Co. and Manchester, Sheffield and Lincolnshire Rail. Co.* (1881), 4 Ry. & Can. Tr. Cas. 44. Where two companies by agreement gave one another mutual advantages over their railways, the court refused to restrain one of the companies from entering into an agreement with a third company on the ground that such third company would thereby be enabled to compete with the other company (*Great Northern Rail. Co.* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (1861), 5 L. T. 667).

(*f*) *Sheffield District Rail. Co.* v. *Great Central Rail. Co.* (1911), 14 Ry. & Can. Tr. Cas. 299; see *Exeter Rail. Co.* v. *Great Western Rail. Co.* (1905), 12 Ry. & Can. Tr. Cas. 182.

(*g*) *Charlton* v. *Newcastle and Carlisle Rail. Co. and North-Eastern Rail. Co.* (1859), 5 Jur. (N. S.) 1096. An agreement between two companies by which the traffic on the two railways is completely pooled, and whereby there is a fusion of the companies if not technically an amalgamation, is *ultra vires* (*Re Great Northern Rail. Co. and Great Central Rail. Co.'s Joint Application* (1908), 24 T. L. R. 417). As to matters *ultra vires*, see, generally, pp. 627 *et seq.*, *ante*.

(*h*) *Great Western Rail. Co.* v. *Birmingham and Oxford Junction Rail. Co.* (1848), 2 Ph. 597; compare note (*s*), p. 629, *ante*.

(*i*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 91.

SECT. 3. Amalgamation.

1434. When two or more railway companies are amalgamated by a special Act, passed since the 28th July, 1863, and incorporating the Railways Clauses Act, 1863 (*k*), Part V., the provisions hereafter referred to apply (*l*).

General purpose and definition of "amalgamating Act."

1435. Companies are deemed to be amalgamated either (1) where by a special Act two or more companies are dissolved and the members of such companies are united into and incorporated as a new company; or (2) where by a special Act a company is dissolved and the undertaking is transferred to another existing company with or without a change in the name of that company.

"Amalgamated company."

"Time of amalgamation."

Such special Act is called the "amalgamating Act"; the company incorporated or continued thereunder is called the "amalgamated company," and the time prescribed in the amalgamating Act for the amalgamation to take effect, or, if no such time is prescribed, then the time of the passing of the amalgamating Act, is called the "time of amalgamation" (*m*).

Vesting of property.

1436. The amalgamated company by virtue of the amalgamating Act has vested in it all the undertaking, railways, harbours, works and other real and personal property, and also all powers, authorities, privileges, exemptions, rights of action and other rights and interests of the dissolved company, subject, however, to the contracts, obligations, debts and liabilities of that company; and all such property, powers, rights and interests may be held, used, exercised and enjoyed by the amalgamated company in the same manner and to the same extent as might have been done by the dissolved company but for the amalgamating Act (*n*).

Operation of Acts relating to dissolved company.

1437. All special Acts affecting the dissolved company and its undertaking and in force at the passing of the amalgamating Act

This provision is made in view of the fact that by the special Act of one or more of the companies authority may be given to demand tolls over a fraction of a mile as over a full mile (*ibid.*).

(*k*) 26 & 27 Vict. c. 92. This date is the date of the passing of the Act.

(*l*) Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 36; that is, the provisions of *ibid.*, Part V., namely, *ibid.*, ss. 36—55, inclusive; see the text, *infra*, pp. 708 *et seq.*, *post*, and see p. 623, *ante*.

(*m*) Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 37.

(*n*) *Ibid.*, s. 38. The X company agreed with the Y company to run over a part of the Y company's line, paying to the Y company a definite rate of toll below the ordinary amount: the X company's railway was subsequently amalgamated with other railways, as also was the Y company's railway; and it was held that not only traffic originating on the X company's railway, but also traffic which came on to that railway, might pass over the agreed part of the Y company's line at the agreed rates (*Lancashire and Yorkshire Rail. Co.* v. *East Lancashire Rail. Co.* (1856), 5 H. L. Cas. 792). But where the X company obtained general running powers over part of the Y company's railway, and afterwards amalgamated with the Z company, which by agreement had limited running powers over the same portion of the Y company's line, it was held that the amalgamated company had no greater rights than were possessed by the Z company prior to amalgamation as regards bringing traffic from their line on to that of the Y company (*Great Central Railway* v. *MidlandRailway*, [1912] 1 Ch. 206, C. A.). As to when a railway "belongs" to a company, see *Yool* v. *Great Western Rail. Co.* 1870), 22 L. T. 781.

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remain in force except in so far as varied and repealed by that Act; all rights and powers conferred by such Acts on the dissolved company may be exercised by the amalgamated company in respect of the undertaking of the dissolved company; and all such special Acts must be read as if the name of the amalgamated company were substituted therein for the name of the dissolved company (*o*).

Transfer of debts, tolls, and duties.

1438. Except as otherwise provided by the special Act (*p*), all debts and money due from or to the dissolved company must be paid by or to the amalgamated company; and all tolls, rates, duties, and money due under any Act relating to the dissolved company from or to that company must be paid by or to the amalgamated company and are recoverable from or by the amalgamated company as if the amalgamating Act had not been passed (*q*).

Contracts, obligations, and liabilities.

1439. All deeds, mortgages, bonds, covenants, contracts and securities of the dissolved company which are in force at the time of amalgamation, and all obligations and liabilities incurred by or to it before the amalgamation or which might have arisen in relation to it but for the amalgamation, are as valid and of full force and effect as if the amalgamated company were the dissolved company (*r*).

Contracts relating to land.

1440. Where the dissolved company has under the powers of any special Act entered into any contract in respect to the purchase, taking, or using of any land, and the contract is in force and uncompleted at the time of amalgamation, such contract must be completed in all respects as if the amalgamated company were the dissolved company (*s*).

Purchase and compensation money.

1441. Any special Act relating to the dissolved company, and any other Act with reference to the payment of money for the purchase

(*o*) Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 39. A special Act amalgamated the undertaking of a dock company with that of a railway company, and provided that the undertakings should thenceforward be one undertaking, *i.e.*, that of the railway company: it also provided that the special Acts of the two companies should continue to apply only to those portions of the undertaking to which they would have applied if no amalgamation had taken place; and the Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), Part V., was incorporated. Before the amalgamation, the docks had been supplied with water by the H. corporation, but, after the amalgamation, the company ceased to take this water and supplied the docks from a source acquired by it for railway purposes. In an action by the H. corporation for a declaration that it was *ultra vires* for the company to supply the docks from this source, it was held that the special Act created a complete union of the two undertakings, and that the company was within its powers in supplying the docks with water in the manner complained of (*A.-G.* v. *North Eastern Railway*, [1906] 2 Ch. 675, C. A.).

(*p*) As to the meaning of "special Act," see p. 622, *ante*.

(*q*) Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 40.

(*r*) *Ibid.*, s. 41. Contracts made by the dissolved company are binding on the amalgamated company (*Edinburgh and Glasgow Rail. Co.* v. *Campbell* (1863), 9 L. T. 157, H. L.).

(*s*) Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 46. As to the effect of amalgamation on an agreement made by a company with a landowner that he should withdraw opposition to a Bill in Parliament, see *Capper* v. *Lindsey* (*Earl*) (1851), 3 H. L. Cas. 293; *Lindsey* (*Earl*) v. *Great Northern Rail. Co.* (1853), 10 Hare, 664.

of lands or any interest therein, or for compensation or on any other account, must be read and construed as if the amalgamated company were the company named in such Act; and such money, and the securities upon which it may be invested and the dividends thereon, must be disposed of and applied in pursuance of such special Act (*t*).

Rights of action.

1442. All rights of action accrued before the time of amalgamation and enforceable at that time by or against the dissolved company may be enforced by or against the amalgamated company as if the amalgamating Act had not been passed and as if the amalgamated company were the dissolved company (*a*).

Legal proceedings.

1443. No action or proceeding at law commenced by or against the dissolved company before the time of amalgamation, and then pending, is abated or in any way prejudicially affected by the amalgamation, but may proceed by or against the amalgamated company; and any person committing an offence against the provisions of any special Act relating to the dissolved company may be prosecuted in the same manner and with all the same consequences as if the amalgamating Act had not been passed and as if the amalgamated company were identical with the dissolved company (*b*).

Arbitration proceedings.

1444. Every submission to arbitration under which a reference is pending and incomplete at the time of amalgamation, and every award then in force, is as valid and effectual for or against the amalgamated company as it would have been for or against the dissolved company (*c*).

Authorised works.

1445. All works which the dissolved company was at the time of amalgamation authorised or bound to execute, and which were then incomplete, may or must, as the case may require, be executed or completed by the amalgamated company under the same powers, rights and conditions as were conferred on or imposed upon the dissolved company (*d*).

Property in possession of officers.

1446. All officers (*e*) and persons who at the time of amalgamation have in their possession or control any books, documents or

(*t*) Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 47.

(*a*) *Ibid.*, s. 42. Where before dissolution the plaintiff had been personally injured on the dissolved company's railway by that company's negligence, it was held that such company remained liable in an action for damages brought after the amalgamation (*Smith* v. *Edinburgh and Glasgow Rail. Co.* (1866), 4 Macph. (Ct. of Sess.) 362). As to the effect of amalgamation upon the liability of a surety, see title GUARANTEE, Vol. XV., p. 500.

(*b*) Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 43. Although the special Act contains no provisions as to actions commenced by the dissolved company, such actions may be continued by the amalgamated company without any order to that effect (*West Hartlepool Harbour and Rail. Co.* v. *Jackson* (1867), 36 L. J. (CH.) 189).

(*c*) Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 44.

(*d*) *Ibid.*, s. 45.

(*e*) As to who is an officer of the company, see *Bruff* v. *Cobbold* (1874), 30 L. T. 597; see also *Re Wansbeck Rail. Co. and Trowsdale* (1866), L. R. 1 C. P. 269.

SECT. 3. Amalgamation.

effects of the dissolved company are liable to account for them and must deliver them up to the amalgamated company, or to the person appointed by the amalgamated company to receive them, as if such officers or persons had been appointed by, or become possessed of, such property for the amalgamated company (*f*).

Clerks, officers and servants of company.

1447. All clerks, officers (*g*) and servants in the employment of the dissolved company at the time of amalgamation thereupon become the clerks, officers and servants of the amalgamated company on the same conditions as to service in their new employment as they would have been if the amalgamation had not taken place (*h*).

Documentary evidence.

1448. All books and documents which would have been evidence in any matter for or against the dissolved company are admissible as evidence in respect of the same or like matters for or against the amalgamated company (*i*).

Resolutions.

1449. All regular resolutions of any general meeting, or of the directors, or of a committee of the board of the dissolved company, remain in force notwithstanding the dissolution, and apply to the amalgamated company until they are duly altered or revoked by or with the authority of the amalgamated company (*j*).

Unpaid calls.

1450. All calls made by the dissolved company and not paid at the time of amalgamation are payable to and may be recovered by the amalgamated company (*k*).

Registers, certificates and transfers of stock or shares.

1451. All registers, books and certificates, relating to the shares, stock, securities or shareholders of the dissolved company, which are valid and subsisting at the time of amalgamation, continue to be valid and subsisting and have the same operation and effect as before the dissolution, unless and until new registers, books or certificates are substituted for them; and all transfers and other dealings with stock or shares made before the dissolution, but then incomplete, have the same operation and effect as if made after the dissolution (*l*).

Bye-laws.

1452. All bye-laws, rules and regulations of the dissolved company continue in full force notwithstanding the dissolution, and may be enforced by the amalgamated company, as if they had been originally made by the amalgamated company, for twelve months from the time of amalgamation, or until other bye-laws, rules or regulations are duly made in their stead, whichever event first happens (*m*).

(*f*) Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 48.
(*g*) See note (*e*), p. 709, *ante*.
(*h*) Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 49.
(*i*) *Ibid.*, s. 50.
(*j*) *Ibid.*, s. 51.
(*k*) *Ibid.*, s. 52. The amalgamated company may bring an action for calls against a shareholder of the dissolved company (*Cork and Youghal Rail. Co.* v. *Paterson* (1856), 18 C. B. 414), but not unless there has been a complete and legal amalgamation (*Midland Great Western Railway of Ireland* v. *Leech* (1852), 3 H. L. Cas. 872).
(*l*) Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 53.
(*m*) *Ibid.*, s. 54.

SECT. 3. Amalgamation.

General saving of rights and claims.

1453. The dissolution and amalgamation, and the amalgamating Act and the provisions above referred to (*n*), are all subject and without prejudice to anything done, suffered or confirmed before the time of amalgamation under the powers of any special Act relating to the dissolved company; and all rights, liabilities and claims incident thereto are as valid as if the dissolution had not taken place; and in relation to such rights, liabilities and claims the amalgamated company represents the dissolved company to all intents and purposes (*o*).

SECT. 4.—*Leasing.*

Statutory authority necessary.

1454. It is unlawful for any railway company to lease a railway except under the authority of a provision in an Act of Parliament (*p*); and any agreement which in effect amounts to the grant of a lease is invalid without such authority (*q*).

When Board of Trade's certificate necessary.

If an Act of Parliament authorises a lease to be granted by one company and accepted by another on terms to be agreed upon, and provided that the Board of Trade has given a certificate that certain requirements have been fulfilled, no lease or agreement for a lease is binding until such certificate has been given (*r*).

Covenants in lease.

1455. Where a railway company is authorised by a special Act to lease a railway, the lease must contain all usual and proper covenants on the part of the lessee for maintaining the railway in good and efficient repair and working condition during the term, and for so leaving it at the end of the term, and it must also contain such other conditions and covenants as are usually inserted in such leases (*s*).

(*n*) *I.e.*, Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), Part V. (ss. 36—55); see pp. 706 *et seq.*, *ante*.

(*o*) Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 55.

(*p*) *East Anglian Railways Co.* v. *Eastern Counties Rail. Co.* (1851), 11 C. B. 775; and, generally, as to acts *ultra vires*, see pp. 627 *et seq.*, *ante*. As to leases under powers, see title LANDLORD AND TENANT, Vol. XVIII., p. 346. Not even with the assent of all the shareholders can a company take a lease of a railway from another company, and any contract for such purpose is *ultra vires* and cannot be enforced (*ibid.*). By the Railway (Sales and Leases) Act, 1845 (8 & 9 Vict. c. 96), it was provided that no company by virtue of any powers contained in any Act passed in the session of 1845 should grant or accept the sale or lease of any railway except under the authority of a distinct provision in some Act of Parliament to that effect, specifying by name the railway to be so sold or leased and the company by which such sale or lease might be granted or accepted.

(*q*) *Beman* v. *Rufford* (1851), 1 Sim. (N. S.) 550.

(*r*) *Kent Coast Rail. Co.* v. *London, Chatham and Dover Rail. Co.* (1868), 3 Ch. App. 656.

(*s*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 112. Under an agreement by lessees of a railway to work the railway "efficiently" they are bound to work it so as to secure the agreed benefits to the lessor, but they are not necessarily bound to work it so as to secure the greatest possible gross profits (*West London Rail. Co.* v. *London and North Western Rail. Co.* (1853), 11 C. B. 327, Ex. Ch.). As to the meaning of "efficiently," see *East London Rail. Co.* v. *London, Brighton and South Coast Rail. Co.* (1876), 2 Ry. & Can. Tr. Cas. 413; *Sheffield District Rail. Co.* v. *Great Central Rail. Co.* (1911), 14 Ry. & Can. Tr. Cas. 299; and see p. 706, *ante*. The provisions of the Act as to leasing do not apply to railways

SECT. 4. **Leasing.**

Effect of lease on powers and duties of lessor.

1456. Such a ease entitles the lessee to the free use of the railway comprised therein (*t*), and, during the continuance of the lease, all powers and privileges of the lessor with regard to the possession, enjoyment and management of the railway, and with regard to the tolls to be taken thereon, may be exercised and enjoyed by the lessee subject to the same regulations and restrictions as governed the lessor (*u*); and the lessee is with respect to such railway subject to all the obligations imposed on the lessor by the special Act or the Clauses Acts (*x*).

Liability to provide reasonable facilities.

1457. Where, under the terms of an authorised lease, the lessee company is bound to provide for the proper working of the leased railway, any person interested in the traffic on that railway and injured by the failure of the lessee to work it properly is entitled to prefer a complaint against the lessee of the denial of reasonable facilities (*a*). But where the lessor company continues liable to execute such works as may from time to time be required under the authority of Parliament for the working and use of the railway, it is bound to afford such reasonable facilities as depend on the execution of such works (*b*).

SECT. 5.—*Pooling Agreements.*

Legality and effect.

1458. With the object of avoiding competition (*c*), an agreement known as a "pooling agreement" is frequently made between companies which are the owners of competitive lines. By such an

constructed under the Railways Construction Facilities Act, 1864 (27 & 28 Vict. c. 121), s. 31.

(*t*) Where an authorised agreement gives one company the power to work and maintain the railway of another company, the first company has the right to the exclusive possession of the railway (*Sevenoaks, Maidstone, and Tunbridge Rail. Co.* v. *London, Chatham and Dover Rail. Co.* (1879), 11 Ch. D. 625).

(*u*) In a lease of a railway and "all rights, powers and privileges in relation thereto," the rights of the lessors under an agreement with a third company are acquired by the lessees (*West London Rail. Co.* v. *London and North Western Rail. Co.* (1853), 11 C. B. 337, Ex. Ch.; *London and South Western Rail. Co.* v. *South Eastern Rail. Co.* (1853), 8 Exch. 584).

(*x*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 113. As to the Clauses Acts, see pp. 622, 623, *ante*. As to the construction of a lease providing for the payment to the lessor company of a mileage proportion of through traffic, see *Salisbury and Dorset Junction Rail. Co.* v. *London and South Western Rail. Co.* (1878), 3 Ry. & Can. Tr. Cas. 314.

(*a*) *Watkinson* v. *Wrexham, Mold and Connah's Quay Rail. Co.* (1879), 3 Ry. & Can. Tr. Cas. 164. The "reasonable facilities" are such as are required by the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 2; Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 25; see title CARRIERS, Vol. IV., pp. 65 *et seq.*

(*b*) *London and South Western Rail. Co.* v. *Staines, Wokingham and Woking Rail. Co.* (1877), 3 Ry. & Can. Tr. Cas. 48, in which it was held that the lessor company was bound to provide such works as new signals, made necessary by the introduction of the block system, the failure to provide which would have rendered the lessee liable to a penalty; and see p. 693, *ante*.

(*c*) As to agreements to avoid competition, see p. 703, *ante;* and see *Hare* v. *London and North Western Rail. Co.* (1861), 2 John. & H. 80, where WOOD, V.-C., points out that competition may be ruinous to a company and still not tend in the end to benefit the public. As to working agreements, generally, see pp. 703 *et seq.*, *ante*.

SECT 5. Pooling Agreements.

agreement the companies, parties thereto, agree that the gross revenue arising from the competitive traffic shall be divided between them in agreed proportions. Such an agreement is not illegal (*d*); but a pooling agreement with regard to the revenue to be derived from traffic on a railway not yet in existence nor authorised by Parliament is invalid (*e*).

SECT. 6.—*Railway Clearing House.*

Clearing system: Clearing Committee: Railway Clearing House.

1459. Before 1850, a Committee appointed by the boards of several railway companies existed for the purpose of facilitating through traffic over their railways under mutual arrangements which were known as the "clearing system." In 1850, this Clearing Committee, whose office was known as the "Railway Clearing House," was formally recognised by Act of Parliament and was given power to sue and be sued in the name of its secretary (*f*).

Parties to clearing system.

1460. Any company which was not a party to the clearing system in 1850 may become a party to it with the assent of the Clearing Committee by request (*g*). Any company which is at any time a party to the clearing system may by notice cease to be a party (*h*); and any company may be compelled to cease to be a party to the clearing system if not less than two-thirds of the members of the Committee present at a meeting specially summoned for the purpose agree to give such company notice to retire (*i*).

Representation on Clearing Committee.

1461. Each company which is a party to the clearing system is entitled at all times to be represented on the Clearing Committee by one delegate appointed by the board of that company; but the acts of the Committee are not invalidated by the fact that at any meeting any company is unrepresented (*k*).

Meetings.

1462. The Clearing Committee must meet at least once a quarter, and at any other time fixed by the secretary at the request of the

(*d*) *Hare* v. *London and North Western Rail. Co.* (1861), 2 John. & H. 80. This is a decision of WOOD, V.-C., given with some hesitation; but it has never been taken to a higher court, and is considered to be a correct statement of the law. Previous to this decision there was considerable divergence of judicial opinion on the subject. In *Shrewsbury and Birmingham Rail. Co.* v. *London and North Western Rail. Co.* (1850), 2 Mac. & G. 324, Lord COTTENHAM, L.C., decided in favour of the legality of such an agreement, and the Court of Queen's Bench, in S. C. (1851), 17 Q. B. 652, upheld his opinion. In S. C. (1853), 4 De G. M. & G. 115, C. A., TURNER, L.J., however, considered such an agreement to be invalid. As to the termination of a pooling agreement, see *Rhymney Railway* v. *Brecon and Merthyr Tydfil Junction Railway* (1900), 69 L. J. (CH.) 813, C. A.

(*e*) *Midland Rail. Co.* v. *London and North Western Rail. Co.* (1866), L. R. 2 Eq. 524.

(*f*) Railway Clearing Act, 1850 (13 & 14 Vict. c. xxxiii.), Preamble, ss. 1, 20. The Act is classed as a local Act, but it is provided that it is to be deemed a public Act, and as such to be judicially noticed (*ibid.*, s. 28); and see title STATUTES. For an account of the working of the Railway Clearing House, see Encyclopædia Britannica, 11th ed., Vol. II., p. 477, title "Clearing House."

(*g*) Railway Clearing Act, 1850 (13 & 14 Vict. c. xxxiii.), s. 2.

(*h*) *Ibid.*, s. 3.

(*i*) *Ibid.*, s. 4.

(*k*) *Ibid.*, s. 5.

SECT. 6. Railway Clearing House.

chairman or of any two members. A quorum consists of ten members, and, unless otherwise provided, all questions are decided by a majority of the votes of those present, the chairman having a casting vote in case of an equality of votes. Six days' notice of the business to be brought before any meeting must be given to every company party to the clearing system (*l*).

Chairman.

1463. The chairman is elected at an annual general meeting of the Clearing Committee held in March, and holds office till the next annual general meeting unless he dies, or resigns, or is removed by a general meeting specially summoned for the purpose, in any of which cases another person may be chosen to fill the place till the end of the period. If the chairman is absent from any meeting the members of the Committee present may choose one of their number to be chairman of that meeting. The chairman need not be one of the delegates of the companies parties to the clearing system, but if he is not a delegate he is not entitled to vote on any question except in the case of an equality of votes, when he has the casting vote (*m*).

Secretary.

1464. A secretary must be appointed by the Clearing Committee, and may be removed by it at any time and another appointed (*n*). A treasurer may also be similarly appointed (*o*).

Funds.

1465. Any money received by the Clearing Committee is held by it as trustee for the company or companies to whom the Committee decides it is payable; but no member of the Committee is personally liable for the loss of any such money unless it is lost owing to his misconduct (*p*).

Questions as to accounts and contributions.

1466. The accounts of the clearing system, the balance due to and from the several companies parties thereto, and the contributions of such companies to the funds of the clearing system are settled and adjusted by the secretary, and in case of any difference respecting any such accounts the decision of the Clearing Committee is final and conclusive (*q*).

Expenses.

1467. All expenses and charges are paid out of the funds of the clearing system, and the members of the Clearing Committee and the secretary are completely indemnified by the companies parties to the system (*r*) against any personal liability for anything they or he may do or omit to do in their official capacity.

Recovery of sums due.

1468. Any sum which the Clearing Committee may decide to be payable by any company, either to any other company or on account of the clearing system, may be recovered by action in the name of

(*l*) Railway Clearing Act, 1850 (13 & 14 Vict. c. xxxiii.), s. 6.
(*m*) *Ibid.*, ss. 7, 8.
(*n*) *Ibid.*, s. 9.
(*o*) *Ibid.*, s. 10.
(*p*) *Ibid.*, s. 11.
(*q*) *Ibid.*, s. 12; and, as to the conclusiveness of a decision by secretary or Committee, see *Benson* v. *Dunn* (1871), 23 L. T. 848.
(*r*) Railway Clearing Act, 1850 (13 & 14 Vict. c. xxxiii.), s. 13.

the secretary whether such company at the time of the decision is still or has ceased to be a party to the clearing system (*s*).

Proof in actions for recovery of sums due.

1469. In any such action proof that the Clearing Committee decided the sum in question to be payable by the defendant and that the defendant was at the time of such decision a party to the clearing system, or that it was a party at some previous time and that the sum was decided to be payable in respect of matters happening while it was a party, is conclusive in favour of the plaintiff unless the defendant can establish a plea of satisfaction. A plea denying that the plaintiff is secretary is inadmissible (*t*).

Minutes of proceedings and their effect as evidence.

1470. The Clearing Committee is bound to cause minutes of all its proceedings and orders to be entered in its books, and also notes of all appointments made, and copies of all contracts entered into, by the Committee. Every entry in such books purporting to be signed by the chairman of the meeting at which such proceedings, orders, appointments or contracts took place is admissible as evidence in any court without further proof; and at the trial of any action, as soon as it is proved that a company is or had at some relevant time been a party to the clearing system, the books of the Committee are *primâ facie* evidence of the truth of all matters therein stated (*a*).

Parties to legal proceedings.

1471. In all legal proceedings, the companies parties to the clearing system may be described collectively as "the companies parties to the clearing system mentioned in the Railway Clearing Act, 1850"; and the Clearing Committee may be described as "The Clearing Committee mentioned in the Railway Clearing Act, 1850" (*b*). The secretary may be described as "A. B., secretary to the Clearing Committee, and now named by virtue of the Railway Clearing Act, 1850" (*c*); and in all legal proceedings the name of the secretary is used to represent the Clearing Committee (*d*). In regard to criminal proceedings the property of the Committee is deemed to be the property of the secretary, and a servant of the Committee is deemed to be a servant of the secretary (*d*). No proceedings abate or are affected by the death or removal of the secretary for the time being (*e*).

Service of documents.

1472. All notices and requisitions by the Clearing Committee, or by any company, are sufficient if signed by the secretary of the Committee, or by the secretary or other officer of such company, as the case may be, and may be served by post (*f*).

(*s*) Railway Clearing Act, 1850 (13 & 14 Vict. c. xxxiii.), s. 14. A form of declaration in such actions is given in *ibid.*, s. 15 and Sched. As to statements of claim and other pleadings, see title PLEADING, Vol. XXII., pp. 440 *et seq.* For an example of an action against sureties for the sums due under the Railway Clearing Act, 1850 (13 & 14 Vict. c. xxxiii.), by a railway company, see *Benson* v. *Dunn* (1871), 23 L. T. 848.

(*t*) Railway Clearing Act, 1850 (13 & 14 Vict. c. xxxiii.), ss. 16, 17.

(*a*) *Ibid.*, ss. 18, 19.

(*b*) *Ibid.*, s. 24.

(*c*) *Ibid.*, s. 25, and Sched.

(*d*) *Ibid.*, ss. 20, 21, 22.

(*e*) *Ibid.*, s. 26.

(*f*) *Ibid.*, s. 23.

SECT. 7. Arbitration.

SECT 7.—*Arbitration* (*g*).

Agreement to refer.

1473. Any two or more railway companies may, by writing under their common seals, agree to refer to arbitration any existing or future matters of difference between them which they may lawfully settle by agreement between themselves; and they may delegate to the arbitrator any power to determine all or any of the terms of any contract to be made between the companies which the directors might lawfully delegate to a committee of themselves (*h*). Such agreement may be from time to time added to, altered or revoked, but only by all the companies parties thereto, by writing under their common seals (*i*).

Binding effect of agreement.

1474. Such agreements or references are binding upon the companies parties thereto (*j*), and full effect must be given by the High Court to all such agreements or references and to all awards resulting therefrom; and process may issue against the property of any such company to enforce them (*k*).

Ouster of jurisdiction of the court.

1475. By any such agreement to refer, the jurisdiction of the court is ousted, even though the matter in dispute is a proper one for the decision of the court (*l*). But, where none of the parties to the agreement insists on the right to go to arbitration, the court has jurisdiction; and if the point is not raised in the court of first

(*g*) As to the law of arbitration in general, see title ARBITRATION, Vol. I., pp. 438 *et seq.*

(*h*) Railway Companies Arbitration Act, 1859 (22 & 23 Vict. c. 59), s. 2. In the Act the expression "railway companies" includes all persons who own or lease, and all contractors who work, any railway upon which steam power is used (*ibid.*, s. 1). The provisions of the Arbitration Act, 1889 (52 & 53 Vict. c. 49), apply to all proceedings under the Railway Companies Arbitration Act, 1859 (22 & 23 Vict. c. 59), except in so far as the provisions of the latter Act are inconsistent therewith (Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 24). Railway companies have only power to refer their differences between one another to arbitration under the Railway Companies Arbitration Act, 1859 (22 & 23 Vict. c. 59) (*Great Western Rail. Co.* v. *Waterford and Limerick Rail. Co.* (1881), 17 Ch. D. 493, C. A., *per* COTTON, L.J., at p. 510); and see pp. 718, 719, *post*.

(*i*) Railway Companies Arbitration Act, 1859 (22 & 23 Vict. c. 59), s. 3. Where there was an agreement between two companies as to running powers and other matters, a clause therein providing that any difference should be referred to arbitration, one of the companies gave notice to the other to terminate the agreement, and it was held that in the absence of any provision in the agreement as to its termination, or as to the time of its duration, the agreement was permanent and the notice invalid (*Llanelly Railway and Dock Co.* v. *London and North Western Rail. Co.* (1875), L. R. 7 H. L. 550). There is no analogy between such an agreement and a contract of partnership or of service (*ibid.*, *per* Lord CAIRNS, L.C., at p. 559).

(*j*) Railway Companies Arbitration Act, 1859 (22 & 23 Vict. c. 59), s. 4.

(*k*) *Ibid.*, s. 26. As to enforcing awards, see title ARBITRATION, Vol. I., p. 473.

(*l*) *Watford and Rickmansworth Rail. Co.* v. *London and North Western Rail. Co.* (1869), L. R. 8 Eq. 231. But where the agreement is *ultra vires* of the companies, or one of them, the court will interfere at the instance of a shareholder in such company and restrain proceedings under an arbitration agreement (*Maunsell* v. *Midland Great Western Railway* (*of Ireland*) *Co. and Great Northern and Western* (*of Ireland*) *Rail. Co.* (1863), 8 L. T. 347).

instance it cannot be taken in the Court of Appeal (*m*). Where, however, there is a statutory provision in an Act of any of the companies that disputes are to be referred to arbitration (as when an agreement to refer is scheduled to such Act), the court has no jurisdiction and arbitration is the only way in which any such dispute can be settled (*n*). Where an agreement provides for the reference of disputes to a standing arbitrator to be appointed as agreed and no such arbitrator is in fact ever appointed, the jurisdiction of the court is not ousted (*o*).

Arbitrator.

1476. When the companies parties to such agreement so agree, the reference is to a single arbitrator (*p*); otherwise the reference is to as many arbitrators as there are companies, each company appointing one arbitrator by writing under its common seal and giving notice of such appointment to each of the other companies (*q*). If any company fails to appoint an arbitrator within fourteen days after being requested in writing so to do, the Board of Trade may appoint (*r*).

Appointment of new arbitrator.

If any arbitrator dies or becomes incapable or unfit, or for seven consecutive days fails to act as arbitrator, before the matters referred are determined, the company by which he was appointed must by writing under its common seal appoint an arbitrator in his place (*s*); and, in default of such appointment for fourteen days after request in writing by any other company party to the agreement, the Board of Trade may appoint (*t*).

Revocation of appointment of arbitrator

A company having duly appointed an arbitrator has no power to revoke such appointment without the consent in writing under its common seal of every other company party to the agreement (*a*).

Umpire.

1477. Where two or more arbitrators are appointed, they must appoint an umpire, and if they fail so to do within seven days after the reference to them the Board of Trade may appoint (*b*).

Appointment of new umpire.

If any such umpire dies or becomes incapable or unfit, or for seven consecutive days fails to act before the matters referred are determined, the arbitrators, or failing them the Board of Trade, may appoint an umpire in his place (*c*).

Powers of new arbitrator or umpire.

1478. Every arbitrator or umpire appointed in the place of a preceding arbitrator or umpire has the same power and authority as his predecessor (*d*).

(*m*) *London, Chatham and Dover Rail. Co.* v. *South Eastern Rail. Co.* (1888), 40 Ch. D. 100, C. A.

(*n*) *Caledonian Rail. Co.* v. *Greenock and Wemyss Bay Rail. Co.* (1874), L. R. 2 Sc. & Div. 347; *Yool* v. *Great Western Rail. Co.* (1870), 22 L. T. 781.

(*o*) *Wolverhampton and Walsall Rail. Co.* v. *London and North-Western Rail. Co.* (1873), L. R. 16 Eq. 433.

(*p*) Railway Companies Arbitration Act, 1859 (22 & 23 Vict. c. 59), s. 5.

(*q*) *Ibid.*, ss. 6, 7.

(*r*) *Ibid.*, s. 8.

(*s*) *Ibid.*, s. 9.

(*t*) *Ibid.*, s. 10.

(*a*) *Ibid.*, s. 11.

(*b*) *Ibid.*, ss. 12, 13.

(*c*) *Ibid.*, ss. 14, 15.

(*d*) *Ibid.*, s. 16.

SECT. 7. **Arbitration.**

Matters referred to umpire.

1479. Where two or more arbitrators do not agree on their award within thirty days after reference is made to them, or within such other time as may be agreed on by the companies, all matters referred, upon which they have not agreed, stand referred to the umpire (*e*).

Evidence.

1480. The arbitrator, arbitrators, or umpire may require any company party to the reference to produce as evidence any document in its possession or power which the arbitrator, arbitrators, or umpire think necessary for determining the matters in question, and may examine witnesses on oath (*f*).

Procedure.

Except as otherwise agreed by the companies, the procedure in the reference is in the discretion of the arbitrator, arbitrators, or umpire (*g*), and they may proceed in the absence of any company which has had notice of any proceeding (*h*).

The award.

1481. Several awards may be made on different parts of the matters referred, each of which awards is binding as to the matters to which it extends (*i*).

Time for making award.

1482. An award in writing, made within thirty days after the matters in difference have been referred, or within such other time as may be agreed on by the companies, is binding and conclusive on all parties (*k*); but, unless otherwise agreed, the umpire may from time to time by writing under his hand extend the time for making the award, and an award made within such extended time is as valid and effectual as if made within the prescribed time (*l*).

Binding effect of award.

An award must be obeyed by all companies parties to the reference (*m*), and no award can be set aside for any irregularity or informality (*n*).

Costs.

1483. Except as otherwise agreed by the companies, the costs of and attending the arbitration and award are in the discretion of the arbitrator, arbitrators, or umpire (*o*). If and so far as that discretion is not exercised, such costs must be borne by the companies in equal shares, and in other respects each company must bear its own costs (*p*).

Differences referred to Railway and Canal Commissioners in lieu of arbitration.

1484. Any difference between railway companies, or between canal companies, or between a railway company and a canal company, which is required or authorised by the provisions of any general or special Act to be referred to arbitration, must, at the instance of

(*e*) Railway Companies Arbitration Act, 1859 (22 & 23 Vict. c. 59), s. 17.
(*f*) *Ibid.*, s. 18.
(*g*) *Ibid.*, s. 19.
(*h*) *Ibid.*, s. 20.
(*i*) *Ibid.*, s. 21.
(*k*) *Ibid.*, s. 22.
(*l*) *Ibid.*, s. 23.
(*m*) *Ibid.*, s. 25.
(*n*) *Ibid.*, s. 24. As to setting aside an award, see title ARBITRATION, Vol. I., pp. 476 *et seq.*
(*o*) Railway Companies Arbitration Act, 1859 (22 & 23 Vict. c. 59), s. 27.
(*p*) *Ibid.*, s. 28.

any company party to the difference, be referred to the Railway and Canal Commissioners (*q*) instead of to arbitration, provided the consent of the Commissioners is obtained (*r*); and, for this purpose, the provisions of any agreement confirmed or authorised by an Act are deemed provisions of such Act (*s*). Where, however, any arbitrator has been designated by name or by the name of his office, in any Act, or where a standing arbitrator has been appointed under any Act and the Commissioners are of opinion that the difference in question may more conveniently be referred to him, this power of compelling a reference to the Commissioners does not exist (*t*); and where an agreement containing an arbitration clause is made between two companies, under powers conferred upon them by a special Act which makes no provision for arbitration, one of the companies has no power, contrary to the desire of the other, to refer a difference arising under such agreement to the Railway and Canal Commissioners (*u*).

Part V.—Relations Between Railway Companies and the Public.

SECT. 1.—*The Company as Carrier.*

1485. The liability of a railway company as carrier of persons or goods is that of a stage coach proprietor and common carrier, and it is entitled to all the protection and privileges afforded by law to such persons (*a*). Liability.

(*q*) As to the jurisdiction of the Railway and Canal Commissioners, see p. 753, *post*.

(*r*) Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 8; see p. 754, *post*.

(*s*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 15. This provision alters the law as laid down in *R.* v. *Midland Rail. Co.* (1887), 19 Q. B. D. 540. The term "agreement" in the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 15, is not limited to specific agreements authorised by Act of Parliament, and all agreements resting for their authority on statutory powers under general Acts are within the provision; see *Great Western Rail. Co.* v. *Barry Rail. Co.* (1909), 13 Ry. & Can. Tr. Cas. 362.

(*t*) Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 8. This provision applies even though the arbitrator designated in an agreement scheduled to a special Act has since died (*Alexandra (Newport and South Wales) Docks and Rail. Co.* v. *Taff Vale Rail. Co.* (1906), 13 Ry. & Can. Tr. Cas. 1).

(*u*) *Great Western Rail. Co.* v. *Waterford and Limerick Rail. Co.* (1881), 17 Ch. D. 493, C. A.; and see note (*h*), p. 716, *ante*.

(*a*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 89; see title CARRIERS, Vol. IV., pp. 1 *et seq.* As to the statutory control of carriers' business, including such matters as reasonable facilities, cheap tickets, workmen's trains, through rates, maximum rates, and rebates, see title CARRIERS, Vol. IV., pp. 65 *et seq.*

SECT. 2. Right of Public to use Railway.

SECT. 2.—*Right of Public to Use Railway.*

Use of railway.

1486. Upon payment of the tolls (*b*) at the time lawfully demandable, all companies and persons are entitled to use the railway with properly constructed (*c*) engines and carriages (*d*). This right, however, is of little practical use, because the court will not grant an injunction restraining a company from preventing a person from using its railway, as such use cannot be had without serious danger to the public, unless the company by its own servants works the signals and points, and this the court cannot compel the company to do (*e*).

By private wagons.

A company cannot be compelled to haul upon its railway the loaded or unloaded wagons of traders, unless in circumstances where the provision of motive power is a reasonable facility (*f*) within the Railway and Canal Traffic Act, 1854 (*g*).

SECT. 3.—*Trespass on Railway.*

Penalty for trespass on railway.

1487. If any person wilfully trespasses upon any railway (*h*) and refuses to quit it upon request by any officer or agent of the company, such person or anyone aiding or assisting him (*i*) may be arrested

(*b*) For the meaning of toll, see p. 635, *ante*.

(*c*) See pp. 690 *et seq.*, *ante*.

(*d*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 92.

(*e*) *Powell Duffryn Steam Coal Co.* v. *Taff Vale Rail. Co.* (1874), 9 Ch. App. 331, C. A.; see *Woodruff* v. *Brecon and Merthyr Tydfil Junction Rail. Co.* (1884), 28 Ch. D. 190, C. A. It is clear that in 1845, when this power was given to the public, the legislature contemplated that the public would use railways like highways, running their own engines and carriages upon them. This, however, was soon seen to be impracticable unless the company's servants worked the points and signals, and there was no power to compel this to be done. Hence, as in the first-mentioned case, the court is powerless to enforce the right given to the public by statute.

(*f*) As to reasonable facilities, see title CARRIERS, Vol. IV., pp. 65 *et seq.* As to the construction of private sidings and branch railways, see *ibid.*, p. 68; and see pp. 671 *et seq.*, *ante*.

(*g*) *Spillers and Bakers, Ltd.* v. *Great Western Railway*, [1911] 1 K. B. 386, C. A. This case decided that when a railway company fails to provide sufficient wagons for the carriage of a trader's goods, such trader may provide his own wagons, and then the company may be compelled to haul such wagons as a "reasonable facility"; but a company is under no general obligation to haul the wagons of a trader on its railway, on tender of the tolls applicable to the carriage of goods in such wagons or otherwise. The Railway and Canal Commissioners will consider a demand for reasonable facilities with reference to the circumstances of each case, and will not declare an abstract right. They will refuse to order that a trader shall be entitled as a reasonable facility to put such wagons of his own on a company's railway, irrespective of the number of wagons which the company tenders for the accommodation of his traffic (*Watson (John), Ltd.* v. *Caledonian Rail. Co., Glasgow and South Western Rail. Co. and North British Rail. Co., Polquhairn Coal Co., Ltd.* v. *Glasgow and South Western Rail. Co.* (1911), 14 Ry. & Can. Tr. Cas. 185).

(*h*) Or any station, works, or premises connected with the railway (Railway Regulation Act, 1840 (3 & 4 Vict. c. 97), s. 16).

(*i*) In *Roberts* v. *Preston* (1860), 9 C. B. (N. S.) 208, the defendant was the owner of a wall close to the railway, and he ordered men to repair the wall by entering on the railway and putting materials thereon. The men

and detained until he can be brought before a justice of the peace, and on conviction before the justice, is liable to a fine not exceeding £5 and to be imprisoned in default of payment (*k*).

Right to exclude trespassers.

1488. The right of a railway company is just as absolute in the first instance as that of any other landowner to forbid unauthorised persons to come or be upon its land; and if a man not using or desiring to use the railway enters the company's premises and stays on the premises after being requested to leave he commits a wilful trespass (*l*). A company may exclude from a station all persons other than those who use or are desirous of using the railway (*m*); and even though an intending passenger has a right to enter a company's station, a person conveying or accompanying such person to a railway has not necessarily any right to enter such station (*n*).

Licensees plying for hire.

Where a company licenses one person to ply for hire upon or otherwise use its premises, no other person carrying on a similar business has any right without licence to so ply for hire upon or use the company's premises, even though the exclusive licence to the first person amounts to an undue preference (*o*).

were requested to quit, but the defendant told the men to remain, and it was held that he was properly convicted.

(*k*) Railway Regulation Act, 1840 (3 & 4 Vict. c. 97), s. 16. As to offences, generally, see pp. 734, 735, *post*.

(*l*) *Perth General Station Committee* v. *Ross*, [1897] A. C. 479; see *per* Lord MACNAGHTEN, at p. 492; and see, generally, title TRESPASS.

(*m*) *Perth General Station Committee* v. *Ross, supra*; *Hole* v. *Digby* (1879), 27 W. R. 884.

(*n*) *Barker* v. *Midland Rail. Co.* (1856), 18 C. B. 46. It was held in this case that the plaintiff, an omnibus proprietor, had no right to enter station premises against the company's wish merely because he had persons on his vehicle who desired to travel; and that an action would not lie on the part of the plaintiff for any breach by the company of a duty which it owed to the persons desiring to travel; see *ibid.*, *per* WILLES, J., at pp. 58, 59; approved by the House of Lords in *Perth General Station Committee* v. *Ross, supra*.

(*o*) *Hole* v. *Digby, supra*; *Re Beadell* v. *Eastern Counties Rail. Co.* (1857), 2 C. B. (N. S.), 509. In *Foulger* v. *Steadman* (1872), L. R. 8 Q. B. 65, it was held that when only certain cab-owners were privileged to ply for hire within a station, a non-privileged cabman refusing to quit on request was guilty of a wilful trespass. Where a cabman who brings a person to a station has concluded his business he must, on request, leave the station, or else he is a trespasser and may be removed by force (*Wood* v. *North British Rail. Co.* (1899), 2 F. (Ct. of Sess.) 1). But where it is shown that an arrangement in favour of one cab proprietor causes inconvenience to the public, the Railway and Canal Commissioners may interfere on the ground of undue preference of the favoured proprietor (*Re Marriott* v. *London and South Western Rail. Co.* (1857), 1 C. B. (N. S.) 499; and see title CARRIERS, Vol. IV., p. 79). The system of privileged cabs at London stations was abolished by the London Cab and Stage Carriage Act, 1907 (7 Edw. 7, c. 55), s. 2, which provides that a company shall not show any preference to any cab in respect of admission to such a station (the term "station" including the precincts and the approaches thereto), and that where a charge is made for admission it shall not exceed such sum as may be allowed by the Home Secretary. The Home Secretary has power to suspend the operation of this provision where he is satisfied that otherwise it is not possible to secure a sufficient supply of cabs to the station. Nothing in the provision affects the liability to comply with the company's regulations for maintaining order and controlling the traffic, for limiting the number of cabs admitted, for excluding unfit cabs or drivers, or for expelling drivers guilty of misconduct. As to cabs plying for hire, see,

SECT. 3. Trespass on Railway.

Ouster of jurisdiction of justices.

1489. When a person is charged with wilful trespass before justices, a *bonâ fide* claim by that person of a right to be upon the premises ousts the jurisdiction of the justices (*p*), provided such claim is one which, upon the evidence, is capable of existing at law (*a*). If the claim of right is impossible at law the justices have jurisdiction (*b*); but a mere belief in a right, althought *bonâ fide*, is not sufficient to oust jurisdiction (*c*).

There is nothing in law to prevent a railway being also a highway, and so there may be a public right of way over a railway (*d*). Where a public right of way existed before a railway was made, such right is not extinguished merely by the making of the railway; therefore justices have no jurisdiction where a person charged before them with trespass sets up a *bonâ fide* claim to have been on the railway in exercise of such right (*e*).

Wilful intent.

1490. A person cannot be convicted of obstructing the line unless there is an intention to obstruct (*f*).

further, title STREET AND AERIAL TRAFFIC. As to trespass generally, see title TRESPASS. As to the liability of cab-owners for the wilful neglect or default of cab-drivers, see titles MASTER AND SERVANT, Vol. XX., pp. 249, 254, note (*n*); NEGLIGENCE, Vol. XXI., pp. 415, 434.

(*p*) See title MAGISTRATES, Vol. XXI., p. 597; and see title TRESPASS.

(*a*) *Wilkinson* v. *Goffin* (1876), 33 L. T. 824; *Cole* v. *Miles* (1888), 60 L. T. 145; *Arnold* v. *Morgan*, [1911] 2 K. B. 314; *Foulger* v. *Steadman* (1872), L. R. 8 Q. B. 65. But where a cabman was charged with trespassing and refusing to quit and he raised the defence that the place which he was asked to quit was a public road and not the private road of the company, it was held that the justices had jurisdiction to determine the title to the land (*London, Brighton and South Coast Rail. Co.* v. *Fairbrother* (1900), 16 T. L. R. 167).

(*b*) *Arnold* v. *Morgan*, *supra*.

(*c*) *Foulger* v. *Steadman*, *supra*. In *Jones* v. *Taylor* (1858), 1 E. & E. 20, a wagon was on the railway by permission of a railway company; the defendant had been forbidden by the company to come upon its premises, but acting under a contract with the owner of the wagon he came on to the railway to repair the wagon and refused to leave when requested. On the defendant being charged with wilful trespass the justices refused to convict. The court refused to interfere with the justices' decision, Lord CAMPBELL saying, "If he was a trespasser the magistrates were not bound to find he was a wilful trespasser." *Jones* v. *Taylor*, *supra*, has, however, been doubted in *Foulger* v. *Steadman*, *supra*, and in *Perth General Station Committee* v. *Ross*, [1897] A. C. 479.

(*d*) *Arnold* v. *Morgan*, *supra*; *A.-G.* v. *London and South Western Rail. Co.* (1905), 69 J. P. 110; and see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 37. Where a railway crossed a highway by a level crossing, and the defendant company had power to lay pipes under highways and break up soil for such purpose but to convey wires "directly but not otherwise across any railway," it was held that the defendants had no power to disturb the soil of the railway at the crossing (*South Eastern Rail. Co.* v. *European and American Electric Printing Telegraph Co.* (1854), 9 Exch. 363).

(*e*) *Cole* v. *Miles* (1888), *supra*; *Arnold* v. *Morgan*, *supra*. In Scotland, however, it has been held to be no defence to a summons for crossing a railway where there was no authorised crossing that, before the railway was made, there was a public right of way at that place which has never been extinguished (*Caledonian Rail. Co.* v. *Walmsley*, [1907] S. C. 1047). A company cannot dedicate a right of way over a railway, nor can it re-dedicate a right of way extinguished by its special Act (*Great Central Rail. Co.* v. *Balby-with-Hexthorpe Urban District Council*, *A.-G.* v. *Great Central Rail. Co.*, [1912] 2 Ch. 110).

(*f*) Under a company's special Act it was an offence to obstruct the

SECT. 3. Trespass on Railway.

Penalty for wrongfully crossing the railway.

1491. Any person who is or passes upon any railway (*g*), except for the purpose of crossing it at an authorised crossing (*h*), after having once (*i*) received warning by the company, or a servant of the company, not to go or pass thereon, is liable on summary conviction to a fine not exceeding 40*s.* for every such offence (*k*).

Duty to take care towards persons habitually crossing the line.

1492. A company owes no duty to a person who is upon its railway without right and without invitation express or implied, and is therefore under no obligation to warn such person of danger (*l*). If, however, a company allows persons habitually to cross its railway at a certain point, it must use reasonable care in passing over that point not to injure such persons (*m*).

Right of distress.

1493. A railway company has the right to distrain an engine damage feasant (*n*) which is found trespassing on its railway (*o*).

SECT. 4.—*Injury in Exercise of Powers.*

SUB-SECT. 1.—*In General.*

Liability for compensation.

1494. Where a person suffers injury through the injurious affection of his land or otherwise, by the exercise by a railway company of the powers conferred on it by Act of Parliament, no compensation is payable by the company in respect of such injury unless Parliament has given the injured person the right to such compensation (*p*).

line: the appellant, who had a right to cross the railway with a cart, in doing so created an obstruction by the cart breaking down through his negligent management and blocking the line; but it was held that he could not be convicted of the offence (*Batting* v. *Bristol and Exeter Rail. Co.* (1860), 3 L. T. 665).

(*g*) "Railway" in the Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 23, it is submitted, clearly means the line and does not include stations or other works.

(*h*) As to level crossings, generally, see pp. 660 *et seq.*, *ante*. As to the right of the owner of severed lands to cross the line, see p. 669, *ante*. As to when such an owner becomes a trespasser, see *ibid.*, note (*x*). As to the equipment and working of level crossings, and precautionary measures to be adopted in connection therewith, see pp. 660, 694, *ante*.

(*i*) The word "once" was inserted in this section by the Regulation of Railways Act, 1871 (34 & 35 Vict. c. 78), s. 14.

(*k*) Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 23.

(*l*) *Dublin, Wicklow and Wexford Rail. Co.* v. *Slattery* (1878), 3 App. Cas. 1155, *per* Lord SELBORNE, at p. 1187; *Harrison* v. *North Eastern Rail. Co.* (1874), 29 L. T. 844; *Wilby* v. *Midland Rail. Co.* (1876), 35 L. T. 244; and see title NEGLIGENCE, Vol. XXI., pp. 394, 449, 450.

(*m*) See cases cited in note (*c*), *supra*; *Barratt* v. *Midland Rail. Co.* (1858), 1 F. & F. 361; compare *Lowery* v. *Walker*, [1911] A. C. 10. As to the liability of railway companies for accidents at level crossings, see pp. 662, 696, *ante*; and see title CARRIERS, Vol. IV., p. 49.

(*n*) As to the nature of this remedy, see title ANIMALS, Vol. I., pp. 378 *et seq.*

(*o*) *Ambergate, Nottingham and Boston and Eastern Junction Rail. Co.* v. *Midland Rail. Co.* (1853), 2 E. & B. 793.

(*p*) *Hammersmith, etc. Rail. Co.* v. *Brand* (1869), L. R. 4 H. L. 171. As to when a person has a right to compensation, see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 31 *et seq.*; and as to the effect of the absence of compensation provisions, in relation to liability for nuisance, see title NUISANCE, Vol. XXI., pp. 517, 518.

SECT. 4
Injury in Exercise of Powers.

Liability for nuisance.

A railway company which is given power by statute to do an act which would otherwise amount to an interference with the rights of the public is not liable to indictment for a public nuisance (*q*); nor does an action lie against a railway company for doing an act which is authorised by statute, but which would be a nuisance if not so authorised (*r*).

Manner of exercise of statutory powers.

Where a company has power to do such an act it is not bound to do it so as to do as little injury as possible (*a*); but it is bound to exercise its powers with moderation and discretion, in a proper manner and without negligence (*b*), to use all reasonable precautions not to do injury to any persons (*c*), and, in constructing authorised works, to do as little damage as can be (*d*), and to construct them so as not to cause a public nuisance, unless such nuisance is the necessary consequence of such works (*e*).

Proper precautions during construction.

1495. If, by taking proper and reasonable precautions in making a railway, the flooding of land can be avoided, the company is liable if lands are flooded because of the absence of such precautions (*f*); but it is not liable for floods caused by the carrying out of its authorised works without negligence (*g*). So in carrying out works

(*q*) *R.* v. *Pease* (1832), 4 B. & Ad. 30; and see the numerous authorities cited in title NUISANCE, Vol. XXI., pp. 519, note (*a*).

(*r*) *London and Brighton Rail. Co.* v. *Truman* (1885), 11 App. Cas. 45; *Vaughan* v. *Taff Vale Rail. Co.* (1860), 5 H. & N. 679, Ex. Ch.; see *East Freemantle Corporation* v. *Annois*, [1902] A. C. 213, P. C.

(*a*) *London and Brighton Rail. Co.* v. *Truman*, *supra*. *E.g.*, a railway company is not bound to choose a site for a cattle yard which would be more convenient for other persons than the site the company has chosen (*ibid.*); and compare note (*d*), p. 653, *ante*.

(*b*) *Biscoe* v. *Great Eastern Rail. Co.* (1873), L. R. 16 Eq. 636; *Geddis* v. *Bann Reservoir* (*Proprietors*) (1878), 3 App. Cas. 430, *per* Lord BLACKBURN, at p. 455; see *Roberts* v. *Charing Cross, Euston, and Hampstead Rail. Co.* (1902), 87 L. T. 732; and see titles COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 44; NEGLIGENCE, Vol. XXI., p. 467; NUISANCE, Vol. XXI., pp. 520, 521. As to negligence in the performance of statutory powers, generally, see title NEGLIGENCE, Vol. XXI., pp. 422 *et seq.* As to the exercise of statutory powers as a defence to a claim for negligence, see *ibid.*, pp. 464 *et seq.*

(*c*) *Norton* v. *London and North Western Rail. Co.* (1878), 9 Ch. D. 623; affirmed (1879), 13 Ch. D. 268, C. A. Statutory rights must be exercised reasonably so as to do as little injury as possible; *Southwark and Vauxhall Water Co.* v. *Wandsworth Board of Works*, [1898] 2 Ch. 603, C. A., *per* COLLINS, L.J., at p. 611; and see title NUISANCE, Vol. XXI., pp. 521, 523. In *Norton* v. *London and North Western Rail. Co.*, *supra*, it was held in the Chancery Division that a railway company is not entitled to erect a hoarding on its own land in order to prevent the acquisition of rights of light over the railway. This decision was not considered by the Court of Appeal.

(*d*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 80), s. 16: see p. 653, *ante*.

(*e*) *A.-G.* v. *Furness Rail. Co.* (1878), 38 L. T. 555.

(*f*) *Lawrence* v. *Great Northern Rail. Co.* (1851), 16 Q. B. 643; see *Brine* v. *Great Western Rail. Co.* (1862), 10 W. R. 341; *A.-G.* v. *Furness Rail. Co.*, *supra*.

(*g*) *Boughton* v. *Midland Great Western Railway of Ireland Co.* (1873), 7 I. R. C. L. 169. Nor is a company liable for floods caused by reasonable means taken to protect its own property from anticipated damage by flooding (*Maxby Drainage Board* v. *Great Northern Rail. Co.* (1912), 76 J. P. 236). As to authorised works, see pp. 653, 654, *ante*.

near houses, proper precautions must be taken to secure the safety of such houses (*h*); and if, in the construction of an authorised work, two methods of construction are reasonably open to the company, one of which will do injury while the other will be harmless, the company may be restrained from adopting the former course (*i*).

Alternative methods of execution.

1496. With regard to temporary annoyance caused to persons living near works which are in the act of being constructed, the company is not liable provided it conducts the necessary operations reasonably; but if it conducts them unreasonably it may be restrained by injunction from doing so (*k*).

Liability for temporary annoyance.

1497. The liabilities and obligations of a company with regard to the authorised use of lands taken under agreement are the same as those of the company with regard to the authorised use of lands taken under compulsory powers (*l*).

Liability with regard to use of lands.

1498. In working the railway under its powers the company is not responsible for annoyance caused by vibration, noise, or smoke (*m*); but it is not entitled to carry on its business so as to cause such annoyance if, by taking reasonable precautions, the annoyance would be avoided (*n*).

Liability for vibration, noise or smoke.

1499. As a company is under no obligation to screen its railway from view, unless required to do so by the Board of Trade (*o*), it is therefore not liable for injuries caused by horses taking fright at engines or trains (*p*).

Liability for damage caused by frightened horses.

(*h*) *Biscoe* v. *Great Eastern Rail. Co.* (1873), L. R. 16 Eq. 636; *Gillespie* v. *Lucas and Aird* (1893), 20 R. (Ct. of Sess.) 1035.

(*i*) *Coats* v. *Clarence Rail. Co.* (1830), 1 Russ. & M. 181 (where a company, which had power to make a bridge over a mill race and proposed to make a bridge of small span which would do harm, whereas a large span would avoid injury, was restrained from making the small span); and see *Manser* v. *Northern and Eastern Counties Rail. Co.* (1841), 2 Ry. & Can. Cas. 380; and see p. 653, *ante*.

(*k*) Where the company carried on the work of construction throughout the night as well as by day so that plaintiff's house was rendered uninhabitable, an injunction was granted against such night work as not being reasonably necessary (*Roberts* v. *Charing Cross, Euston, and Hampstead Rail. Co.* (1902), 87 L. T. 732); but where such night work was shown to be reasonably necessary an injunction was refused (*Ash* v. *Great Northern, Piccadilly and Brompton Rail. Co.* (1903), 67 J. P. 417).

(*l*) *London and Brighton Rail. Co.* v. *Truman* (1885), 11 App. Cas. 45; and see titles COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 24—26, 32, 48; NEGLIGENCE, Vol. XXI., pp. 465, 466.

(*m*) *Hammersmith etc. Rail. Co.* v. *Brand* (1869), L. R. 4 H. L. 171; and see title NUISANCE, Vol. XXI., p. 519, note (*a*). This is so even where the property of the person complaining has been depreciated in value by such working, provided no land of such person has been taken (*ibid.*; *Vaughan* v. *Taff Vale Rail. Co.* (1860), 5 H. & N. 679, Ex. Ch.). As to the liability of a railway company as to the provision of engines, see p. 690, *ante*. As to the liability for nuisance arising from smoke from engines, see title NUISANCE, Vol. XXI., pp. 519, note (*a*), 545.

(*n*) *Smith* v. *Midland Rail. Co. and Lancashire and Yorkshire Rail. Co.* (1877), 37 L. T. 224 (where an injunction was granted against the continuation of a nuisance by smoke and vapour from engine-cleaning sheds erected by a company on its own land near the plaintiff's house).

(*o*) See p. 687, *ante*.

(*p*) *Simkin* v. *London and North Western Rail. Co.* (1888), 21 Q. B. D.

SECT. 4. SUB-SECT. 2.—*Fires Caused by Locomotives* (*q*).

Injury in Exercise of Powers.

Sparks from engines.

1500. A railway company has generally authority to use steam engines on its railway (*r*). Hence, if an engine is constructed with the precautions which science suggests against fire, and is used without negligence, the company is not responsible for any damage which may be done by sparks (*s*).

Presumption of negligence.

The fact that sparks from an engine caused a fire appears to raise a presumption of negligence on the part of the company (*t*), but it must always be a question for the jury whether on the evidence before them the company was guilty of negligence in the construction or use of the engine or otherwise in relation to the circumstances causing the fire (*a*).

Use of preventive apparatus.

1501. In the construction of an engine the company is bound to use all the discoveries which science has put within its reach in order to avoid doing harm, provided they are such as it is reasonable to require the company to adopt, having proper regard to the likelihood of the danger and to the cost and convenience of the remedy (*b*); but it is not negligence on the part of a company

453, C. A. (where the plaintiff was injured, while leaving a railway station in a carriage, through the horses being frightened by an engine blowing off steam, and it was held that as no negligence could be proved, and as there was no statutory obligation to erect a screen, the company was not liable for damages). But the failure to erect a screen if such screen is reasonably necessary to protect persons from injury while passing at places where the company invites them to pass may be negligence (*Atherton* v. *London and North Western Rail. Co.* (1905), 21 T. L. R. 671, C. A.).

(*q*) As to the power of a railway company to enter on land for the purpose of preventing or extinguishing fires caused by sparks from engines, see titles AGRICULTURE, Vol. I., pp. 279, 280; COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 155.

(*r*) As to the construction of engines, see p. 690, *ante*.

(*s*) *Vaughan* v. *Taff Vale Rail. Co.* (1860), 5 H. & N. 679, Ex. Ch., approved in *Hammersmith etc. Rail. Co.* v. *Brand* (1869), L. R. 4 H. L. 171; *Smith* v. *London and South Western Rail. Co.* (1870), L. R. 6 C. P. 14, Ex. Ch. But where Parliament gave a company power to make a railway, but gave it no power to use steam engines, and injury was done by sparks from an engine, it was held that, as the company had no express authority to use such an engine, it was under its common law liability and was liable for the nuisance irrespective of negligence (*Jones* v. *Festiniog Rail. Co.* (1868), L. R. 3 Q. B. 733). As to the common law liability, and the liability of persons bringing engines on to a highway, see *Powell* v. *Fall* (1880), 5 Q. B. D. 597, C. A.; titles AGRICULTURE, Vol. I., pp. 278, 279; HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 151 *et seq.*; NEGLIGENCE, Vol. XXI., pp. 403—405; NUISANCE, Vol. XXI., p. 522.

(*t*) *Piggot* v. *Eastern Counties Rail. Co.* (1846), 3 C. B. 229. As to the burden of proof of negligence in such a case, see title NEGLIGENCE, Vol. XXI., p. 437. As to the function of the jury, see *ibid.*, pp. 441 *et seq.*

(*a*) See *Aldridge* v. *Great Western Rail. Co.* (1841), 3 Man. & G. 515; *Longman* v. *Grand Junction Canal Co.* (1863), 3 F. & F. 736; and see the cases cited in notes (*s*), (*t*), *supra*; and see note (*c*), p. 727, *post*.

(*b*) This paragraph is founded on the direction of WILLIAMS, J., to the jury in *Fremantle* v. *London and North Western Rail. Co.* (1860), 2 F. & F. 337, 340, approved of on a motion for a new trial by the Court of Common Pleas (1861), 10 C. B. (N. S.) 89, also approved of in *Dimmock* v. *North Staffordshire Rail. Co.* (1866), 4 F. & F. 1058, and in *Groom* v. *Great Western Rail. Co.* (1892), 8 T. L. R. 253; and see title NEGLIGENCE, Vol. XXI., pp. 364, 404, 405, 467.

if it refuses to use an apparatus the efficiency of which is open to *bonâ fide* doubt (*c*).

Fires from sparks alighting on inflammable material.

1502. Although there may be no negligence in the working of the engine or in its construction, a company may be liable for damage done by fire caused by sparks, if by leaving inflammable material close to the line, or otherwise, its negligence caused the damage (*d*).

Damage to agricultural land or crops.

1503. When damage is caused to agricultural land or to agricultural crops (*e*) by fire arising from sparks or cinders emitted from an engine on a railway, the fact that the engine was used under statutory powers does not affect the liability of the company in an action for such damage (*f*). Where such damage is caused by an engine used by one company on a railway worked by another company (*g*) either company is liable; but the latter company is entitled to be indemnified in respect of its liability by the company using the engine (*h*). These provisions, however, only apply where the claim for damage in the action does not exceed the sum of £100 (*i*), and where written notice of claim has been sent to the company within seven days of the occurrence of the damage and particulars of the damage in writing within fourteen days (*k*).

SECT. 5.—*Liability in respect of Dangerous Property.*

Responsibility for dangerous condition of premises or of things on premises.

1504. When a railway company expressly or impliedly allows persons to come upon its premises, it may be responsible for injuries suffered by such persons through the dangerous condition of the premises (*l*); and when a company places upon such premises any machine of such a nature as to be attractive to children and dangerous as a plaything, the company may be responsible for injuries caused to children through their playing with such machine if the children are upon the company's premises with its tacit

(*c*) *Shaftesbury* (*Earl*) v. *London and South Western Rail. Co.* (1895), 11 T. L. R. 269, C. A.; *Groom* v. *Great Western Rail. Co.* (1892), 8 T. L. R. 253. Evidence has been given in these and other cases that a "spark arrester," used widely at one time by some companies, is in fact useless, or worse; see *Port-Glasgow and Newark Sailcloth Co.* v. *Caledonian Rail. Co.* (1893), 20 Rettie (House of Lords), 35.

(*d*) *Smith* v. *London and South Western Rail. Co.* (1870), L. R. 6 C. P. 14, Ex. Ch.; and see titles NEGLIGENCE, Vol. XXI., p. 404; NUISANCE, Vol. XXI., pp. 520—522.

(*e*) For the meaning of the terms "agricultural land" and "agricultural crops," see title AGRICULTURE, Vol. I., p. 279. Agricultural land under the management of the Commissioners of Works and agricultural crops thereon are included (Railway Fires Act, 1905 (5 Edw. 7, c. 11), s. 4).

(*f*) *Ibid.*, s. 1 (1).

(*g*) As to working agreements, see pp. 703 *et seq.*, *ante*.

(*h*) Railway Fires Act, 1905 (5 Edw. 7, c. 11), s. 1 (2).

(*i*) *Ibid.*, s. 1 (3).

(*k*) *Ibid.*, s. 3. The sending of these particulars is a condition precedent to the right to this statutory remedy, and particulars are not sufficient unless they contain a statement of the amount of the claim in money (*Martin* v. *Great Eastern Rail. Co.*, [1912] 2 K. B. 406).

(*l*) See title NUISANCE, Vol. XXI., pp. 515 *et seq.*

SECT. 5. Liability in respect of Dangerous Property.

permission and are unable by reason of their age to take care of themselves (*m*). But where such tacit permission to play is confined to a particular spot, there is no duty on the company to fence off such spot from the rest of its land, and the company is not liable for any injury caused to children who have trespassed on such adjoining land (*n*).

SECT. 6.—*Bye-Laws* (*o*).

Approval by Board of Trade.

1505. Whenever a railway company has power to make bye-laws (*p*), and to impose penalties for the enforcement thereof upon persons other than servants of the company (*q*), a copy of any such bye-law, certified as the Board of Trade may direct, must be laid before the Board, and the bye-law can have no force or effect until two months have passed from that time, unless the Board previously signify its approval thereof (*r*). The approval of the Board of Trade to a bye-law in no way affects the authority of the courts to decide the question of its validity or invalidity (*s*).

Disallowance by Board of Trade.

1506. The Board of Trade has discretion, either before or after the expiration of such two months, to notify the company that it disallows any such bye-law; and thereupon the bye-law can have no force or effect, or, if it is in force at the time of such disallowance, it thenceforth ceases to have any force or effect except in so far as any penalty may have been incurred thereunder (*t*).

Proof of bye-laws.

1507. Any such bye-law may be proved in a court of justice by the production of a copy thereof proved to be an examined copy or extract, or purporting to be signed and certified as a true copy by the officer who has charge of the original (*a*).

(*m*) *Cooke* v. *Midland Great Western Railway of Ireland*, [1909] A. C. 229. As to the general duty to take care, see title NEGLIGENCE, Vol. XXI., pp. 370 *et seq.* As to the increase of the degree of care required where children are concerned, see *ibid.*, p. 373, note (*s*). As to the respective degrees of care required in the cases of invitees, bare licensees, and trespassers, see *ibid.*, pp. 387, 391, 394, the degree of liability being commensurate with the nature or absence of the invitation; see *ibid.*, p. 390. As to contributory negligence on the part of children, see *ibid.*, p. 453. As to the obligation of a company to fence at level crossings, see pp. 660, 662, *ante*. As to the duty to fence the line from adjoining lands, see p. 670, *ante*.

(*n*) *Jenkins* v. *Great Western Railway*, [1912] 1 K. B. 525, C. A.

(*o*) As to bye-laws, generally, see also titles CORPORATIONS, Vol. VIII., pp. 336 *et seq.*; PUBLIC HEALTH AND LOCAL ADMINISTRATION, pp. 388 *et seq.*, *ante*.

(*p*) Including in the term "bye-laws" rules or orders or regulations for which a penalty is to be enforced (Railway Regulation Act, 1840 (3 & 4 Vict. c. 97), s. 7). As to penalties, see pp. 734 *et seq.*, *post*.

(*q*) As to bye-laws affecting servants of the company, see p. 731, *post*.

(*r*) Railway Regulation Act, 1840 (3 & 4 Vict. c. 97), ss. 7, 8.

(*s*) *Kruse* v. *Johnson*, [1898] 2 Q. B. 91; *R.* v. *Wood* (1855), 5 E. & B. 49.

(*t*) Railway Regulation Act, 1840 (3 & 4 Vict. c. 97), s. 9.

(*a*) Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 14. It was held in *Motteram* v. *Eastern Counties Rail. Co.* (1859), 7 C. B. (N. S.) 58, that railway bye-laws are "documents of a public nature" within this provision; and see title EVIDENCE, Vol. XIII., p. 526.

Regulations for use of railway and premises.

1508. For the purpose of regulating the use of the railway, the company has power to make regulations (1), as to the mode by which, and the speed at which, carriages (*b*) using the railway are to be moved, (2) as to the times of the arrival and departure of any such carriages, (3) as to the loading and unloading of such carriages and the weights they may carry, (4) as to the receipt and delivery of goods conveyed on such carriages, (5) for preventing the smoking of tobacco and the commission of any other nuisance in such carriages or on any premises of the company, and (6) generally for regulating the travelling upon or using and working of the railway (*c*). A company may also make provision for maintaining order in, and regulating the use of, its stations or the approaches thereto (*d*).

Enforcement of regulations by bye-laws.

1509. The company may make bye-laws to enforce such regulations and may from time to time repeal or alter such bye-laws and make others, provided they are not repugnant to the law of England or to the provisions of the Railways Clauses Consolidation Act, 1845 (*e*), or the special Act of the company (*f*).

Sealing and publication of bye-laws.

1510. Bye-laws, to be effective, must be sealed with the common seal of the company (*g*), and must be painted on boards, or printed on paper and pasted on boards, and hung up or affixed and continued in a conspicuous place in every station or wharf of the company (according to their subject-matter) in such manner as to give public notice thereof to persons affected thereby; and no penalty imposed by any such bye-law can be recovered unless the bye-law is published in this manner (*h*). In order to prove publication it is

(*b*) The carriages referred to are either the carriages of the company or those of persons using their own trains; see *Dyson* v. *London and North Western Rail. Co.* (1881), 7 Q. B. D. 32, *per* LINDLEY, J., at p. 36. It is to be observed, however, that in *Saunders* v. *South Eastern Rail. Co.* (1880), 5 Q. B. D. 456, COCKBURN, C.J., at p. 459, expressed an opinion that the carriages referred to were only those of other persons using the railway, as it was expected in 1845 that other persons would; see p. 720, *ante*.

(*c*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 108. No such regulations, however, may authorise the closing of the railway (except for necessary repairs or other sufficient cause), or the preventing of the passage thereon of engines and carriages at reasonable times (*ibid.*). As to bye-laws affecting passengers, see title CARRIERS, Vol. IV., pp. 61—65.

(*d*) Regulation of Railways Act, 1889 (52 & 53 Vict. c. 57), s. 7.

(*e*) 8 & 9 Vict. c. 20. A bye-law is repugnant to the provisions of this Act when it professes to make something punishable when done without intent to defraud, which thing the Act makes punishable only when the intent exists (*Dearden* v. *Townsend* (1865), L. R. 1 Q. B. 10, followed and approved in *London and Brighton Rail. Co.* v. *Watson* (1878), 3 C. P. D. 429).

(*f*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 109. No bye-law is valid which militates against or is repugnant to the powers given to the Postmaster-General by, and the other provisions of, the Railways (Conveyance of Mails) Act, 1838 (1 & 2 Vict. c. 98) (*ibid.*, s. 11). As to conveyance of mails, see p. 700, *ante*.

(*g*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 109.

(*h*) *Ibid.*, s. 110. As often as such printed bye-laws become obliterated or destroyed the company is bound to renew them (*ibid.*). To pull down or injure any such board or to obliterate any of the words thereon is an offence (*ibid.*, s. 144; see p. 688, *ante*). When a person is charged with an offence

SECT. 6. **Bye-Laws.**

sufficient to prove that a painted board or printed paper containing a copy of such bye-laws was affixed and continued and if necessary replaced in the manner prescribed (*i*).

When bye-laws effective.

Such bye-laws when confirmed by the Board of Trade and so published are binding upon, and must be observed by, all parties (*k*).

Penalty for breach of bye-laws.

1511. Any person offending against a bye-law is liable to forfeit as a penalty for every offence a sum not exceeding £5; and if the infraction or non-observance of the bye-law is attended with danger or annoyance to the public, or hindrance to the company in the lawful use of the railway, the company may, without prejudice to any penalty, summarily interfere to obviate or remove such danger, annoyance or hindrance (*l*).

Bye-laws regulating traffic on steam vessels.

1512. A railway company which has power to use steam vessels may make bye-laws regulating the traffic on such vessels with regard to either passengers or goods. Each bye-law must be sanctioned and published, and may be enforced in the same manner as bye-laws relating to passengers or goods traffic upon the company's railway (*m*).

Bye-laws relating to explosives.

1513. Every railway company which carries or intends to carry explosives must make bye-laws, with the sanction of the Board of Trade, for regulating the conveyance, loading and unloading of such explosives upon its railway (*n*).

Part VI.—Railway Companies and Their Servants.

SECT. 1.—*Liability for Injury to Servants.*

Liability for personal injury.

1514. The liability of a railway company for personal injuries to its servants is in general the same as that of other employers (*o*). Its liability under the Employers' Liability Act, 1880 (*p*), however, is wider than that of other employers in that it is liable for the

against any such bye-law it is not necessary for the company to prove that a copy of such bye-law is posted at every station on the company's railway, it is sufficient if the company prove that a copy is posted at the stations at which the defendant entered and left the train (*Motteram* v. *Eastern Counties Rail. Co.* (1859), 7 C. B. (N. S.) 58).

(*i*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 111.

(*k*) *I.e.*, by the company as well as by an individual. To avail itself of a bye-law a company must keep strictly within its provisions (*Jennings* v. *Great Northern Rail. Co.* (1865), L. R. 1 Q. B. 7).

(*l*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 109.

(*m*) Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 32; and as to offences, see pp. 734 *et seq.*, *post.*

(*n*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 35; see title EXPLOSIVES, Vol. XIV., p. 385; and see p. 787, *post.*

(*o*) See title MASTER AND SERVANT, Vol. XX., pp. 118 *et seq.*, 128 *et seq.* As to notices to the Board of Trade of accidents to servants and inquiries into the causes of such accidents, see title CORONERS, Vol. VIII., p. 244; and see pp. 747 *et seq.*, *post.*

(*p*) 43 & 44 Vict. c. 42.

negligence of any person in its service who has the charge or control of any signal, points, locomotive, or train upon a railway (*q*).

SECT. 1. Liability for Injury to Servants.

SECT. 2.—*Bye-laws Regulating Servants' Conduct.*

1515. A railway company has power to make bye-laws for regulating the conduct of its officers and servants (*r*); and such bye-laws must be sealed with the common seal of the company and a copy thereof given to every officer and servant affected thereby (*a*). Making and sealing.

Reasonable penalties, not exceeding £5 for any one offence, may be imposed for offences against such bye-laws (*b*). Penalties.

Such bye-laws may be proved by the production of a copy thereof sealed with the common seal of the company (*c*). Proof.

SECT. 3.—*Regulation of Hours of Work.*

1516. Every railway company must make periodical returns to the Board of Trade as to the persons in the employment of the company whose duty involves the safety of trains or passengers, and who are employed for more than such number of hours at a time as may be from time to time fixed by the Board (*d*). Periodical returns as to servants and hours of employment.

The Board has power from time to time to give directions as to the form and contents of such returns and the intervals at which they must be made (*e*).

1517. If it is represented to the Board of Trade by or on behalf of the servants, or any class of the servants, of a railway company that their hours of labour are excessive, or do not provide sufficient intervals of rest between the periods of duty, or sufficient relief in respect of Sunday duty, the Board must inquire into the representation (*f*). If it then appears to the Board that there is reasonable Representation to Board of Trade and inquiry as to hours of employment.

(*q*) See title MASTER AND SERVANT, Vol. XX., pp. 145, 146. As to the application to railways of statutory provisions relating to dangerous trades, see title FACTORIES AND SHOPS, Vol. XIV., pp. 486, 487.

(*r*) As to the general duty of a servant towards his employer, see title MASTER AND SERVANT, Vol. XX., pp. 125 *et seq.* As to societies or combinations of persons employed or engaged in trades and employments, see title TRADE AND TRADE UNIONS.

(*a*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 124. This power is possessed by all companies created by an Act of Parliament which incorporates the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16; and see title COMPANIES, Vol. V., p. 717. It should be noted that no consent of the Board of Trade is required as in the case of bye-laws made under the Railway Regulation Act, 1840 (3 & 4 Vict. c. 97) (see p. 728, *ante*), or the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20) (see p. 730, *ante*).

(*b*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 125. The bye-laws must be framed so that the justice before whom a person is charged may mitigate the penalty as he thinks fit (*ibid.*, s. 126). As to offences by servants of railway companies, see pp. 733, 734, *post.*

(*c*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 127.

(*d*) Regulation of Railways Act, 1889 (52 & 53 Vict. c. 57), s. 4 (1).

(*e*) *Ibid.*, s. 4 (2). Penalties are incurred for a breach of this provision as under the Regulation of Railways Act, 1871 (34 & 35 Vict. c. 78), ss. 9, 10 (Regulation of Railways Act, 1889 (52 & 53 Vict. c. 57), s. 4 (3); see p. 644, *ante*).

(*f*) Railway Regulation Act, 1893 (56 & 57 Vict. c. 29), s. 1 (1). This

SECT. 3. **Regulation of Hours of Work.**

ground for such complaint, it must order the company to submit to the Board, within a specified period, such a schedule of time for the duty of the servants complaining as will in the opinion of the Board bring the actual hours of work within reasonable limits, having due regard to the circumstances of the traffic and the nature of the work (*g*).

Reference to Railway and Canal Commissioners.

If the company fails to comply with such order or to enforce the provisions of any such schedule approved by the Board, the Board may refer the matter to the Railway and Canal Commissioners, who may thereupon order the company to submit to them such a schedule of time as will in their opinion bring the actual hours of work within reasonable limits (*h*).

Penalty for non-compliance with order.

Failure to comply with such order of the Commissioners, or to enforce any such schedule approved by the Commissioners, renders the company liable to a fine of £100 for every day during which the default continues (*i*).

Variation or rescission of order.

Any such order made by the Board or by the Commissioners respectively may from time to time be varied or rescinded by them as circumstances may require (*k*).

Report to Parliament.

All proceedings under these provisions must be reported annually to Parliament by the Board of Trade (*l*).

Part VII.—Damages, Penalties, and Offences.

SECT. 1.—*Damages.*

Jurisdiction of two justices as to damages.

1518. Where damages, costs, or expenses are in any case directed to be paid by the Railways Clauses Consolidation Act, 1845 (*m*), or by the special Act of a railway company or by any Act incorporated

does not apply to any servant who is wholly employed in clerical work or in the company's workshops (Railway Regulation Act, 1893 (56 & 57 Vict. c. 29), s. 1 (7)).

(*g*) *Ibid.*, s. 1 (2).

(*h*) *Ibid.*, s. 1 (3).

(*i*) *Ibid.*, s. 1 (4). The Railway and Canal Commissioners have all the powers to make and enforce such orders as they have to make or enforce other orders within their jurisdiction (see p. 761, *post*), but their jurisdiction may be exercised by the two appointed Commissioners without the *ex officio* Commissioner (Railway Regulation Act, 1893 (56 & 57 Vict. c. 29), s. 1 (5)).

(*k*) *Ibid.*, s. 1 (6).

(*l*) *Ibid.*, s. 2. The last report was presented in August, 1912.

(*m*) 8 & 9 Vict. c. 20. Damages may be payable under the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), for any injury done, in the exercise of a company's powers of executing works (*ibid.*, s. 16; see p. 653, *ante*), and, as to the jurisdiction of two justices, see also pp. 662, 667, 668, 672, *ante*, to the property of any gas or water authority (Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 18—21; see p. 679, *ante*); by failure to supply a road in place of a road stopped up (Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 57; see p. 666, *ante*); for wrongful, unreasonable, or vexatious detention of goods or wagons where there is a dispute as to tolls (Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 101, 102); for injury to the property of a

therewith, then, unless other procedure is prescribed, the amount in case of dispute must be determined by two justices (*n*).

Enforcement of order, as to damages, by distress.

1519. If the amount as so determined is not paid within seven days after demand it may be recovered by distress on the goods of the company or other party liable, and the justices must issue their warrant accordingly (*o*). When, in the case of a railway company, no sufficient goods can be found to satisfy such distress, and the amount payable does not exceed £20, it may be recovered by distress on the goods of the treasurer of the company, and the justices must issue a warrant accordingly. No such distress, however, can issue unless seven days' notice in writing, stating the amount due and demanding payment thereof, is given to the treasurer or left at his residence. If the treasurer pays any money under such distress, he is entitled to be indemnified by the company, and may enforce his right by action or retain the amount paid out of any of the company's money in his possession (*p*).

Procedure in claims for compensation and damage.

1520. Whenever any question of compensation, damages, charges, or expenses is referred by any of the Acts above mentioned (*q*) to the determination of one or more justices, any justice may on the application of one party issue a summons requiring the other party to appear at a named time and place. On the appearance of the parties, or, in the absence of any party, on proof of service of the document, one or two justices, as the case may be, may examine witnesses on oath and hear and determine the question. The costs of such proceedings are in the discretion of the justice or justices, and he or they must determine the amount thereof (*r*). A witness may be summoned to attend, and in case of default, provided he has been paid or tendered a reasonable sum for his expenses, he is liable to a penalty not exceeding £5 (*s*).

SECT. 2.—*Offences by Servants of a Company.*

Offences.

1521. Where any servant of a railway company or other person who is employed in conducting the traffic upon the railway, or in repairing or maintaining the works of the company, is found drunk while employed upon the railway, or commits any offence against the bye-laws, rules or regulations of the company, or wilfully, maliciously, or negligently does or omits to do any act

railway company by a servant of the owner of an engine (Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 124; see p. 692, *ante*).

(*n*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 140. The term "justice" means a justice of the peace for the place where the matter arises who is not interested in the matter (*ibid.*, s. 3). As to the jurisdiction of justices, generally, see title MAGISTRATES, Vol. XIX., pp. 559 *et seq.*; and see *ibid.*, p. 552, note (*n*).

(*o*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 140.

(*p*) *Ibid.*, s. 141.

(*q*) See p. 732, *ante*, and the text, *supra*.

(*r*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20) s. 142.

(*s*) *Ibid.*, s. 153. So far as relates to offences this provision has been repealed by the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), Sched.

SECT. 2. Offences by Servants of a Company.

whereby life or limb is endangered or the traffic obstructed, he may be arrested without warrant (*t*) and taken before a justice by any officer or agent of the company, or by a duly appointed special constable (*a*) or by any person called upon for assistance (*b*).

Conviction and penalty.

The justice on complaint may act summarily in the matter (*c*), and on conviction may sentence the offender to a term of imprisonment with hard labour not exceeding two months, or to a fine not exceeding £10, with imprisonment in default of payment for a term not exceeding two months (*d*). The justice, however, if upon the hearing he thinks fit, may commit the person charged for trial at quarter sessions (*e*), and if he is so tried, and convicted, he may be sentenced to imprisonment with or without hard labour for a term not exceeding two years (*f*).

SECT. 3.—*Obstruction of Officers of a Company.*

Offence and penalty.

1522. If any person wilfully obstructs or impedes any officer or agent of a railway company in the execution of his duty upon the railway, or upon the works or premises connected therewith, he also may be arrested without warrant (*t*) and taken before a justice, and on conviction may be fined a sum not exceeding £5 or be imprisoned in default of payment (*g*).

SECT. 4.—*Offences under Railways Clauses and Other Acts.*

Procedure for penalties.

1523. Every penalty or forfeiture imposed by the Railways Clauses Consolidation Act, 1845 (*h*), or by the special Act of a company, or

(*t*) As to arrest without warrant, see titles CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 296, 300; POLICE, Vol. XXII., pp. 497 *et seq.*

(*a*) As to special constables, see title POLICE, Vol. XXII., pp. 491 *et seq.*, 494 *et seq.*

(*b*) Railway Regulation Act, 1842 (5 & 6 Vict. c. 55), s. 17; see also Railway Regulation Act, 1840 (3 & 4 Vict. c. 97), s. 13. Any person counselling, aiding, or assisting in such offence is under the same liability (*ibid.*). As to bye-laws regulating the conduct of a railway company's servants and offences against such bye-laws, see p. 731, *ante*.

(*c*) Where a single justice acts, his power of inflicting fine or imprisonment is limited; see Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 20 (7), and title MAGISTRATES, Vol. XIX., pp. 573—575.

(*d*) Railway Regulation Act, 1842 (5 & 6 Vict. c. 55), s. 17; see also Railway Regulation Act, 1840 (3 & 4 Vict. c. 97), s. 13.

(*e*) As to quarter sessions, see title MAGISTRATES, Vol. XIX., pp. 632 *et seq.*

(*f*) Railway Regulation Act, 1840 (3 & 4 Vict. c. 97), s. 14.

(*g*) *Ibid.*, s. 16; see also pp. 720, 721, *ante*.

(*h*) 8 & 9 Vict. c. 20. Penalties are imposed by the Act in respect of the following matters:—constructing works without the consent of the Board of Trade when such consent is required (*ibid.*, s. 17; see note (*b*), p. 673, *ante*); obstructing construction of railway (Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 24; see p. 689, *ante*); not substituting a road for a road interfered with (Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 54; see p. 664, *ante*); failing to restore a road interfered with (Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 57; see p. 666, *ante*); failing to repair a road injured in execution of works (Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 58; see pp. 665, 666, *ante*); failing to construct a screen (Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 64; see p. 687, *ante*); disobeying an order to make approaches and fences, or to

by any bye-law made in pursuance thereof (*i*), unless other provision is made, may be recovered by summary proceedings before two justices (*j*). No such penalty or forfeiture can be recovered in any other court or otherwise than before justices (*k*).

A penalty imposed by a bye-law need not be a specific sum, but in such case no proceedings can be taken to recover a penalty unless a specific sum is demanded before the proceedings are commenced (*l*); and it is a condition precedent to the recovering of any penalty that a list of offences and penalties should be published on a board in the required manner (*m*).

Conditions precedent to recovery of penalties.

1524. Any person who commits an offence, and whose name and address are unknown, may be arrested by an officer or agent of the company and taken with all convenient despatch before a justice without warrant (*n*).

Arrest without warrant.

1525. Where any person in committing an offence also does damage to the property of the company, he is liable to make good

Award of damages as well as penalty.

repair any bridge, fence, approach, gate, or other work (Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 62, 65; see p. 662, *ante*); omitting to fasten gates (Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 75; see pp. 695, 696, *ante*); defacing or destroying a toll board or milestone (Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 95; see p. 688, *ante*); giving a false account of goods consigned (Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 99; see title CARRIERS, Vol. IV., pp. 86, 87); refusal by passenger to quit carriage at end of journey (Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 103; see title CARRIERS, Vol. IV., p. 61); bringing dangerous goods on to the railway (Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 105; see title CARRIERS, Vol. IV., p. 27); using engine not constructed to consume its own smoke (Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 114; see p. 690, *ante*); using any improper engine or carriage on the railway (Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 116, 119; see p. 691, *ante*); pulling down or injuring any board showing penalties (Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 144; see p. 688, *ante*).

(*i*) As to bye-laws, see pp. 728 *et seq.*, *ante*.

(*j*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 145. The procedure is governed by the Summary Jurisdiction Acts (Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), s. 5, Sched.), and is not in the nature of a claim for a sum of money due and recoverable on complaint, nor is such a penalty or forfeiture a civil debt within the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), ss. 6, 35 (*R.* v. *Paget* (1881), 8 Q. B. D. 151; see title MAGISTRATES, Vol. XIX., p. 609); as to the meaning of "justices," see note (*n*), p. 733, *ante*. As to procedure under the Summary Jurisdiction Acts, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*

(*k*) *London and Brighton Rail. Co.* v. *Watson* (1879), 4 C. P. D. 118, C. A. But where a special ticket is issued with a condition that, if used for any station other than the one mentioned, it is to be forfeited and the full fare paid, an action to recover such full fare is not one to recover a forfeiture or penalty (*Great Northern Rail. Co.* v. *Winder*, [1892] 2 Q. B. 595).

(*l*) *Brown* v. *Great Eastern Rail. Co.* (1877), 2 Q. B. D. 406.

(*m*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 143; see p. 729, *ante*.

(*n*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 154. As to arrest by special constable of railway company, see *Lambert* v. *Great Eastern Railway*, [1909] 2 K. B. 776, C. A.; title POLICE, Vol. XXII., p. 495.

SECT. 4. Offences under Railways Clauses and Other Acts.

the damage as well as to pay the penalty; and the justices who convict of the offence must in case of dispute determine the amount of the damages (*o*).

Application of penalties by award of justices.

1526. Unless the application of a penalty or forfeiture is otherwise provided for, the justices by whom it is imposed may award not more than half thereof to the informer and must award the remainder to the overseers of the poor of the parish in which the offence was committed to be applied in aid of the poor rate (*p*). In the Metropolitan Police District, however, penalties are payable to the receiver of that District (*q*).

Distress and sale.

1527. A penalty or other sum directed to be levied by distress must be levied by distress and sale of the goods of the party liable to pay the same, and any surplus realised must be returned to such party on demand (*r*). No such distress is to be deemed unlawful by reason of any defect or want of form in the summons, conviction, warrant of distress, or other proceeding relating thereto (*s*).

Certiorari.

1528. No such proceedings as are above referred to (*t*) may be quashed or vacated for want of form, nor may they be removed by *certiorari* or otherwise into the High Court (*u*). Nevertheless *certiorari* may be granted at the suit of the Crown and of an individual prosecuting in the name of the King (*v*).

Appeal to quarter sessions.

Any party aggrieved by a decision of justices on any such matter may appeal to quarter sessions (*w*), and that court may make any order which the justices might have made in the first instance and has discretion as to the costs both of the proceedings before the justices and of the appeal (*x*).

Procedure under other Railway Acts.

1529. The law relating to the proceedings above referred to (*t*) applies, unless otherwise provided, to all penalties and forfeitures incurred under the Railway Regulation (Gauge) Act, 1846 (*y*), the Railway Companies Powers Act, 1864 (*z*), the Railways Construction Facilities Act, 1864 (*a*), the Regulation of Railways Act, 1868 (*b*), and the Regulation of Railways Act, 1871 (*c*).

(*o*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 152.
(*p*) *Ibid.*, s. 150.
(*q*) *Ibid.*, s. 159; and see title POLICE, Vol. XXII., pp. 474—477.
(*r*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 148.
(*s*) *Ibid.*, s. 149.
(*t*) *I.e.*, proceedings referred to in the text, *supra*, and in note (*h*), p. 734, *ante*.
(*u*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 156.
(*v*) See title CROWN PRACTICE, Vol. X., p. 177.
(*w*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 157. This applies where the matter has been before a metropolitan police magistrate as in the case of justices (*ibid.*, s. 159). As to appeals to quarter sessions, see title MAGISTRATES, Vol. XIX., pp. 642 *et seq.*
(*x*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 158.
(*y*) 9 & 10 Vict. c. 57, s. 8; see p. 686, *ante*.
(*z*) 27 & 28 Vict. c. 120, s. 33; see pp. 686, 687, *ante*.
(*a*) 27 & 28 Vict. c. 121, s. 62; see pp. 624 *et seq.*, *ante*.
(*b*) 31 & 32 Vict. c. 119, s. 40. These are for the following offences:— in respect of the accounts of a railway company (*ibid.*, ss. 3, 4, 5, 8; p. 646, *ante*); providing trains for prize fights (Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 21; and, as to prize fights, see title

(*c*) For note (*c*), see next page.

SECT. 4. Offences under Railways Clauses and Other Acts.

1530. All penalties recoverable summarily under the Railway and Canal Traffic Act, 1888 (*d*), are recovered under the provisions of the Summary Jurisdiction Acts (*e*).

A person who fraudulently travels on a railway with intent to avoid payment of his fare is punishable under the Regulation of Railways Act, 1889 (*f*); and a company which issues a ticket not bearing upon the face thereof the fare chargeable is liable to a penalty under the same Act (*g*).

Penalties.

SECT. 5.—*Felonies and Misdemeanours.*

1531. Unlawfully and maliciously to put anything upon a railway, or to remove rails, or to interfere with signals or points, or to do any act with intent to upset or injure a train or to endanger the safety of passengers, is a felony; and unlawfully to obstruct a train or to do, or omit to do, anything, thereby endangering the safety of passengers, is a misdemeanour (*h*).

Felonies and misdemeanours.

SECT. 6.—*Police.*

1532. Special constables may be appointed by justices, at the expense of a railway company, to maintain order amongst the persons employed upon the railway, if the behaviour of such persons makes such an appointment advisable (*i*).

Special constables.

It is within the powers of a railway company to obtain the appointment of special constables to protect its property and keep order on the railway (*k*).

CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 470, 582; non-compliance with regulations for communication between passengers and guard (Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 22; see p. 692, *ante*); trespass on railway (Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 23; see p. 723, *ante*); in respect of shareholders' address book (Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 34; see pp. 646, 647, *ante*).

(*e*) 34 & 35 Vict. c. 78, ss. 8, 15. These are for the following offences:—in regard to returns of accidents (*ibid.*, s. 6; see p. 748, *ante*); in regard to returns of statistics (Regulation of Railways Act, 1871 (34 & 35 Vict. c. 78), s. 9; see p. 644, *ante*); obstruction of Board of Trade inspector (Regulation of Railways Act, 1871 (34 & 35 Vict. c. 78), s. 11; see note (*s*), p. 739, *post*).

(*d*) 51 & 52 Vict. c. 25. Under this Act penalties may be incurred by a railway company for not observing the provisions with regard to books showing rates and classification of traffic and with regard to disintegrating rates (*ibid.*, s. 33; see title CARRIERS, Vol. IV., p. 86), and by a canal company for not making the prescribed returns (Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25, s. 39); see p. 791, *post*).

(*e*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 49. For procedure under the Summary Jurisdiction Acts, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*

(*f*) 52 & 53 Vict. c. 57, s. 5; and see title CARRIERS, Vol. IV., p. 60.

(*g*) Regulation of Railways Act, 1889 (52 & 53 Vict. c. 57), s. 6. The penalty is a fine not exceeding 40*s.* for each ticket so issued; see title CARRIERS, Vol. IV., p. 53.

(*h*) Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), ss. 35, 36; Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), ss. 32, 33, 34; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 786.

(*i*) Special Constables Act, 1838 (1 & 2 Vict. c. 80); and see title POLICE, Vol. XXII., pp. 494, 495.

(*k*) *Edwards* v. *Midland Rail. Co.* (1880), 6 Q. B. D. 287. Companies have usually express powers given to them by their special Acts as to the

Part VIII.—Controlling Powers of Board of Trade.

SECT. 1. In General.

SECT. 1.—*In General.*

SUB-SECT. 1.—*Origin of Powers.*

Powers conferred by statute.

1533. In regard to the construction, working, and regulation of railways, a large amount of discretionary power is reserved (*l*) by Acts of Parliament (*m*) to the Executive Government represented by the Board of Trade (*n*).

Transferred powers.

Before 1851 various powers and duties were conferred upon a body of persons called "Commissioners of Railways" (*o*) by various special Acts. In 1851, however, all such powers, rights, authorities, and duties were transferred to and vested in the Board of Trade (*p*); and, in 1862, all powers and duties for the protection of navigation, conferred on the Admiralty by any special Act passed before 1862 which authorised the construction of a railway on or affecting the shore of the sea or of any navigable river where the tide ebbs and flows, were also transferred to the Board of Trade (*q*).

SUB-SECT. 2.—*Inspectors.*

Appointment.

1534. For the purpose of carrying out its duties the Board of Trade has power to appoint inspectors to inspect railways and to make authorised inquiries with respect to any railway or into the cause of any railway accident (*r*).

Powers.

1535. Every such inspector has power, for the purposes of his duties, to enter and inspect any railway and all stations, works, buildings, offices, stock, plant and machinery belonging thereto.

appointment of police. As to the liability of a railway company for the acts of such constables, see titles MASTER AND SERVANT, Vol. XX., pp. 248 *et seq.*, 261; POLICE, Vol. XXII., p. 495.

(*l*) For particular instances of the reservation of this power, see pp. 625, 637, 638, 639, 643, 644, 645, 661, 673, 674, 678, 682, 685, 687, *ante*; and see pp. 739, 740, 742, 773, 791, *post*.

(*m*) The chief of these Acts are the Railway Regulation Act, 1842 (5 & 6 Vict. c. 55) (see pp. 660, 662, 678, *ante*); the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20) (see p. 673, *ante*); the Railway Companies Powers Act, 1864 (27 & 28 Vict. c. 120) (see pp. 632, 637, 638, *ante*); the Railways Construction Facilities Act, 1864 (27 & 28 Vict. c. 121) (see pp. 624 *et seq.*, *ante*); the Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119) (see pp. 645, 646, *ante*); the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25) (see pp. 635, 661, *ante*).

(*n*) As to the Board of Trade, see title CONSTITUTIONAL LAW, Vol. VII., pp. 102, 103.

(*o*) Created by the Act for constituting Commissioners of Railways, stat. (1846) 9 & 10 Vict. c. 105, repealed by the Railway Regulation Act, 1851 (14 & 15 Vict. c. 64).

(*p*) *Ibid.*, s. 1.

(*q*) Harbours Transfer Act, 1862 (25 & 26 Vict. c. 69); and see pp. 673 *et seq.*, *ante*. As to the powers and duties of the Admiralty, see title CONSTITUTIONAL LAW, Vol. VII., pp. 88 *et seq.*

(*r*) Regulation of Railways Act, 1871 (34 & 35 Vict. c. 78), s. 3. As to the duties of coroners in the case of death occasioned by a railway accident, see title CORONERS, Vol. VIII., p. 244.

Any person engaged in the management of a railway or in the employment of a company may be summoned to attend an inspector, and is bound to supply answers and returns to such inquiries as the inspector makes. An inspector may also require and enforce the production of all books, papers, and documents of a company which he considers necessary (*s*).

Inspection as to contravention of rules for preventing accidents.

An inspector may also inspect any railway for the purpose of ascertaining whether there has been any contravention of the rules for the prevention of accidents, or whether there is any ground for proceeding against the company for any such contravention (*t*).

SUB-SECT. 3.—*Arbitration.*

Appointment of arbitrator to act for Board of Trade.

1536. Whenever the Board of Trade is required to make any award or decide any difference in a case in which a railway company is one of the parties, the Board may appoint an arbitrator to act for it, and his award or decision is deemed to be the award or decision of the Board (*u*).

If an arbitrator dies or in the judgment of the Board becomes incapable or unfit, the Board may appoint another arbitrator (*v*).

Remuneration of arbitrator or umpire.

1537. The remuneration of any arbitrator or umpire appointed by the Board in any case where a railway company is one of the parties may be fixed by the Board, and in that case no larger sum can be charged (*w*).

Arbitration where one party is not a railway company.

1538. Although one of the parties to an arbitration may not be a railway company, the provisions of the Railway Companies Arbitration Act, 1859 (*x*), as to the powers of the arbitrator, procedure and award (*y*), apply to such arbitration so far as consistently may be (*z*).

Inquiries held by person appointed by Board of Trade.

1539. Where under the provisions of any special Act (*a*) the Board of Trade is required or authorised to sanction, approve, confirm, or determine any appointment, matter, or thing, or to make any order

(*s*) Regulation of Railways Act, 1871 (34 & 35 Vict, c. 78), s. 4. To prevent or impede an inspector in the execution of his duty is an offence punishable with a fine not exceeding £10 (Regulation of Railways Act, 1871 (34 & 35 Vict. c. 78), s. 11). As to offences, generally, see pp. 734 *et seq.*, *ante*.

(*t*) Railway Employment (Prevention of Accidents) Act, 1900 (63 & 64 Vict. c. 27), s. 13 (1). But such inspection is not required where inspection or inquiry may be made with respect to the same matter for the same purposes under another Act by a Government officer (*ibid.*, s. 18). As to accidents, see pp. 747—753, *post*.

(*u*) Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 30.

(*v*) *Ibid.*

(*w*) *Ibid.*, s. 31.

(*x*) 22 & 23 Vict. c. 59 ; see pp. 716—719, *ante*.

(*y*) *I.e.*, Railway Companies Arbitration Act, 1859 (22 & 23 Vict. c. 59), ss. 18—29 ; see p. 718, *ante*.

(*z*) Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 32.

(*a*) The term "special Act" here means a local or local and personal Act, or any Act of a local and personal character, and includes a provisional order of the Board of Trade confirmed by Parliament, and a certificate under the Railways Construction Facilities Act, 1864 (27 & 28 Vict. c. 121) ; see p. 624, *ante* ; see Board of Trade Arbitrations, etc. Act, 1874 (37 & 38 Vict. c. 40), s. 4.

SECT. 1. In General.

or do any act for the purpose of the special Act, the Board may make any such inquiries as it thinks necessary to enable it to carry out its duties; and it may hold such inquiries, or any inquiry directed by any special Act, by any person or persons duly authorised by it (*b*).

Costs of application to Board of Trade.

When in such circumstances application is made to the Board to be arbitrator or to appoint any arbitrator or other person, or to hold any inquiry or do any other thing for the purpose of a special Act, all expenses incurred by the Board in relation to such application must be defrayed by the parties thereto in such manner and to such amount as the Board may direct. The Board also may, if it thinks fit, require parties to any such application to pay or give security for the payment of such sum as it thinks requisite to meet such expenses as a condition precedent to acting in pursuance of the application. All such expenses directed by order of the Board to be paid may be recovered as a debt, and, if payable to the Board, as a debt to the Crown (*c*). Any order under these provisions is made by writing under the hand of the President or one of the secretaries of the Board (*d*).

Power to refer to Railway Commissioners.

1540. Where any difference to which a railway company is a party is required or authorised by any Act to be referred to the arbitration of the Board of Trade, or of some person appointed by the Board, the Board may, if it thinks fit, refer the matter for decision to the Railway and Canal Commissioners (*e*).

SUB-SECT. 4.—*Enforcing Acts of Parliament.*

Certificate by Board of Trade to the Attorney-General, and proceedings thereon.

1541. Whenever it appears to the Board of Trade that the provisions of any Act of Parliament, general or special, relating to or regulating railways or any railway, have not been complied with on the part of any company, or that any company has acted or is acting in an unauthorised manner or in excess of its powers, the Board may certify to the Attorney-General that in the public interest such company should be restrained from so acting; and thereupon the Attorney-General must (*f*) proceed against such company, by information, action, or other proceeding as the case may require, to enforce such statutory provisions, to restrain illegal acts by injunction, to recover any penalties or forfeitures which the company has

(*b*) Board of Trade Arbitrations, etc. Act, 1874 (37 & 38 Vict. c. 40), s. 2.
(*c*) *Ibid.*, s. 3.
(*d*) *Ibid.*, s. 4.
(*e*) *Ibid.*, s. 6; and see, further, p. 754, *post.* This provision does not apply to the appointment of an umpire under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 28; see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 80. Under this provision the Board can refer matters arising under clauses 4 and 5 of the Schedule to the various Railway Rates and Charges Confirmation Acts, 1891—1892; see title CARRIERS, Vol. IV., pp. 83, 84; and see pp. 746, 754, *post.*
(*f*) On delivery to him of the certificate of the Board the Attorney-General has no option, but is bound to proceed (*A.-G.* v. *Great Northern Rail. Co.* (1860), 1 Drew. & Sm. 154); and see p. 761, *post.*

incurred, or for such other relief as the nature of the case may require (*g*).

Time limits regarding proceedings.

1542. The Board, however, cannot give any such certificate until twenty-one days after notice, to the company concerned, of its intention to do so; and no such proceedings may be taken by the authority of the Board except upon such certificate and within one year after the alleged offence was committed (*h*).

SUB-SECT. 5.—*Authentication of Acts of Board.*

Authentication of acts of Board of Trade.

1543. All regulations, certificates, notices, and other documents purporting to be made or issued by the Board of Trade, or by its authority, and signed by some officer appointed for that purpose by the Board, are, for the purpose of any Act of Parliament relating to railways, deemed to have been so made and issued, without proof of the authority of the person signing them, or of the signature thereto, which are presumed until the contrary is proved.

Service of documents.

The service of such documents may be effected by leaving them at one of the principal offices of the railway company or by sending them by post to the secretary at such office. All notices and other documents required by any such Act of Parliament to be given to or laid before the Board of Trade must be delivered at the office of the Board in London or sent by post addressed to that office (*i*).

Effect of documents signed by officers of the Board of Trade.

1544. Where by any Act, relating to railways or to any railway, the Board of Trade has power to make or issue any appointment, authority, determination, order, requisition, regulation, certificate, or notice, or to do any other act, it may do so by a document signed by one of the secretaries of the Board or by an assistant secretary, or by any other officer appointed for the purpose; and every such act so signified is to be deemed to have been duly done by the Board, and every such document is evidence in any court without further proof, unless it is proved that it was not signed by the authority of the Board (*k*).

Admissibility as evidence.

1545. All documents purporting to be rules, orders, or certificates of the Board and to be sealed with the seal of the Board, or to be signed by a secretary or assistant secretary of the Board or by any person authorised so to sign by the President of the Board, must be received in evidence and be deemed to be what they purport to be without further proof, unless the contrary is shown. A certificate signed by the President that any order, certificate, or act is the order, certificate, or act of the Board is conclusive evidence of the fact certified (*l*).

(*g*) Railway Regulation Act, 1844 (7 & 8 Vict. c. 85), s. 17. This provision has not diminished any other powers possessed by the Attorney-General of taking proceedings (*A.-G.* v. *Great Northern Rail. Co.* (1860), 1 Drew. & Sm. 154); *e.g.*, see *A.-G.* v. *London and North Western Railway*, [1900] 1 Q. B. 78, C. A.). The court will not consider the sufficiency of the reasons of the Board for putting the Attorney-General in motion (*A.-G.* v. *Oxford, Worcester, and Wolverhampton Rail. Co.* (1854), 2 W. R. 330).

(*h*) Railway Regulation Act, 1844 (7 & 8 Vict. c. 85), s. 18.

(*i*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 67.

(*k*) Railway Regulation Act, 1851 (14 & 15 Vict. c. 64), s. 3.

(*l*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 53.

SECT. 2.

Opening a Railway.

SECT. 2.—*Opening a Railway.*

Notices to Board of Trade.

1546. No railway or any portion of a railway (*m*) may be opened (*n*) by a company for the public conveyance of passengers until a month after notice in writing has been given to the Board of Trade of the intention to open it, and until ten days after similar notice of the time when it will be, in the opinion of the company, sufficiently completed for the safe conveyance of passengers (*o*) and ready for inspection (*p*).

Penalty for opening without notice.

If a railway or portion of a railway is opened without any such notice, the company is liable to a penalty of £20 a day for every day during which it continues open until the required notices have been duly given and have expired (*q*).

Opening of additional works.

These provisions apply to the opening of any additional line of railway, deviation line, station (*r*), junction (*s*), or level crossing (*t*), forming a portion of or directly connected with a railway on which passengers are carried, which has been constructed subsequently to the inspection of the railway by the Board of Trade in respect of its original opening; but the Board has discretion from time to time, upon the application of the company, to dispense with any notice with respect to any such works (*u*).

(*m*) A line on the land of the company and parallel to an existing line is a "portion of a railway" and cannot be opened without notice (*A.-G.* v. *Great Western Rail. Co.* (1872), 7 Ch. App. 767). Where a company had power to make a double line and opened the down line with the sanction of the Board, it was held that the Board was not by such sanction *functus officio* and could refuse to sanction the opening of the up line (*A.-G.* v. *Oxford, Worcester, and Wolverhampton Rail. Co.* (1854), 2 W. R. 330).

(*n*) Where a company was bound to make a certain payment "immediately after the opening of the railway," it was held that the money was payable as soon as any portion of the railway was opened (*Grantham Canal Co.* v. *Ambergate, Nottingham, Boston and Eastern Junction Rail. Co.* (1852), 16 Jur. 946). But where a small portion of a railway in course of construction was occupied and maintained by another company, but the line was not otherwise opened for traffic, it was held that the railway was not opened for public traffic (*Re Beddgelert Railway* (1871), 19 W. R. 427).

(*o*) A company may be restrained by injunction if it begins to run passenger trains over any portion of the line without notice to the Board of Trade (*A.-G.* v. *Oxford, Worcester, and Wolverhampton Rail. Co., supra*; *A.-G.* v. *Great Western Rail. Co., supra*). The opening of a railway is a matter of public interest, and a company will be restrained from opening in violation of the statute on the information of the Attorney-General (*ibid.*). But where an opening of a line was not in violation of the statute, but merely an injury to certain persons, it was held that the circumstances did not warrant the interference of the Attorney-General (*A.-G.* v. *Birmingham and Oxford Junction Rail. Co.* (1851), 3 Mac. & G. 453).

(*p*) Railway Regulation Act, 1842 (5 & 6 Vict. c. 55), s. 4.

(*q*) *Ibid.*, s. 5. This sum is recoverable as a debt to the Crown in any court of record (*ibid.*).

(*r*) As to stations, see pp. 679—681, *ante*.

(*s*) As to injunctions, see p. 684, *ante*.

(*t*) As to level crossings, see pp. 660 *et seq.*, 694 *et seq.*, *ante*.

(*u*) Regulation of Railways Act, 1871 (34 & 35 Vict. c. 78), s. 5. As to the necessity of obtaining the sanction of the Board before using a private level crossing over a railway, see *Summerlee and Mossend Iron and Steel Co., Ltd.* v. *Caledonian Rail. Co.*, [1909] S. C. 536.

SECT. 2.
Opening a Railway.

Postponement orders, after inspection.

1547. If an inspector of the Board of Trade, after inspecting any such railway or portion of a railway, reports in writing to the Board, with grounds for his opinion, that in his opinion the opening of the railway would be attended with danger to the public using it, by reason of the incompleteness of the works or permanent way, or the insufficiency of the staff for working the railway, the Board may order the company to postpone the opening for any period not exceeding one month (*v*).

Further orders after inspection.

Such an order may be repeated from time to time, according to the reports of the Board's inspectors on further inspections, until the Board is satisfied that the line may be opened without danger (*w*). No such order, however, is binding upon any company unless a copy of the report of the inspector is delivered to the company with the order (*a*).

Further orders without inspection.

Where the Board has made any such order for postponing, for a month, the opening of any portion of a railway, and the company has not informed the Board that the requisitions of the inspector have been complied with, the Board has a discretion to make further postponing orders from time to time for periods not exceeding a month, without incurring the expense of further inspection, until it is satisfied that the requisitions of the inspector have been complied with or otherwise that the railway can be opened with safety to the public (*b*).

Disobedience to postponement order.

1548. Disobedience to such an order renders the company liable to the same penalty as a company is liable to for opening a line without giving notice (*c*).

Injunction.

Even though the Board has not ordered the opening of a railway to be postponed, the court may restrain the opening by injunction when such opening is an injury to the individual praying its aid (*d*).

(*v*) Railway Regulation Act, 1842 (5 & 6 Vict. c. 55), s. 6. Where an inspector reports that the opening would be dangerous and states in his report grounds for his opinion, the Board, although not bound by such report, has an absolute discretion as to making an order, and the court will not consider whether the conclusions drawn by the inspector are correct or not (*A.-G.* v. *Great Western Rail. Co.* (1877), 4 Ch. D. 735, C. A.; *A.-G.* v. *Oxford, Worcester, and Wolverhampton Rail. Co.* (1854), 2 W. R. 330).

(*w*) Railway Regulation Act, 1842 (5 & 6 Vict. c. 55), s. 6.

(*a*) *Ibid.*

(*b*) Railway Regulation Act (Returns of Signal Arrangements, Working, etc.), 1873 (36 & 37 Vict. c. 76), s. 6.

(*c*) Railway Regulation Act, 1842 (5 & 6 Vict. c. 55), s. 6; see *ibid.*, s. 5; and see p. 742, *ante*.

(*d*) *Chamberlain* v. *Chester and Birkenhead Rail. Co.* (1848), 1 Exch. 870; and see title INJUNCTION, Vol. XVII., pp. 228, 229. But such an injunction will not be granted as a matter of course, and, even when a company's special Act provided that a railway should not be opened, till a certain junction line was completed, the court refused an injunction against opening the railway before the junction was complete, on being satisfied that the company intended to complete it without delay (*Cromford and High Peak Rail. Co.* v. *Stockport, Disley and Whaley Bridge Rail. Co.* (1857), 1 De G. & J. 326, C. A.).

SECT. 3. **Construction of Roads, Bridges, and Other Works.**

SECT. 3.—*Construction of Roads, Bridges, and Other Works.*

Differences as to construction, alteration, or restoration.

1549. Where any difference arises between a railway company and any person or public body having control of or authorised by law to enforce the construction of any road, bridge, or other public work of an engineering nature required by Act of Parliament, as to the construction, alteration, or restoration of such work, either party, after giving fourteen days' notice in writing of his or its intention to the other party, may apply to the Board of Trade to decide upon the proper construction, alteration or restoration of such work (*e*).

Certificate of Board of Trade deciding matters in difference.

The Board may then at its discretion decide the matter in difference, and may by certificate authorise any arrangement or mode of construction in regard to such road, bridge, or other work which appears to it either to be in substantial compliance with the statutory requirements or to be calculated to afford equal or greater accommodation to the public (*e*). After the Board has given such a certificate the road, bridge, or other work to which it applies must be constructed by the company in conformity with the certificate; and, if it is so constructed, it is deemed to be constructed in conformity with all statutory requirements. No such certificate, however, may be granted by the Board unless it is satisfied that existing private rights and interests will not be injuriously affected thereby (*e*).

Certificate authorising substitution of authorised works.

1550. In the construction of the railway a company may substitute any engineering work not shown on the deposited plans (*f*) for any arch, tunnel, or viaduct (*g*) shown thereon, provided the Board authorises such substitution by its certificate, after satisfying itself by due inquiry that the company has acted with good faith in the matter, that the persons interested in the lands affected consent, and that the safety and convenience of the public will not be diminished by the substitution (*h*).

SECT. 4.—*Rates and Charges.*

Returns to Board of Trade.

1551. The Board of Trade may order every railway company to make a return to it of all tolls, rates, and charges from time to time levied by the company for the carriage of passengers and goods (*i*).

(*e*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 66. As to repairs to roads, see pp. 688 *et seq.*, *ante*. As to excessive weight and extraordinary traffic, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 172 *et seq.*

(*f*) As to the deposited plans, see pp. 647 *et seq.*, *ante*.

(*g*) As to authorised works, see p. 654, *ante*.

(*h*) Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 4. This is subject to the provisions of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 11, 12, 14, 15; see pp. 650—653, *ante*.

(*i*) Railway Regulation Act, 1840 (3 & 4 Vict. c. 97), s. 3. If the returns are not made within thirty days after being required, the defaulting company is liable to a penalty of £20 a day, recoverable in any court of record, for every day in which it wilfully neglects to deliver them (*ibid.*). As to the penalty for making false returns, see Perjury Act, 1911 (1 & 2 Geo. 5, c. 6), s. 5.

Such returns must be required in like manner and at the same time from all railway companies in England, unless the Board specially exempts any particular company and enters in the minutes of its proceedings the grounds of such exemption (*j*).

Exemption of company.

1552. In the year 1888 every railway company was required by statute (*k*) to submit to the Board of Trade a revised classification of merchandise traffic and a revised schedule of maximum rates and charges applicable thereto; and after these classifications and schedules had been considered and settled they were embodied in provisional orders and confirmed by Acts of Parliament (*l*).

Schedule of maximum rates and charges.

Any railway company or any person after giving not less than twenty-one days' notice to the company may apply to the Board to amend any classification and schedule so confirmed by adding thereto any articles, matters, or things; and the Board may hear and determine such application and may classify and deal with the articles, matters, or things referred to in such manner as it thinks right (*m*).

Amendment of schedule by Board of Trade.

These provisions have, however, no application to payments by the Postmaster-General (*n*), or by the Secretary of State for War (*o*), to any company for the carriage of mails or stores (*p*).

1553. Every book or other document in use by a company containing the classification of merchandise traffic and schedule of charges carried on the railway must be open to public inspection without charge, and must be kept on sale at a price not exceeding 1*s.* at every station at which such merchandise is handled. Printed copies of such classification and schedule must also be kept for sale by every company at such places and at such reasonable price as the Board of Trade may by general or special order direct; and every company must publish at every station a notice, in such form as the Board prescribes, to the effect that all such books or documents are open to public inspection, and that information as to any charge can be obtained by application as stated in the notice (*q*).

Books and documents containing classification of goods and schedule of charges.

(*j*) See note (*i*), p. 744, *ante*.

(*k*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 24; see title CARRIERS, Vol. IV., pp. 83 *et seq.*

(*l*) As a rule a separate confirmation Act applies to each company, and, when any question arises, the particular Act applying to the company concerned must be referred to; but these various Acts are in substance and in wording almost identical—*e.g.*, see the London and North Western Railway Company (Rates and Charges) Order Confirmation Act, 1891 (54 & 55 Vict. c. ccxxi.).

(*m*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 24 (11). Under this provision the Board has power to add to the classification new articles which are not in any class and to determine in which class those new articles are to be placed; but it has no power to take an article out of one class and put it into another (*Ex parte London and North Western Rail. Co.* (1909), 100 L. T. 998). This decision was given by a King's Bench Divisional Court on a motion for *certiorari* and prohibition to the Board of Trade; and see note (*r*), p. 746, *post*.

(*n*) See titles CARRIERS, Vol. IV., p. 70; POST OFFICE, Vol. XXII., pp. 652, 653.

(*o*) See Cheap Trains Act, 1883 (46 & 47 Vict. c. 34), s. 6; see p. 699, *ante*; title ROYAL FORCES.

(*p*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 24 (12), (13).

(*q*) *Ibid.*, s. 33 (1), (2), (4). A company infringing these provisions is

SECT. 4. Rates and Charges.

Notice of intention to increase charges.

1554. When a company intend within its powers to make any increase in their existing charges as shown in such books they must publish fourteen days' notice of such intention in such manner as the Board prescribes, otherwise such increase has no effect (*r*).

Disputes between traders and company determined by the Board of Trade or an arbitrator.

1555. Any dispute between a trader and a railway company in reference to any service terminal (*s*) charged to him must be determined by the Board of Trade (*t*); and any difference which arises between such parties as to the charges of the company (1) for services rendered at a private siding, (2) for the collection or delivery of merchandise, (3) for the weighing of merchandise, (4) for the detention of trucks or the occupation or use of any accommodation beyond a reasonable time, (5) for loading, unloading, covering or uncovering heavy goods, (6) for the use of coal drops, or (7) for services rendered at any waterside wharf (*u*), or as to the sum payable by the company by way of demurrage for detention of the trader's trucks, must be determined by an arbitrator appointed by the Board (*v*).

liable to a penalty not exceeding £5, recoverable summarily (*ibid.*, s. 33 (7)). See pp. 734 *et seq.*, *ante*. As to procedure before courts of summary jurisdiction, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.* As to such books, tables, and other documents, see also Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 14; title CARRIERS, Vol. IV., p. 85. Every company must also keep open for inspection all books and documents showing the rates and charges in force on the 31st December, 1892 (Railway and Canal Traffic Act, 1894 (57 & 58 Vict. c. 54), s. 1 (2)). This is because by *ibid.*, s. 1 (1), the burden lies on the company to justify any increase of rate above the rate in force on the date mentioned; see title CARRIERS, Vol. IV., p. 89. As to variation of rules by the Board of Trade, see note (*r*), *infra*.

(*r*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 33 (6). The Board may from time to time make, rescind, and vary rules with regard to any of the provisions relating to rates and charges dealt with on pp. 744, 745, *ante* (Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 35).

(*s*) See title CARRIERS, Vol. IV., p. 83.

(*t*) London and North Western Railway Company (Rates and Charges) Order Confirmation Act, 1891 (54 & 55 Vict. c. ccxxi.), Sched., cl. 4, and similar Acts relating to other companies.

(*u*) *Ibid.*, Sched., cl. 5. Any such difference can be settled only by arbitration as provided, and the court has no jurisdiction (*London and North Western Railway* v. *Donellan*, *Same* v. *Billington, Ltd.*, [1898] 2 Q. B. 7, C. A.; see, further, title CARRIERS, Vol. IV., pp. 83, 84). The Board has power to appoint the Railway and Canal Commissioners to act as arbitrators for these purposes under the Board of Trade Arbitrations, etc. Act, 1874 (37 & 38 Vict. c. 40), s. 6, and this course is frequently adopted; see p. 740, *ante*; and see p. 754, *post*. A company may also charge a trader for rent for siding and other structural accommodation, which may be a sum fixed by agreement or by an arbitrator appointed either by the parties or by the Board (London and North Western Railway Company (Rates and Charges) Order Confirmation Act, 1891 (54 & 55 Vict. c. ccxxi.), Sched., cl. 6). Where there is a difference of gauge between two railways a company may make a reasonable charge for services of transhipment, and such charge, in case of difference, must be determined by an arbitrator appointed by the Board (*ibid.*, Sched., cl. 8). As to gauge, see pp. 686, 687, *ante*; and see *ibid.*, note (*f*).

(*v*) London and North Western Railway Company (Rates and Charges) Order Confirmation Act, 1891 (54 & 55 Vict. c. ccxxi.), Sched., cl. 6; and see similar Acts of other companies.

Hearing by Board of Trade of complaints as to unreasonable charges.

1556. Before any person can apply to the Railway and Canal Commissioners to have a through rate fixed (*a*) he must first have made a complaint to the Board of Trade of unreasonable charges, and the Board must have heard such complaint (*b*).

Whenever any person receiving or sending or desiring to send goods by railway is of opinion that the company is charging him an unfair or unreasonable rate, or is in any other way treating him in an oppressive or unreasonable manner, he may complain to the Board of Trade (*c*). Any authority or public body which may make a complaint to the Railway and Canal Commissioners may also complain to the Board, where such authority thinks that it, or any traders or persons in its district, are being charged unfair or unreasonable rates (*d*). On any such complaint being made the Board, if it thinks that there are reasonable grounds for the complaint, may call upon the company concerned for an explanation and endeavour to settle the matter in difference amicably (*e*). For this purpose the Board may appoint any competent person to deal with the parties and may pay him such sum as the Treasury approves (*f*). Reports of all such complaints made to the Board and the results of proceedings taken in relation to such complaints, together with any observations thereon which it thinks fit to make, must be submitted to Parliament from time to time (*g*).

Order by Board of Trade as to workmen's trains.

1557. Where the Board of Trade has reason to believe that a railway company does not provide sufficient cheap passenger trains or workmen's trains, it may after inquiry order the company to provide proper services (*h*).

Certificate of Board of Trade varying tolls.

1558. In the case of a railway made under the provisions of the Railways Construction Facilities Act, 1864 (*i*), the company may demand and take tolls and charges not exceeding those specified in the Act (*k*), but the Board of Trade may by certificate vary such tolls and charges whenever it seems to it necessary or proper so to do (*l*).

SECT. 5.—*Accidents.*

Notice to Board of Trade.

1559. The company working any railway is obliged to give notice to the Board of Trade of certain accidents which take place

(*a*) *I.e.*, under the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 25, and Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 2; see title CARRIERS, Vol. IV., p. 72.
(*b*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 25.
(*c*) *Ibid.*, s. 31 (1).
(*d*) *Ibid.*, s. 31 (5). As to who these authorities are, see *ibid.*, s. 7; see p. 756, *post*; and see *Port of London Authority* v. *Midland Railway* [1912] 2 K. B. 1; title CARRIERS, Vol. IV., pp. 89—91.
(*e*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 31 (2).
(*f*) *Ibid.*, s. 31 (3).
(*g*) *Ibid.*, s. 31 (4).
(*h*) Cheap Trains Act, 1883 (46 & 47 Vict. c. 34), s. 3; and see title CARRIERS, Vol. IV., p. 71.
(*i*) 27 & 28 Vict. c. 121; see p. 624, *ante*.
(*k*) Railways Construction Facilities Act, 1864 (27 & 28 Vict. c. 121), s. 49, Sched.
(*l*) *Ibid.*, ss. 49, 50; compare p. 635, *ante*.

SECT. 5. Accidents.

in the course of such working (*m*) and happen in or about the railway or any of the works or buildings connected therewith, or any building or place, open or enclosed, occupied by the company. These accidents are:—

(1) Any accident attended with loss of life or personal injury to any person whatsoever;

(2) Any collision where one of the trains is a passenger train;

(3) Any passenger train or part thereof accidentally leaving the rails;

(4) Any other accident, of such a kind as to have caused or to be likely to cause loss of life or personal injury, which may be specified from time to time by order of the Board (*n*).

Notice of accident on private or foreign line or siding.

1560. Where an accident happens on any line or siding having a junction with a railway, but not belonging to or occupied by the company, and causes the death of or personal injury to a servant of the company, the company must also give notice of such accident to the Board of Trade (*o*).

If the accident happens to a train belonging to any other company, that company also must report it to the Board (*n*).

Nature of notice to Board of Trade.

1561. The notice to the Board of Trade must specify the loss of life or personal injury, if any, caused by the accident, and must be in the form and contain such other particulars as the Board from time to time may direct. It must be sent by the earliest practicable post after the accident; but the Board may require notice of any class of accidents to be sent by telegram, and notice of every accident of such a class must be telegraphed immediately after such accident takes place. A company failing to give the required notice is liable to a penalty not exceeding £20 (*p*).

Inquiry or formal investigation.

1562. The Board of Trade may direct an inquiry by an inspector (*q*) into the causes of any such accident; and, if the Board thinks it expedient, it may by order direct a formal investigation of such

(*m*) Where a man was killed by a fall of gravel in a ballast pit, on a railway company's own land, which was used by the company to get gravel for the maintenance and repair of the line, it was held that the accident did not happen "in the course of working the railway" (*Scott* v. *Midland Rail. Co.*, [1901] 1 K. B. 317).

(*n*) Regulation of Railways Act, 1871 (34 & 35 Vict. c. 78), s. 6; see Order, dated 21st December, 1906.

(*o*) Railway Employment (Prevention of Accidents) Act, 1900 (63 & 64 Vict. c. 27), s. 13 (2). But such notice need not be given where notice is given under any Act relating to factories or mines (*ibid.*, s. 18; see titles FACTORIES AND SHOPS, Vol. XIV., p. 472; MINES, MINERALS, AND QUARRIES, Vol. XX., p. 607). Where a siding is not part of a railway within the meaning of the statute (see note (*h*), p. 750, *post*) and is used in connection with a mine or quarry, the provisions of the Coal Mines Act, 1911 (1 & 2 Geo. 5, c. 50), and of the Metalliferous Mines Regulation Acts, 1872 and 1875 (35 & 36 Vict. c. 77; 38 & 39 Vict. c. 39), as to notices of accidents apply as if the siding were part of a mine or quarry (Notice of Accidents Act, 1906 (6 Edw. 7, c. 53), s. 3); see title MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 607, 627

(*p*) Regulation of Railways Act, 1871 (34 & 35 Vict. c. 78), s. 6. For form and contents of notice to the Board of Trade, see Order of the Board, dated 21st December, 1906.

(*q*) As to inspectors and their appointment, see p. 738, *ante*.

causes and of the circumstances attending the accident (*r*). If the Board takes the latter course, it may by order appoint any person possessing legal or special knowledge to assist the inspector, or it may direct a county court judge or stipendiary or police magistrate or other named person to hold the investigation with the assistance of an inspector or other assessor (*r*).

Conduct of investigation and powers of tribunal.

The investigation is conducted as an open court, such court having all the powers of a court of summary jurisdiction (*s*) as well as all the powers of an inspector of the Board of Trade (*t*). The court may inspect places, summon and examine witnesses (*u*), administer oaths, and enforce the production of documents. A witness, provided he is not in the service or employment of or otherwise connected with a railway company, is entitled to his expenses in the same way as a witness summoned to attend a court of record (*v*).

Report.

1563. An inspector making an inquiry or a court holding an investigation must report the result of their proceedings to the Board of Trade, and the Board must cause such report to be published in such manner as it thinks fit (*x*).

Inspector acting at inquest.

1564. Where any such accident causes the death of any person, on request of the coroner holding an inquest on such death, the Board of Trade may appoint an inspector or other person to act as assessor to the coroner and assist him in holding the inquest. Such assessor must make a report to the Board as in the case of a court of investigation (*a*).

Accidents arising in connection with authorised works.

1565. Where in the construction, use, working, or repair of any railway, canal, bridge, tunnel, or other work authorised by a special Act, there occurs an accident which causes to any person employed therein either loss of life or such bodily injury as to cause him to be absent throughout at least one whole day from his ordinary work (*b*), the employer (*c*) of such person must as soon as possible, and in case of an accident not resulting in death within six days, send notice of the accident to the Board of Trade, specifying the time and place of its occurrence, its probable cause, the name and address of any person killed or injured, the work on

(*r*) Regulation of Railways Act, 1871 (34 & 35 Vict. c. 78), s. 7.

(*s*) As to courts of summary jurisdiction and their powers, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*

(*t*) For these powers, see p. 738, *ante.*

(*u*) To refuse to attend to give evidence before an inspector or a court of investigation on tender of expenses is an offence punishable with a fine not exceeding £10. The same rule applies to a refusal to make any return or produce any document (Regulation of Railways Act, 1871 (34 & 35 Vict. c. 78), s. 11).

(*v*) In case of dispute as to such expenses the court must refer the question to a master of the High Court (Regulation of Railways Act, 1871 (34 & 35 Vict. c. 78), s. 7).

(*x*) *Ibid.*

(*a*) *Ibid.*, s. 8; and see title CORONERS, Vol. VIII., p. 244. As to returns by the coroner, see *ibid.*

(*b*) See Notice of Accidents Act, 1906 (6 Edw. 7, c. 53), s. 6.

(*c*) It should be noted that the employer need not be the railway company—*e.g.*, he may be a contractor.

SECT. 5. **Accidents.**

which such person was engaged at the time, and, in case of injury, the nature of the injury (*d*).

Formal investigation.

Where it appears to the Board of Trade that any such accident is of sufficient importance to require a formal investigation, it may by order direct such investigation to be held (*e*).

Rules for prevention of accidents.

1566. The Board of Trade has power to make rules with the object of reducing or removing the dangers and risks incidental to certain matters (*f*) of railway service (*g*).

Power of Board of Trade to make rules.

1567. When the Board of Trade considers that avoidable danger to persons employed on any railway (*h*) arises from any other operation of railway service, either because of the doing or the omitting to do something or from the want of proper appliances or plant, it may make rules to meet the circumstances, provided it first communicates with the company concerned and gives them a reasonable opportunity of reducing or removing the danger or risk (*i*).

(*d*) Notice of Accidents Act, 1894 (57 & 58 Vict. c. 28), ss. 1 (1), 2 (1), and Sched. Any person who wilfully makes default in giving such notice is liable to a fine not exceeding 40*s.* (*ibid.*, s. 1 (2)).

(*e*) *Ibid.*, s. 3. This investigation is held under similar conditions to those under which an investigation is held under the Regulation of Railways Act, 1871 (34 & 35 Vict. c. 78) ; see pp. 748, 749, *ante*.

(*f*) Railway Employment (Prevention of Accidents) Act, 1900 (63 & 64 Vict. c. 27), s. 1 (1), Sched. The matters referred to are :—

1. Brake levers on both sides of wagons.
2. Labelling wagons.
3. Movement of wagons by propping and tow roping.
4. Steam or other power brakes on engines.
5. Lighting of stations or sidings where shunting operations are frequently carried on after dark.
6. Protection of point rods and signal wires and position of ground levers working points.
7. Position of offices and cabins near working lines.
8. Marking of fouling points.
9. Construction and protection of gauge glasses.
10. Arrangement of tool boxes and water gauges on engines.
11. Working of trains without brake vans upon running lines beyond the limits of stations.
12. Protection to permanent way men when relaying or repairing permanent way (*ibid.*, Sched.).

(*g*) Under these powers the Board of Trade has published the Prevention of Accidents Rules, 1902, which relate (*inter alia*) to labelling wagons, propping, tow roping, engine brakes, brake vans, the lighting of sidings, the guarding of point rods and signal wires, steam gauges, water gauges, and provisions for the safety of platelayers. These rules were varied in the case of the Taff Vale Railway by the Prevention of Accidents Rules, 1902, Amendment Rules, 1907. The Board has also published the Prevention of Accidents Rules, 1911 (Stat. R. & O., 1911, p. 381), which provide that all wagons constructed after the 7th May, 1912, must be fitted on both sides with brake levers, which must comply with the conditions set out. Wagons constructed before the date mentioned must be fitted with similar brake levers before a certain date, which varies according to the number of wagons possessed by the owners, the latest date being the 7th November, 1931.

(*h*) The expression "railway" here includes any works of a railway company connected with the railway (Railway Employment (Prevention of Accidents) Act, 1900 (63 & 64 Vict. c. 27), s. 16).

(*i*) *Ibid.*, s. 1 (2).

Any such rules may require the use of any plant or appliances which the Board thinks will conduce to the safety of persons employed or the disuse of any plant or appliances which it thinks involve danger (*j*). A reasonable time must, however, be given to any company to carry out any requirements (*k*). Such rules may apply generally to all railways or to any particular railway or class of railways (*l*).

Nature of rules.

Notice of proposed rules must be published, and opportunity must be given by the Board to interested persons to make objections and have their objections considered (*m*). Any such person, if dissatisfied with the manner in which the Board deals with his objections, may by written notice require the objection to be referred to the Railway and Canal Commissioners, who must decide whether the objection is reasonable or not (*n*). Where such is the general desire of objectors, the objections to a proposed rule may be referred to a referee appointed by the Board instead of to the Commissioners (*o*).

Notice of proposed rules and hearing of objections.

In considering any such objection, regard must be had to the question whether the requirements of the proposed rule would materially interfere with the trade of the country or with the necessary operations of any railway company (*p*).

Matters to be considered.

1568. The Board of Trade may, with the concurrence of the Treasury, employ and pay such persons and may hold such inquiries as it thinks expedient in reference to the making of such rules (*q*).

Inquiries held by Board of Trade.

1569. Every railway company must (subject to the due working of its traffic) give all reasonable facilities to the Board of Trade for conducting any experiments with a view to making any such rules, provided such experiments are made without risk or expense to the company, unless otherwise agreed (*r*).

Experiments.

1570. Where the Board of Trade holds a special inquiry with reference to an objection to a proposed rule on the application of the objector, the person holding the inquiry may order the objector to pay the whole or any part of the costs of the inquiry as certified by the Board, if he is of opinion that the inquiry was unnecessary (*s*).

Costs of special inquiry.

1571. Where, in the opinion of the Board of Trade, in any particular case, a specific order or direction would be better than a general rule, the Board may give such order or direction in the

Specific order in lieu of general rule.

(*j*) Railway Employment (Prevention of Accidents) Act, 1900 (63 & 64 Vict. c. 27), s. 1 (3).
(*k*) *Ibid.*, s. 1 (4); *e.g.*, see note (*g*), p. 750, *ante*.
(*l*) Railway Employment (Prevention of Accidents) Act, 1900 (63 & 64 Vict. c. 27), s. 7.
(*m*) *Ibid.*, ss. 2, 5, 9.
(*n*) *Ibid.*, s. 3.
(*o*) *Ibid.*, s. 6. In this case, by *ibid.*, s. 15 (4), the provisions of the Board of Trade Arbitrations, etc. Act, 1874 (37 & 38 Vict. c. 40), s. 3, apply; see p. 740, *ante*.
(*p*) Railway Employment (Prevention of Accidents) Act, 1900 (63 & 64 Vict. c. 27), s. 4.
(*q*) *Ibid.*, s. 15 (1), (2).
(*r*) *Ibid.*, s. 15 (3).
(*s*) *Ibid.*, s. 15 (5).

SECT. 5. Accidents.

same manner and subject to the same conditions as it may make a rule (*t*).

Variation or rescission of rule.

1572. Any person affected by any rule which has been in operation for more than three months may apply to the Board of Trade to vary or rescind it. If such application is made within eighteen months of the coming into operation of the rule and the Board declines to entertain the application, it must on request refer the application to the Railway and Canal Commissioners, who must decide whether the application is reasonable or not. If the Commissioners decide that the application is reasonable the Board must propose a rule to meet it (*a*).

Penalty for non-observance of rule.

1573. Any person or company acting in contravention of or failing to comply with any rule is liable on summary conviction to a fine of £50, or in the case of a continuing offence to a fine of £10 a day for every day during which the offence continues after conviction. Alternatively, on the application of the Board of Trade, compliance with the rule may be enforced by the Railway and Canal Commissioners as if the rule were an order made by it (*b*).

Creating of stock to meet expenses.

1574. Where the requirements of any rule involve expenditure by a railway company which would properly be chargeable to capital account, the Board of Trade must on the application of the company fix, determine, and certify the sum properly so chargeable, and the company may thereupon issue debentures or debenture stock for that or any less sum at interest not exceeding 5 per cent., ranking *pari passu* with any existing debentures or debenture stock; and the sum so raised must be applied in carrying out the requirements of such rules (*c*).

Breach of contractual obligation consequent on rule.

1575. If any such rule imposes upon a company an obligation inconsistent with the terms of any lease or agreement under which the railway is worked, the company is under no liability for any breach of the obligation made necessary by such rule (*d*).

Appointment by Board of Trade of arbitrator to determine compensation.

1576. Where a person has been injured or killed by an accident on a railway, the Board of Trade, upon a joint application by the company and the injured person or his representatives, may, if it thinks fit, appoint an arbitrator to determine the compensation, if any, to be paid by the company (*e*). Such arbitrator may order the injured person to be examined by a duly qualified medical practitioner (*f*) named in the order who is not a witness on either

(*t*) Railway Employment (Prevention of Accidents) Act, 1900 (63 & 64 Vict. c. 27), s. 8.

(*a*) *Ibid.*, s. 10.

(*b*) *Ibid.*, s. 11. A summary conviction is subject to appeal to quarter sessions (*ibid.*); as to appeals to quarter sessions, see title MAGISTRATES, Vol. XIX., pp. 642 *et seq.* As to recovery of penalties, see pp. 734 *et seq.*, *ante*. For the mode in which an order of the Railway and Canal Commissioners is enforced, see p. 761, *post*.

(*c*) Railway Employment (Prevention of Accidents) Act, 1900 (63 & 64 Vict. c. 27), s. 14. As to the similar power in respect of expenses under the Regulation of Railways Act, 1889 (52 & 53 Vict. c. 57), see p. 632, *ante*.

(*d*) Railway Employment (Prevention of Accidents) Act, 1900 (63 & 64 Vict. c. 27), s. 17.

(*e*) Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 25. As to the liability of employers for compensation for accidents to their servants, see title MASTER AND SERVANT, Vol. XX., pp. 128 *et seq.*

(*f*) See title MEDICINE AND PHARMACY, Vol. XX., p. 325.

side, and may make such order as he thinks fit as to the costs of such examination (*g*). SECT. 5. Accidents.

Part IX.—Jurisdiction of the Railway and Canal Commission.

SECT. 1.—*The Court.*

1577. The Railway and Canal Commission is a court of record having an official seal which is judicially noticed (*h*). A court of record.

1578. No Commissioner may act in any case in which he is directly or indirectly interested, except by consent of the parties (*i*). Any Commissioner within three months of his appointment must absolutely sell and dispose of any share, debenture, or other interest which he may have for his own benefit in any railway company in the United Kingdom; and during his tenancy of the office he cannot hold or acquire any such interest, and must dispose of any such interest which comes to or vests in him by will or succession (*j*). Disqualification of Commissioner interested in railway company.

1579. The Commissioners may sit at such times and conduct their business in such manner as they think fit, and may sit anywhere in the United Kingdom, as may be most convenient; but when sitting in London they sit at the Royal Courts of Justice, unless otherwise directed by the Lord Chancellor (*k*). Sittings of the court.

The central office of the Commissioners is in London (*l*). Central office.

1580. Any document purporting to be signed by the Commissioners, or by any one of them, is receivable in evidence without further proof and deemed to be duly executed (*m*). Documents signed by Commissioners as evidence.

SECT. 2.—*Jurisdiction.*

1581. The jurisdiction of the Commissioners is either directly conferred upon them by various Acts of Parliament (*n*) or is exercised by them as arbitrators (*o*). Jurisdiction and limits to jurisdiction.

(*g*) Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 26.

(*h*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 2. As to the constitution of the court, the qualification and salaries of the Commissioners, the number of Commissioners required at a hearing, and the appointment of an additional *ex officio* commissioner, see title COURTS, Vol. IX., p. 217.

(*i*) Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 5.

(*j*) *Ibid.*

(*k*) *Ibid.*, s. 27; Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 5.

(*l*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 5 (2).

(*m*) Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 30.

(*n*) The matters in which they have jurisdiction are summarised in title COURTS, Vol. IX., p. 218.

(*o*) See pp. 754, 755, *post.*

SECT. 2. Jurisdiction.

If they exceed their jurisdiction they may be restrained by prohibition (*p*).

Jurisdiction directly conferred upon them by a public Act is exclusive, and the High Court has no original jurisdiction in such matters (*q*).

Jurisdiction as arbitrators: (i.) by agreement between companies;

1582. As arbitrators, the jurisdiction of the Commissioners is derived either from the agreement to refer (*r*) or from the fact that such agreement, being between railway or canal companies, is confirmed or authorised by an Act of Parliament, and that any of the parties to the agreement requires the matters in difference to be referred to the Commissioners (*s*).

(ii.) on reference by Board of Trade.

The Commissioners also may have referred to them by the Board of Trade any difference to which a railway or canal company is a party and which is required or authorised by any Act of Parliament to be referred to the Board or to some person appointed by the Board (*a*). In such case they have the same power of rescinding, varying, or adding to any award previously made by the Board or by any arbitrator with reference to the same subject-matter as the Board or such arbitrator would have had if the matter had been referred to it or him (*b*).

Effect of award.

When the Commissioners act as arbitrators under statutory authority, the High Court has no jurisdiction to set aside any award they

(*p*) *South Eastern Rail. Co.* v. *Railway Commissioners* (1881), 6 Q. B. D. 586, C. A.; *Toomer* v. *London, Chatham and Dover Rail. Co.* (1877), 2 Ex. D. 450. As to procedure in prohibition, see title CROWN PRACTICE, Vol. X., pp. 152 *et seq.* Where an application was made to the Commissioners to restrain railway companies from refusing to haul traders' wagons, and the railway companies tried to prohibit the Commissioners from dealing with the application, it was held, that as the applicants made their claim as for a reasonable facility, not as a matter of right, the Commissioners had jurisdiction (*Watson (John), Ltd.* v. *Caledonian Rail. Co.*, [1910] S. C. 1066).

(*q*) *Chatterley Iron Co.* v. *North Staffordshire Rail. Co.* (1878), 3 Ry. & Can. Tr. Cas. 238.

(*r*) By the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 9, any difference to which a railway company or canal company is a party may, with the assent of the Commissioners, be referred to them by agreement between the parties; see p. 690, *ante*.

(*s*) Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 8, as amended by the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 15; see p. 690, *ante*. As to the cases where this power does not exist, see also p. 719, *ante*.

(*a*) Board of Trade Arbitrations, etc. Act, 1874 (37 & 38 Vict. c. 40), s. 6.

(*b*) *Ibid.*, s. 7. Under the powers of *ibid.*, ss. 6, 7, the Railway and Canal Commissioners are frequently appointed by the Board of Trade to determine differences between railway companies and traders as to charges for special service under the various Railway Rates and Charges Confirmation Acts (see London and North Western Railway Company (Rates and Charges) Order Confirmation Act, 1891), 1891—1892 (54 & 55 Vict. c. ccxxi.), Sched., cl. 5, and other provisions of that schedule; see pp. 746, 747, *ante*; title CARRIERS, Vol. IV., p. 83. As to the jurisdiction of the Commissioners when acting under such a reference by the Board of Trade, see *Bala and Dolgelly Rail. Co.* v. *Cambrian Rail. Co.* (1874), 2 Ry. & Can. Tr. Cas. 47; and, as to the powers of the Commissioners under the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), see the text, *supra*, and pp. 690, 719, *ante*.

may make (*c*); neither can an award of the Commissioners be reopened on the ground that the evidence given was misunderstood (*d*).

Complaint against railway or canal company.

1583. Where the Commissioners have received any complaint against a railway or canal company alleging infringement of any enactment in respect of which they have jurisdiction, they may in their discretion, and before any further proceedings are taken, communicate the complaint to the company so as to afford them an opportunity of making observations thereon (*e*).

Award of damages in addition to other relief.

1584. Whenever the Commissioners have jurisdiction to hear and determine any matter they may, in addition to or in substitution for any other relief, award damages to the aggrieved party, such damages to be in full satisfaction of all claims, including overcharges. No damages can, however, be awarded unless complaint has been made by such party within one year from his discovery of the matter complained of. The damages may be assessed either by the Commissioners themselves or by an inquiry before an officer of their court (*f*).

General judicial powers.

1585. Within their jurisdiction, the Commissioners have full power to decide questions of both law and fact; and they have all the powers of a superior court with respect to the attendance of witnesses (*g*), the production and inspection of documents (*h*), the inspection of property (*i*), the enforcement of their orders (*k*), and other matters proper to the due exercise of their duties (*l*). Only the *ex officio* Commissioner may, however, commit for contempt of court (*m*).

SECT. 3.—*Exercise of Jurisdiction.*

SUB-SECT. 1.—*Who may Apply to Commissioners.*

Persons complaining as to traffic facilities, tolls etc.

1586. Proceedings may be taken before the Commissioners by any person complaining of any violation or contravention of the

(*c*) *Newry and Enniskillen Rail. Co.* v. *Ulster Rail. Co.* (1856), 2 Jur. (N. S.) 936, C. A. As to setting aside the awards of arbitrators, see title ARBITRATION, Vol. I., pp. 476 *et seq.*

(*d*) *Re Great Western Rail. Co. and Postmaster-General* (1903), 19 T. L. R. 636.

(*e*) Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 7; see p. 757, *post.*

(*f*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 12. As to the limitation of time, see *Holwell Iron Co., Ltd.* v. *Midland Railway*, [1909] 1 K. B. 486. Damages cannot be awarded in respect of undue preference where the rates complained of have been published in the company's rate books, unless written notice has been given to the company requiring them to remedy the complaint and the company has failed to do so (Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 13; see title CARRIERS, Vol. IV., p. 82).

(*g*) See title EVIDENCE, Vol. XII., pp. 577 *et seq.*

(*h*) See title DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI., pp. 67 *et seq.*

(*i*) See titles EVIDENCE, Vol. XIII., p. 509; PRACTICE AND PROCEDURE, p. 136, *ante.*

(*k*) See title JUDGMENTS AND ORDERS, Vol. XVIII., pp. 219 *et seq.*; and see pp. 761 *et seq.*, *post.*

(*l*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 18.

(*m*) *Ibid.* As to contempt of court, generally, see title CONTEMPT OF COURT, ATTACHMENT, AND COMMITTAL, Vol. VII., pp. 279 *et seq.*

SECT. 3. Exercise of Jurisdiction.

law relating to traffic facilities or undue preference (*n*) or of the provisions of the Regulation of Railways Act, 1873 (*o*), or any Act amending or applying that Act; or by any person appointed by the Board of Trade upon a certificate alleging any such violation or contravention (*p*); or by any person disputing the legality of any toll, rate or charge (*q*); or by any other person affected by any matter or complaint in respect of which the Commissioners have jurisdiction to determine (*r*).

Complaints by representative bodies.

1587. A complaint which the Commissioners have jurisdiction to determine may also be made (1) by any harbour or conservancy authority, by any county council or municipal authority, or by any justices in quarter sessions; or (2) by any such association of traders or freighters or chamber of commerce or agriculture as may obtain a certificate from the Board of Trade that it is a proper body to make such complaint (*s*). It is not necessary for any such authority to show that it is aggrieved; and it may appear in opposition to a complaint when the Commissioners are of opinion that it or the persons it represents are likely to be affected (*t*).

SUB-SECT. 2.—*Procedure.*

Rules.

1588. The Commissioners, with the approval of the Lord Chancellor and the President of the Board of Trade, have power

(*n*) *I.e.*, as contained in the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 2; the Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 16; the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25); see title CARRIERS, Vol. IV., pp. 65 *et seq.*; 74 *et seq.*

(*o*) 36 & 37 Vict. c. 48.

(*p*) *Ibid.*, s. 6.

(*q*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 10.

(*r*) For matters within the jurisdiction of the Commissioners, see title COURTS, Vol. IX., p. 218; the same matters being referred to *passim* in this title, and in title CARRIERS, Vol. IV., pp. 65 *et seq.*

(*s*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 7. This certificate remains in force for twelve months unless withdrawn. It may be granted on condition that the authority applying for it gives security for any costs it may be called upon to pay (*ibid.*). The necessity of obtaining the certificate is a protection to railway companies against frivolous or unreasonable complaints by chambers of commerce or associations of traders (*per* WILLS, J., in *Liverpool Corn Trade Association* v. *London and North Western Rail. Co.*, [1891] 1 Q. B. 120). An association so certified cannot be compelled to give particulars of the traders represented by the association (*Mansion House Association on Railway and Canal Traffic for the United Kingdom* v. *Great Western Rail. Co.*, [1895] 2 Q. B. 141, C. A.).

(*t*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 7. Application by a chamber of commerce for leave to appear was refused where it was not prepared to state whether it appeared in opposition or not (*Liverpool Corn Traders' Association* v. *Great Western Rail. Co.* (1892), 8 Ry. & Can. Tr. Cas. 114). The Commissioners are not limited by this provision as to the classes of persons whom they may hear in opposition, but have the ordinary jurisdiction of common law courts to allow intervention in their discretion (*Port of London Authority* v. *Midland Railway*, [1912] 2 K. B. 1). An urban district council has been allowed to intervene in an application under the Cheap Trains Act, 1883 (46 & 47 Vict. c. 34) (*London County Council* v. *Great Eastern Rail. Co.* (1911), 14 Ry. & Can. Tr. Cas. 224).

to make and alter rules governing the practice and procedure of their court (*u*).

Application or complaint.

1589. Proceedings are in general commenced by an application in writing, which is in the nature of a statement of claim (*v*). This application (*w*) must contain a concise statement of the facts relied on, the grounds of application, and the relief or remedy claimed; it must be divided into numbered paragraphs and must be signed by the applicant or his solicitor, or, in the case of a company, by the chairman, manager, secretary, or solicitor (*x*).

Specified damages.

If damages are claimed, the application must specify the amount thereof and the matter in respect of which they are claimed; and the defendant may before or at the time of delivering his answer, or at any time by leave, pay money into court either with or without a denial of liability (*a*).

Filing and service.

The application must be filed with the registrar to the Commissioners (*b*), and a copy must be served upon the manager, secretary, or chief clerk of the defendant, unless the solicitor for the defendant undertakes in writing to accept service (*c*).

Joint application.

1590. If the application is for the Commissioners to hear and determine a dispute as to the legality of any rate, toll or charge, the parties may concur in stating the question in the form of a joint application without further proceedings (*d*).

Communication of application to company complained against.

1591. When the Commissioners in their discretion communicate an application to the company against whom the complaint is made, so as to afford the company an opportunity of making observations thereon (*e*), they must notify the fact of such communication to the applicant within seven days of the filing of the application, and thereupon all formal proceedings are suspended until further notice (*f*). Within the seven days or afterwards, the Commissioners may require further information, particulars or documents, from

(*u*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 20. Rules made by the Commissioners must be laid before Parliament; they must be judicially noticed and have the effect of an Act of Parliament (*ibid.*). Rules have been made under this power entitled the Railway and Canal Commission Rules, 1889 (Stat. R. & O. Rev., Vol. XI., Railway, pp. 43 *et seq.*).

(*v*) Railway and Canal Commission Rules, 1889, r. 2, and Sched. I., Form No. 1.

(*w*) "Application" includes "complaint" (*ibid.*, r. 1).

(*x*) *Ibid.*, r. 2. As to the form of the application in various cases, see *ibid.*, rr. 3—16.

(*a*) *Ibid.*, r. 18; R.S.C., 1883, Ord. 22, rr. 2—7, apply, *mutatis mutandis*, to payment into court (*ibid.*); and see title PRACTICE AND PROCEDURE, pp. 147 *et seq.*, *ante*.

(*b*) Railway and Canal Commission Rules, 1889, r. 19.

(*c*) *Ibid.*, r. 21. As to what parties must be joined as defendants to an application, see *Mapperley Colliery Co.* v. *Midland Rail. Co.* (1896), 9 Ry. & Can. Tr. Cas. 147; *Chance and Hunt, Ltd.* v. *London and North Western Rail. Co.* (1909), 13 Ry. & Can. Tr. Cas. 286.

(*d*) Railway and Canal Commission Rules, 1889, r. 13.

(*e*) *I.e.*, under the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 7; see p. 755, *ante*.

(*f*) Railway and Canal Commission Rules, 1889, r. 22.

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the applicant, and may suspend formal proceedings until their requirements are satisfied (*g*).

Inquiries.

1592. The Commissioners may direct inquiries to be made, at any stage of the proceedings, in such manner and by such persons as they think fit (*h*), and if they do so they must give the parties notice, and may meanwhile suspend all proceedings till further notice (*i*).

Consent orders after filing of application.

1593. In all cases the parties may by consent in writing dispense with all formal proceedings after the filing of the application; and orders by consent may be drawn up, and, if approved of by the Commissioners, may be sealed with their seal (*k*).

Answer to application.

Reply.

1594. Within fifteen days from the service of the application, the defendant must file and deliver his answer, and, within six days from the delivery of the answer, the applicant must file and deliver his reply, if any; but these times are liable to be shortened or extended by order on summons (*l*).

Close of pleadings.

1595. After reply, no further pleading may be delivered without leave (*m*), and, if no reply is delivered, the pleadings are deemed to be closed and all material statements of facts in the pleading last delivered are deemed to be in issue (*n*).

Issues of fact.

1596. If the Commissioners are of opinion that the pleadings do not sufficiently raise the issues of fact they may direct the parties to prepare issues, and in case the parties differ the Commissioners may settle the issues (*o*).

Setting down point of law.

1597. Any point of law raised by the pleadings may be set down for hearing and disposed of by the Commissioners before the hearing of the application, and if the decision on such point, in the opinion of the Commissioners, disposes of the whole application, they may order that the argument shall be the hearing of the application and thereupon may deal with the same as seems to them just (*p*).

Interlocutory orders.

1598. The Commissioners have power to grant interim injunctions (*q*), to make orders for discovery of documents (*r*) and

(*g*) Railway and Canal Commission Rules, 1889, r. 23.
(*h*) Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 3.
(*i*) Railway and Canal Commission Rules, 1889, r. 24.
(*k*) *Ibid.*, r. 25.
(*l*) *Ibid.*, rr. 26, 27, 53, and Sched., Forms Nos. 4, 5.
(*m*) *Ibid.*, r. 28.
(*n*) *Ibid.*, r. 29.
(*o*) *Ibid.*, r. 30.
(*p*) *Ibid.*, r. 31. *E.g.*, this course was followed in *North Staffordshire Colliery Owners' Association* v. *North Staffordshire Rail. Co., London and North Western Rail. Co., Great Western Rail. Co., and Shropshire Union Railways and Canal Co.* (1908), 13 Ry. Can. & Tr. Cas. 78.
(*q*) Railway and Canal Commission Rules, 1889, r. 34. In an application to compel the defendant to carry out a statutory agreement to forward certain traffic by the railway of the applicant, an interim injunction was granted enjoining the defendant to forward the traffic until the hearing,

(*r*) For note (*r*), see next page.

interrogatories (*s*), and to order the production and inspection of documents (*t*). Either party may give to the other notice to produce (*a*) or to admit documents (*b*).

1599. When any application is withdrawn or settled it is the duty of the applicant to immediately give notice thereof to the registrar (*c*).

Notice of withdrawal or settlement.

The date of hearing is fixed by the registrar on application (*d*).

Date.

At the hearing, the evidence is given *viva voce* unless the Commissioners order that any particular facts be proved, or the evidence of any witness be given, by affidavit, or that any witness be examined by interrogatories or on commission (*e*).

Hearing.

Evidence.

1600. Where the Commissioners think fit, a view may be had by one or more of the Commissioners as they determine (*f*).

View.

1601. Interlocutory applications are heard upon summons by the registrar, with an appeal from his decision on a point of law to the *ex officio* Commissioner. An interlocutory application can be adjourned into court for determination by the Commissioners (*g*).

Appeal from interlocutory orders or adjournment into court.

1602. A final order or decision of the Commissioners may be reviewed, rescinded, or varied by them upon application made within twenty-eight days after such order or decision has been communicated to the parties, or within such further time as the Commissioners may allow (*h*). This jurisdiction, however, is exercised

Review or rescission of final order.

on the ground that the applicant had a *primâ facie* right and no harm could be done as accounts could be kept (*Great Northern Rail. Co.* v. *Great Eastern Rail. Co.* (1899), 10 Ry. & Can. Tr. Cas. 266). But in an application to compel the defendant to give the applicant certain facilities for running over and using its railway, an interim injunction enjoining the defendant company to allow such user until the hearing was refused (*North Eastern Rail. Co.* v. *North British Rail. Co.* (1897), 10 Ry. & Can. Tr. Cas. 82). The Court of Appeal disapproves of the Commissioners granting contingent injunctions (*Spillers and Bakers, Ltd.* v. *Great Western Railway*, [1911] 1 K. B. 386, C. A.).

(*r*) Railway and Canal Commission Rules, 1889, r. 35.

(*s*) *Ibid.*, r. 36.

(*t*) *Ibid.*, rr. 37, 38.

(*a*) *Ibid.*, r. 39.

(*b*) *Ibid.*, r. 40.

(*c*) *Ibid.*, r. 41.

(*d*) *Ibid.*, r. 43.

(*e*) *Ibid.*, r. 45. In *Castle Steam Trawlers, Ltd.* v. *Great Western Rail. Co.* (1908), 13 Ry. & Can. Tr. Cas. 145, hearsay evidence was admitted to prove competition (*ibid.*, *per* LAWRENCE, J., at p. 147).

(*f*) Railway and Canal Commission Rules, 1889, r. 48. In a proper case the parties should inform the Commissioners prior to the hearing and make arrangements for them to view if they think fit (*Greenwood (John) & Sons, Ltd.* v. *Cheshire Lines Committee* (1908), 13 Ry. & Can. Tr. Cas. 169).

(*g*) Railway and Canal Commission Rules, 1889, r. 53. On interlocutory applications the practice is to hear only one counsel, but two are heard on an application to review, rescind, or vary (*Rickett, Smith & Co.* v. *Midland Rail. Co., Derbyshire Silkstone Coal Co.* v. *Same, Grassmoor Co.* v. *Same* (1895), 9 Ry. & Can. Tr. Cas. 107).

(*h*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 18 (2), and Railway and Canal Commission Rules, r. 52. An interlocutory order may be similarly reopened within four days. In either case the applica-

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only upon very strong grounds, in exceptional cases, and with great caution (*i*).

Appearance of parties.

1603. Any party may appear before the Commissioners either in person or by counsel or solicitor (*k*); and any parliamentary agent who is certified to have practised before committees of Parliament for two years before the 10th August, 1888, may practise as attorney or agent before the Commissioners, but every such person is, in regard to such practice, subject to the jurisdiction of the Commissioners, and his name must be entered on a roll kept by them (*l*).

SUB-SECT. 3.—*Costs.*

When Commissioners have power to award costs.

1604. In proceedings before the Commissioners, other than disputes between two or more companies (*m*), the Commissioners have no power to award costs on either side, unless they are of opinion that either the claim or the defence has been frivolous or vexatious (*n*). This, however, applies only to the costs of the hearing; the costs of interlocutory matters are in the discretion of the Commissioners (*o*).

Costs of appeal.

1605. In case of appeal (*p*), the costs of appeal come under the ordinary rules of the Court of Appeal, though that court cannot

tion is by motion on notice of motion (*ibid.*). As to appeals, see p. 762, *post*.

(*i*) See *Rickett, Smith & Co.* v. *Midland Rail. Co., Derbyshire Silkstone Coal Co.* v. *Same, Grassmoor Co.* v. *Same* (1895), 9 Ry. & Can. Tr. Cas. 107, *per* COLLINS, J., at p. 135. For a case in which a decision was reopened, see *Great North of Scotland Rail. Co.* v. *Highland Rail. Co., Highland Rail. Co.* v. *Great North of Scotland Rail. Co.* (1885), 5 Ry. & Can. Tr. Cas. 103. The Commissioners will refuse to reopen a decision after a long interval of time (*Denaby Main Colliery Co.* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (No. 2) (1881), 4 Ry. & Can. Tr. Cas. 23). They will also refuse to reopen a decision on a question of costs only, where there is no application to vary on the merits (*Hammons and Foster* v. *Great Western Rail. Co.* (1883), 4 Ry. & Can. Tr. Cas. 181).

(*k*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 50. As to rights of audience, see titles BARRISTERS, Vol. II., pp. 370 *et seq.*; SOLICITORS.

(*l*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 51.

(*m*) This applies to railway companies, canal companies, and railway and canal companies (Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 23). As to canal companies, see p. 791, *post*.

(*n*) Railway and Canal Traffic Act, 1894 (57 & 58 Vict. c. 54), s. 2. As to what is frivolous and vexatious, see *London County Council* v. *Great Eastern Rail. Co.* (1911), 14 Ry. & Can. Tr. Cas. 224. If parties do not make proper discovery of documents and come prepared with copies to the court, their conduct may be held to be "vexatious"; see *Anderton Co., Ltd.* v. *River Weaver Trustees* (1910), 14 Ry. & Can. Tr. Cas. 136, *per* LAWRENCE, J., at p. 140. When proceedings have been unduly protracted by the conduct of an applicant, he may be ordered to pay part of the costs even though he is successful in his application (*Taff Vale Rail. Co.* v. *Barry Docks Co.* (No. 1) (1890), 7 Ry. & Can. Tr. Cas. 41).

(*o*) As provided by the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 19; see *Rickett, Smith & Co.* v. *Midland Rail. Co., Derbyshire Silkstone Coal Co.* v. *Same, Grassmoor Co.* v. *Same, supra*.

(*p*) As to appeals, see pp. 762 *et seq.*, *post*. As to costs in the Court of Appeal, see titles PRACTICE AND PROCEDURE, pp. 207, *ante*; SOLICITORS.

award the costs of proceedings before the Commissioners where the Commissioners themselves had no power to award costs (*q*).

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1606. In disputes in which the parties are railway or canal companies, the costs of and incidental to every proceeding before the Commissioners are in the discretion of the Commissioners, who may order by whom and to whom they are to be paid and by whom they are to be taxed and allowed (*r*). Costs of disputes between companies.

1607. Unless there is reason to otherwise order, the Commissioners generally direct that the costs of proceedings shall follow the event when such costs are within their discretion (*s*). They have no jurisdiction to order defendants to pay the costs of an unsuccessful applicant (*t*). Costs are taxed upon the order under which they are payable by the registrar or by such other person as the Commissioners may direct (*u*). Award and taxation of costs.

SUB-SECT. 4.—*Enforcement of Orders.*

1608. The Commissioners may issue injunctions (*v*) against companies restraining them from violating or contravening the law with regard to matters within their jurisdiction (*w*). Injunctions.

1609. In case of disobedience to any such injunction they may issue writs of attachment (*x*) against any director of a company or any other person answerable for such disobedience; and they may order any company to pay a penalty (*a*) not exceeding £200 for every day, Attachment. Penalty.

(*q*) *Mansion House Association on Railway and Canal Traffic for the United Kingdom* v. *Great Western Rail. Co.*, [1895] 2 Q. B. 141, C. A.

(*r*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 19, as modified by the Railway and Canal Traffic Act, 1894 (57 & 58 Vict. c. 54), s. 1. As to references to the Commissioners of such disputes, see pp. 718, 719, 754, *ante*.

(*s*) See *Palmer* v. *London and South Western Rail. Co.* (No. 2) (1892), 8 Ry. & Can. Tr. Cas. 53 (this was before the discretion over costs was restricted; see p. 760, *ante*); *Stocksbridge Rail. Co.* v. *Great Central Rail. Co.* (1909), 13 Ry. & Can. Tr. Cas. 335.

(*t*) *Re Foster* v. *Great Western Rail. Co.* (1882), 8 Q. B. D. 515, C. A.

(*u*) Railway and Canal Commission Rules, 1889, r. 51. The costs of more than two counsel are, as a rule, not allowed on taxation between party and party, unless the case involves extraordinary complication and difficulty. In applying this test it is material to consider whether a reasonable and prudent man would go into court without three counsel, but the chance of briefed counsel not attending must not be considered (*Glamorgan County Council* v. *Great Western Rail. Co.*, [1895] 1 Q. B. 21). As to taxation of costs, generally, see title SOLICITORS.

(*v*) As to the general nature of this remedy, see title INJUNCTION, Vol. XVII., pp. 197 *et seq.*

(*w*) Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 6; see also Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), ss. 2, 3; Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 16; Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), ss. 8, 9, 10, 18, 25; Railway Regulation Act, 1893 (56 & 57 Vict. c. 29), s. 1; Railway and Canal Traffic Act, 1894 (57 & 58 Vict. c. 54), s. 1; Railway Employment (Prevention of Accidents) Act, 1900 (63 & 64 Vict. c. 27); Railways (Private Sidings) Act, 1904 (4 Edw. 7, c. 19). As to jurisdiction, see pp. 753 *et seq.*, *ante*; title COURTS, Vol. IX., p. 217; and see pp. 740, 741, *ante*.

(*x*) As to attachment, see, generally, titles CONTEMPT OF COURT, ATTACHMENT, AND COMMITTAL, Vol. VII., pp. 279 *et seq.*; CORPORATIONS, Vol. VIII., p. 396.

(*a*) For cases in which companies have been ordered to pay penalties,

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after a day to be named in the order, that such company fails to obey such injunction, and the penalty may be recovered by process of execution (*b*).

Enforcement as a rule of court.

1610. A decision or order of the Commissioners made for the purpose of carrying into effect any of the provisions of the public Acts giving them jurisdiction may be made a rule or order of the High Court, and may be enforced either as above described or as a rule or order of the High Court (*c*).

Enforcement of decisions under powers conferred by special Acts.

1611. Where any enactment in a special Act (1) contains provisions relating to traffic facilities or undue preference, or (2) requires a railway company to provide any station, road, or other similar work for public accommodation, or (3) imposes on a railway company any obligation in favour of the public or of an individual, or when any Act contains provisions relating to private branch railways or private sidings, the Commissioners have the like jurisdiction to enforce their decisions (*d*). The fact, however, that the Commissioners have such jurisdiction does not oust the jurisdiction of the courts in any matter which otherwise they could have dealt with (*e*).

SUB-SECT. 5.—*Appeals.*

When appeal lies.

Questions of law.

1612. On questions of law an appeal lies from the Commissioners to the Court of Appeal, and must be brought in conformity with the Rules of the Supreme Court (*f*). When the Commissioners are sitting as arbitrators under the Regulation of Railways Act, 1873 (*g*), their jurisdiction does not depend on the consent of the parties, and there is an appeal to the Court of Appeal from their decision on a question of law (*h*).

Questions of fact.

No appeal lies from the Commissioners on a question of fact or upon any question regarding the *locus standi* of any complainant (*i*). The findings of fact of the Commissioners will not be disturbed by the Court of Appeal (*k*), but if in finding a fact they

see *Chatterley Iron Co.* v. *North Staffordshire Rail. Co.* (1878), 3 Ry. & Can. Tr. Cas. 238; *Watkinson* v. *Wrexham, Mold and Connah's Quay Rail. Co.* (No. 3) (1880), 3 Ry. & Can. Tr. Cas. 446. As to execution against railway companies, see pp. 764, 765, *post*; and as to execution, generally, see title EXECUTION, Vol. XIV., pp. 1 *et seq.*

(*b*) Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 3; Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 6.

(*c*) Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 26. For the purpose of carrying this into effect rules may be made by the High Court (*ibid.*).

(*d*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 9.

(*e*) *Barry Rail. Co.* v. *Taff Vale Rail. Co.*, [1895] 1 Ch. 128, C. A.

(*f*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), ss. 17 (2), (3), 55; see R. S. C., Ord. 53; title PRACTICE AND PROCEDURE, pp. 192 *et seq.*, *ante*.

(*g*) 36 & 37 Vict. c. 48, s. 8; see p. 754, *ante*.

(*h*) *North Eastern Rail. Co.* v. *North British Rail. Co.* (1897), 35 Sc. L. R. 282.

(*i*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 17 (1); see *Vickers, Sons and Maxim, Ltd.* v. *Midland Rail. Co.* (1902), 87 L. T. 655, C. A.

(*k*) *Spillers and Bakers, Ltd.* v. *Great Western Railway*, [1911] 1 K. B.

proceed on a wrong principle of law their decision may be varied (*l*); and an appeal lies from a decision which is based on "no evidence" (*m*), or which is based on a finding that there is evidence of an alleged violation of law (*n*).

Special case.

1613. The Commissioners also have power to state a special case for the opinion of the High Court (*o*), but no appeal lies from the decision of the High Court on such case (*p*).

Commissioners bound by their own decisions.

1614. The decisions of the Commissioners are binding upon themselves (*q*), and the decision of the Commissioners sitting in one part of the United Kingdom is binding upon themselves when sitting in another part (*r*).

Hearing of the appeal.

1615. On the hearing of an appeal, the Court of Appeal may draw all such inferences as are not inconsistent with the facts found by the Commissioners and are necessary for determining questions of law, and they may make any order which the Commissioners could have made and any further or other order which seems to be just; and the costs of the appeal are in their discretion, saving that no Commissioner can be ordered to pay costs (*s*).

Counsel.

The Court of Appeal will hear two counsel only, although more than one party appears by different counsel in support of the same side (*t*).

Appeal to House of Lords.

1616. The decision of the Court of Appeal is final; but when any decision of the Court of Appeal is inconsistent with a decision of the Court of Session in Scotland (in either Division of the Inner House),

386, C. A.; *Abram Coal Co., Ltd.* v. *Great Central Rail. Co.* (1903), 19 T. L. R. 664, C. A.; *Watson (Joseph) & Sons, Ltd.* v. *Midland Rail. Co.* (1909), 14 Ry. & Can. Tr. Cas. 18; *Great Central Rail. Co.* v. *Lancashire and Yorkshire Rail. Co.* (1910), 14 Ry. & Can. Tr. Cas. 131.

(*l*) *Pickford's, Ltd.* v. *London and North Western Rail. Co.* (1907), 13 Ry. & Can. Tr. Cas. 31, C. A. "This court cannot reverse the decision of the Railway Commissioners on questions of fact; but if, in solving a question of fact, the Railway Commissioners have applied a wrong principle of law, then this court can, if necessary, vary the order of the Commissioners, which, though said to be a finding of fact, had really proceeded upon a misdirection in point of law" (*ibid., per* Lord ALVERSTONE, C.J., at p. 70).

(*m*) *Lever Brothers, Ltd.* v. *Midland Rail. Co.* (1909), 13 Ry. & Can. Tr. Cas. 301, C. A. "A judgment based on 'no evidence' raises always a question of law" (*ibid., per* VAUGHAN WILLIAMS, L.J., at p. 309). But when the only question raised is whether there was evidence to support a finding of fact, a mandamus to state a case will not be granted; see *Rhymney Iron Co., Ltd.* v. *Rhymney Rail. Co.* (1888), 6 Ry. & Can. Tr. Cas. 60, 89, C. A.

(*n*) See *Denaby Main Colliery Co.* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (1880), 3 Ry. & Can. Tr. Cas. 426.

(*o*) *Hall & Co.* v. *London, Brighton and South Coast Rail. Co.* (1885), 15 Q. B. D. 505.

(*p*) *Hall* v. *London, Brighton and South Coast Rail. Co.* (1886), 17 Q. B. D. 230, C. A.

(*q*) *Didcot, Newbury and Southampton Rail. Co.* v. *Great Western Rail. Co. and London and South-Western Rail. Co.* (1896), 9 Ry. & Can. Tr. Cas. 210, *per* COLLINS, J., at p. 229.

(*r*) *Spillers and Bakers, Ltd.* v. *Great Western Rail. Co.* (1910), 14 Ry. & Can. Tr. Cas. 52, C. A., *per* LAWRENCE, J., at p. 57.

(*s*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 17 (4).

(*t*) *Spillers and Bakers, Ltd.* v. *Great Western Rail. Co., supra*, at p. 80.

SECT. 3. Exercise of Jurisdiction.

or of the Court of Appeal in Ireland, the court of appeal in which a matter affected by such difference of opinion is pending may give leave to appeal to the House of Lords on such terms as to costs as the Court of Appeal thinks fit (*a*).

No prohibition or *certiorari*.

1617. Except as above stated, no order or proceeding of the Commissioners can be questioned or reviewed, nor can it be restrained or removed by prohibition, injunction, *certiorari*, or otherwise at the instance of the Crown or otherwise (*b*).

Part X.—Execution and Insolvency.

SECT. 1.—*Execution.*

General protection of rolling stock, plant, and property.

1618. After a railway or any part of a railway is open for public traffic (*c*), the rolling stock and plant, used or provided by the company for the purposes of the traffic on its railway or for its stations or workshops, is not liable to be taken in execution (*d*), provided the judgment on which execution issues is recovered in an action on a contract entered into since the 20th August, 1867 (*e*), or in an action not on a contract (*f*) commenced since that date (*g*).

(*a*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), ss. 17 (5), 55.

(*b*) *Ibid.*, s. 17 (6). As to prohibition and *certiorari*, see title CROWN PRACTICE, Vol. X., pp. 141 *et seq.*, 155 *et seq.*

(*c*) If a railway has once been opened for traffic, the protection from seizure continues even though the railway has subsequently been closed (*Midland Waggon Co.* v. *Potteries Rail. Co.* (1880), 6 Q. B. D. 36); but where no part of an authorised railway was ever worked by the company, although part was opened, worked, and maintained by another company without compensation to the owning company, it was held that the railway had not been opened for traffic within the meaning of the Act (*Re Beddgelert Rail. Co.* (1871), 24 L. T. 122). As to the meaning of "opened for traffic," see also p. 742, *ante*.

(*d*) As to execution, generally, see title EXECUTION, Vol. XIV., pp. 1 *et seq.*; and see *ibid.*, pp. 13, 14, 85.

(*e*) This is the date of the passing of the Railway Companies Act, 1867 (30 & 31 Vict. c. 127).

(*f*) "Action not on a contract" includes every action not founded upon contract; thus it includes an action to enforce an obligation created by Act of Parliament (*Re Manchester and Milford Rail. Co.*, [1897] 1 Ch. 276).

(*g*) Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 4. The provision is made to enable a company against which a creditor has obtained judgment to carry on its business as a going concern notwithstanding the judgment. This is partly for the benefit of the public and partly for the benefit of creditors, who are given the right (see pp. 765, 766, *post*) of obtaining the appointment of a receiver and manager, and who are thereby more likely to get paid than if the whole undertaking was broken up and sold; see *Re Wrexham, Mold and Connah's Quay Railway*, [1900] 2 Ch. 436, *per* FARWELL, J., at p. 439; see also *Re Eastern and Midlands Rail. Co.* (1890), 45 Ch. D. 367, C. A., *per* KAY, J., at p. 379. The provision does not interfere with the right to levy execution against property of the company not actually needed for carrying on the business of the company. As to a judgment creditor taking surplus lands in

Companies entitled to the protection.

1619. A company is entitled to this protection when it has been constituted by Act of Parliament, or by certificate under Act of Parliament, for the purpose of constructing, maintaining, or working a railway either alone or in conjunction with any other purpose (*h*), and whether the construction of the railway is or is not the principal object of the company (*i*).

Determination of questions as to the protection.

1620. Where the property of a company is taken in execution, and a question arises whether or not it is liable to be so taken in view of the statutory protection, the question may be determined by summons in a summary way by the court out of which the execution issued, and such determination is not subject to appeal (*j*).

Rights of contractors of extension railways to resort to original undertaking.

1621. Where an existing railway company incorporated by statute is empowered by a later Act to make extension railways, the contractors who have constructed such extension railways are entitled to be paid the sums due to them for such construction out of the general undertaking, even though it is provided by the Act authorising such extension railways that they are to form a separate undertaking with separate capital, and that as between the general and the separate undertaking the expenses of maintaining and working the separate undertaking are to be paid out of the revenue of the latter (*k*).

SECT. 2.—*Receivers and Managers.*

Right of judgment creditor to appointment of receiver.

1622. A judgment creditor (*l*) who is deprived of his right of having the property of a company taken in execution (*m*) has a right to obtain the appointment of a receiver (*n*), and, if necessary, and if the company is actually carrying on business, has a right

execution, see *Re Hull, Barnsley and West Riding Junction Rail. Co.* (1888), 40 Ch. D. 119, C. A.; *Re Ogilvie* (1871), 7 Ch. App. 174; *Re Hull and Hornsea Rail. Co.* (1866), L. R. 2 Eq. 262; *Gardiner* v. *London, Chatham and Dover Rail. Co., Ex parte Grissell* (1867), 2 Ch. App. 385; *Re Bristol and North-Somerset Rail. Co.* (1869), 20 L. T. 70; *Re Calne Rail. Co.* (1870), L. R. 9 Eq. 658.

(*h*) Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 3.

(*i*) *Great Northern Rail. Co.* v. *Tahourdin* (1883), 13 Q. B. D. 320, C. A. Thus, where a company was formed by Act of Parliament to make a dock, and it was authorised to make a short railway connecting the dock with the line of a railway company, it was held that the dock company was within the protection (*Re East and West India Dock Co.* (1888), 38 Ch. D. 576, C. A.).

(*j*) Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 5.

(*k*) *Pearson (S.) & Son, Ltd.* v. *Dublin and South Eastern Railway*, [1909] A. C. 217.

(*l*) As to the nature of the judgment, see p. 764, *ante*. Where a company had given a certificate of indebtedness and a promise to pay with interest to its secretary, and the secretary had got judgment upon such promise, it was held that he was entitled to an order for a receiver although the services in respect of which he was a creditor had been rendered in part before the 20th August, 1867, the date the Act was passed (*Re Southern Rail. Co., Ex parte Quinton* (1880), 5 L. R. Ir. 165); see note (*e*), p. 764, *ante*.

(*m*) See p. 764, *ante*, and the text, *supra*; and see note (*t*), p. 766, *post*.

(*n*) As to receivers generally, see title RECEIVERS.

SECT. 2. Receivers and Managers.

also to the appointment of a manager (*o*) of the undertaking (*p*) of the company (*q*).

Discretion of the court.

1623. The appointment is obtained by petition in the Chancery Division of the High Court (*r*).

In making the appointment the court acts in its discretion for the benefit of all creditors, and is not fettered in that discretion by any contract between the company and any other party (*s*).

A receiver ought not to be appointed when there is no money for him to receive (*t*).

Managers.

1624. Where the officers of the company are acting fairly they are generally appointed managers (*u*); they have then the same powers of management as before, but they exercise such powers as officers of the court and under the court's directions, not as officers of the company (*v*).

Application of funds in hands of receiver.

1625. All money received (*a*) by such a receiver or by a receiver and manager must in the first place be applied to making due

(*o*) *Re Manchester and Milford Rail. Co., Ex parte Cambrian Rail. Co.* (1880), 14 Ch. D. 645. In *Gardner* v. *London, Chatham and Dover Rail. Co.* (No. 1), *Drawbridge* v. *Same, Gardner* v. *Same* (No. 2), *Imperial Mercantile Credit Association* v. *Same* (1867), 2 Ch. App. 201, it was held by the Court of Appeal that the court could not appoint a manager. The Railway Companies Act, 1867 (30 & 31 Vict. c. 127), was intended to get over that difficulty; see *Re Manchester and Milford Rail. Co., Ex parte Cambrian Rail. Co., supra, per* BAGGALLAY, L.J., at p. 658.

(*p*) A railway company which has never acquired any lands or constructed any works is not an "undertaking" within this provision (*Re Birmingham and Lichfield Junction Rail. Co.* (1881), 18 Ch. D. 155). A receiver or manager, if appointed at all, must be appointed of the whole undertaking of the company, not merely of a railway which is part of such undertaking (*Re East and West India Dock Co.* (1888), 38 Ch. D. 576, C. A.). Where part of a line was opened for traffic and was being worked by another company, it was held that a receiver appointed could be appointed over the part thus open although worked by another company (*Re Southern Rail. Co., Ex parte Quinton* (1880), 5 L. R. Ir. 165).

(*q*) Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 4.

(*r*) *Ibid.* The only evidence required in support of a petition is an affidavit showing that the petitioner is a judgment creditor, that his judgment is unsatisfied, and that the company is a going concern (*Re Manchester and Milford Rail. Co., Ex parte Cambrian Rail. Co., supra*). For the practice as to petitions, see title PRACTICE AND PROCEDURE, p. 188, *ante*.

(*s*) *Re Hull, Barnsley and West Riding Junction Rail. and Dock Co.* (1887), 57 L. T. 82. As long as the company is a going concern, debenture-holders have no voice in deciding who is to be manager or what his salary is to be (*ibid.*).

(*t*) *Re Knott End Railway Act*, 1898, [1901] 2 Ch. 8, C. A.; and see title RECEIVERS. It appears to be doubtful whether the court has any jurisdiction to appoint a receiver under the Act when the line is not open for traffic (*ibid.*).

(*u*) *Re Manchester and Milford Rail. Co., Ex parte Cambrian Rail. Co., supra.*

(*v*) *Re Eastern and Midlands Rail. Co.* (2) (1892), 66 L. T. 153; see *Whadcoat* v. *Shropshire Railways Co.* (1893), 9 T. L. R. 589.

(*a*) "Money received" includes the proceeds of the sale of rolling stock sold to another company under the provisions of a statutory agreement authorised after the appointment of the receiver (*Re Liskeard and Caradon Railway*, [1903] 2 Ch. 681).

provision for the working expenses of the railway (*b*) and other proper outgoings (*c*) in respect of the undertaking (*d*). This priority is strictly confined to such working expenses and other proper outgoings (*e*), and a judgment creditor gains no priority by obtaining a receivership order (*f*).

Distribution under direction of court.

After providing for such working expenses and outgoings, the money received must be applied and distributed under the directions of the court in payment of the debts of the company and otherwise according to the rights and priorities of the persons interested in such money (*g*).

Effect of receivership order on unpaid capital.

1626. A receiver thus appointed has no power to get in unpaid calls or capital (*h*), nor is the right of a judgment creditor to execution against such unpaid capital affected by the appointment (*i*).

Discharge.

1627. As soon as every judgment creditor has been satisfied, the court may, if it think fit, discharge such receiver or such receiver and manager (*k*).

(*b*) "Working expenses" are such as are fairly necessary to enable the railway to be worked efficiently, such as wages, coal and necessary repairs; see *Re Wrexham, Mold and Connah's Quay Railway*, [1900] 2 Ch. 436. Payments for rolling stock bought under a hire-purchase agreement are working expenses (*Re Cornwall Minerals Rail. Co.* (1882), 48 L. T. 41, C. A.; *Re Eastern and Midlands Rail. Co.* (2) (1892), 66 L. T. 153); but a debt for rails supplied before the order is not a working expense (*Re Navan and Kingscourt Rail. Co., Ex parte Price* (1885), 17 L. R. Ir. 398, C. A.), nor is the cost of promoting a Bill in Parliament for power to substitute electricity for steam in working the railway (*Re Mersey Rail. Co.* (1895), 72 L. T. 535), nor a judgment debt for damages obtained against the company for negligence (*Re Wrexham, Mold and Connah's Quay Railway, supra;* see also *Re Eastern and Midlands Rail. Co.* (1890), 45 Ch. D. 367, C. A.).

(*c*) "Proper outgoings" include payments which must be made if the railway is to be kept working, as rates and taxes (*Re Wrexham, Mold and Connah's Quay Railway, supra*). Where a contractor was owed money by a company and the court gave leave for him to proceed with an action against the company and for the company to defend the action, the result being a substantial reduction in the sum payable, it was held that the company's costs of the action were not "proper outgoings" within the Act (*Re Wrexham, Mold and Connah's Quay Railway*, [1900] 1 Ch. 261, C. A.; and see cases cited in preceding note (*b*), *supra*). Where part of a railway was a "separate undertaking" with "separate capital," it was held that even then the working expenses etc. must be paid before the interest on this separate capital (*Re Eastern and Midlands Rail. Co.* (1890), 45 Ch. D. 367, C. A.).

(*d*) Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 4.

(*e*) *Re Wrexham, Mold and Connah's Quay Railway*, [1900] 2 Ch. 436. A person who has obtained a judgment for damages for negligence has no priority either as to the damages or the costs of the action (*ibid.*).

(*f*) *Re Mersey Rail. Co.* (1888), 37 Ch. D. 610, C. A.; *Devas* v. *East and West India Dock Co.* (1889), 61 L. T. 217. Hence, an order for a receivership having been made on the petition of one judgment creditor, a petition by a second judgment creditor should be refused (*Re Mersey Rail. Co., supra*).

(*g*) Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 4. As to the priorities against creditors, see *Liskeard and Looe Rail. Co.* v. *Liskeard and Caradon Rail. Co.* (1901), 18 T. L. R. 1. As to the priority of money borrowed, see p. 633, *ante*.

(*h*) *Re Birmingham and Lichfield Junction Rail. Co.* (1881), 18 Ch. D. 155; *Re West Lancashire Rail. Co.* (1890), 63 L. T. 56.

(*i*) *Re West Lancashire Rail. Co., supra.*

(*k*) Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 4.

SECT. 3. Arrangements with Creditors.

SECT. 3.—*Arrangements with Creditors.*

Preparation and filing of scheme.

1628. When a railway company (*l*) is unable to meet its liabilities, the directors may prepare a scheme of arrangement between the company and its creditors, and may file it in the Chancery Division of the High Court with a declaration in writing under the company's seal verified by affidavit (*m*) to the effect that the company is unable to meet its engagements with its creditors (*n*). Such scheme may or may not include provisions for settling and defining any rights of shareholders or for raising additional share or loan capital (*o*).

Purpose of scheme.

1629. The intention of the Legislature is that an insolvent railway company shall be kept going and at the same time take proper steps for the purpose of enabling the company to pay its way and pay off its creditors by means of a going concern (*p*). An arrangement with creditors must be the principal object of the scheme, and the court will not sanction a scheme with any other principal object (*q*).

Stay of pending proceedings.

1630. After the scheme has been filed, the court may, on the application of the company, restrain any action against the company on such terms as the court thinks fit (*r*); and no execution,

(*l*) As to the meaning of "railway company" in the Railway Companies Act, 1867 (30 & 31 Vict. c. 127), see note (*b*), pp. 679, 680, *ante*.

(*m*) The chairman and other directors, or a majority of the directors, must make this affidavit to the best of their judgment and belief (Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 6).

(*n*) *Ibid.*

(*o*) *Ibid.*

(*p*) *Re East and West India Dock Co.* (1890), 44 Ch. D. 38, C. A., *per* LINDLEY, L.J., at p. 68. In this case the court refused to reject a scheme on the objection raised to it that some of the assets available for general creditors were appropriated to the payment of interest on debentures, such general creditors having no lien on such assets, the scheme appearing to be honestly framed with regard to the benefit of all parties.

(*q*) *Re Letterkenny Rail. Co.* (1870), 4 I. R. Eq. 538, where the proposed scheme provided for raising large sums to be applied in completing and equipping the railway; no special provision being made for paying the company's creditors, the court refused to confirm the scheme. But where a scheme proposes to convert mortgages and bonds into irredeemable debenture stock, the court may confirm the scheme, if satisfied that it is beneficial to all parties (*Re Irish North-Western Rail. Co.'s Scheme* (1868), 3 I. R. Eq. 190).

(*r*) Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 7. The application is made by summons or motion (*ibid.*). This power of the court to restrain on summary process only exists during the period between filing and enrolment. After enrolment, an injunction can only be obtained by action in the ordinary way (*Re Potteries, Shrewsbury and North Wales Rail. Co.* (1869), 5 Ch. App. 67). The court has jurisdiction to restrain actions by unpaid landowners and general creditors during the maturing of the scheme, although the scheme, if confirmed, will not bind such persons; but the court will not restrain such actions unless the scheme makes reasonable provision for the payment of such persons (*Re Cambrian Railways Co.'s Scheme* (1868), 3 Ch. App. 278). Protection will not be granted against an action for specific performance by a landowner except upon terms of the company submitting to judgment (*Robertson* v. *Wrexham, Mold and Connah's Quay Rail. Co.* (1868), 17 W. R. 137).

attachment, or other process against the property of the company is available without leave of the court after publication of notice of the filing of the scheme (*s*).

Assent of interested persons.

1631. The assent to the scheme of various classes of interested persons must be separately obtained (*t*). The scheme is deemed to be assented to by the following persons when it is assented to in writing by three-fourths of them in value:—(1) the holders of mortgages or bonds (*u*) issued by the company under statutory authority; (2) the holders of debenture stock (*a*); (3) the holders of rentcharges or other sums payable by the company in consideration of the purchase of the undertaking of another company (*b*); (4) each class of preference or guaranteed shareholders (*c*). With regard to ordinary shareholders, the scheme is deemed to be assented to by them when their assent is given at an extraordinary general meeting of the company specially called for that purpose (*d*). Where the company are lessees of a railway, the similar assent must be obtained of the holders of mortgages and bonds, of debenture-holders, of guaranteed and preference shareholders, and of ordinary shareholders of the lessor company (*e*).

Persons not affected.

The assent of none of these classes of persons need, however, be obtained where the scheme does not prejudicially affect any right or interest of such class (*f*).

(*s*) Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 9. Leave is obtained by summons or motion (*ibid.*). Unpaid capital is property of the company within this provision, and, after publication of the notice of filing, creditors are not allowed without leave to issue execution against shareholders who have not paid fully for their shares under the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 36 (*Re Devon and Somerset Rail. Co.* (1) (1868), L. R. 6 Eq. 610; see title COMPANIES, Vol. V., p. 695). When a receiver and manager of a railway company had been appointed (see pp. 665, 666, *ante*) and afterwards a scheme was filed, an order was made restraining judgment creditors from proceeding to execution; and it was held that the fact that one judgment creditor had taken steps for equitable execution gave him no priority over other judgment creditors (*Devas* v. *East and West India Dock Co.* (1889), 61 L. T. 217).

(*t*) Railway Companies Act, 1867 (30 & 31 Vict. c. 127), ss. 10—14.

(*u*) See p. 634, *ante*.

(*a*) Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 10; see p. 633, *ante*.

(*b*) Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 11.

(*c*) *Ibid.*, s. 12. As to the capital of a railway company, see pp. 630, 631, *ante*. Where there was a provision in a special Act of the company that all preference shares should carry the same right of voting as ordinary shares, it was held that such provision did not qualify the provision of this provision that the assent of preference shareholders must be in writing (*Re Cambrian Rail. Co.* (1871), 24 L. T. 417). Where a company had power to divide ordinary shares into preferred and deferred half-shares, but had no other power to issue preference stock, it was held that the holders of preferred half-shares did not form a class of preference shareholders whose separate assent was required to a scheme (*Re Brighton and Dyke Rail. Co.* (1890), 44 Ch. D. 28, C. A.).

(*d*) Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 13.

(*e*) *Ibid.*, s. 14.

(*f*) *Ibid.*, s. 15. The assent of the statutory majority of any class cannot be dispensed with if any existing right of that class is prejudicially affected by the scheme (*Re Neath and Brecon Rail. Co.*, [1892] 1 Ch. 349, C. A.).

SECT. 3. Arrangements with Creditors.

Petition for confirmation.

1632. Within three months of the filing of the scheme, or within such extended time as is allowed by the court, the directors may apply by petition for confirmation of the scheme, provided they consider that all the requisite assents have been given (*g*).

When assent of outside creditors required.

1633. Where a scheme seriously affects the rights of outside creditors, the court will not confirm it without the written assent of each (*h*), and if any of such creditors appear and oppose the petition, and such opposition seems to the court to be reasonable with regard to their interests, the court will refuse confirmation (*i*).

Confirmation of scheme.

1634. Where no sufficient objection to the scheme is established, the court, on being satisfied that the requisite assents have been given, may confirm the scheme after hearing the directors, creditors, shareholders, or any other interested parties whom the court thinks entitled to be heard (*k*).

Enrolment and general effect upon parties.

1635. The scheme when confirmed must be enrolled in the court, and from the time of enrolment is effectual to all intents, and its provisions have the effect of an Act of Parliament against and in favour

Each class must determine for itself whether on the whole its interests are affected by the scheme (*ibid.*).

(*g*) Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 16. The court cannot sanction a scheme which gives debenture-holders the same right to vote as shareholders (*Re Stafford and Uttoxeter Rail. Co.* (1872), 41 L. J. (CH.) 777), nor one based on the assumption that Parliament would pass a Bill prepared to enable another company to purchase the undertaking (*Re Eastern and Midlands Rail. Co.* (1892), 67 L. T. 711).

(*h*) *Re Bristol and North Somerset Rail. Co.* (1868), L. R. 6 Eq. 448, where the scheme proposed that creditors should receive fully paid up shares to the amount of their claims in discharge of the company's debts, some of the creditors appeared and opposed the petition, confirmation was refused.

(*i*) *Re Somerset and Dorset Rail. Co.* (1869), 21 L. T. 656. There is no provision in the Act for a majority of unsecured creditors to bind a minority, but the court may by order bind creditors who unreasonably dissent (*ibid., per* STUART, V.-C.). A scheme was confirmed which enabled a company to create debenture stock in excess of its statutory powers in order to pay creditors by the allotment to them of such stock, nine-tenths in value of the creditors appearing and assenting (*Re Teign Valley Rail. Co.* (1867), 17 L. T. 201). Where a scheme provided that the debts of creditors should be satisfied by the allotment of debenture stock, and nearly all assented and none appeared to oppose, the court granted confirmation on the personal undertaking of the directors not to allot debenture stock to any creditors who did not assent (*Re West Cork Rail. Co.* (1873), 7 I. R. Eq. 96). Unpaid landowners who successfully appear and oppose are entitled to their costs against the company (*Re Letterkenney Rail. Co.* (1870), 4 I. R. Eq. 538).

(*k*) Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 17. Where the scheme has been assented to by the required majority of every class whose assent is necessary (see p. 769, *ante*), such assent is binding on the minority; and such minority has no right to be heard in opposition to the scheme, unless it can be shown that the vote of the majority was obtained by fraud (*Re East and West India Junction Rail. Co.* (1869), L. R. 8 Eq. 87). Where a scheme was filed but not confirmed within the three months, it was held that it must still be considered as pending so far as interim orders under the Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 7, were concerned (see note (*r*), p. 768, *ante*); see *Robertson* v. *Wrexham, Mold and Connah's Quay Rail. Co.* (1868), 17 W. R. 137).

of the company and all parties assenting thereto or bound thereby (*l*); but a scheme is not binding on unpaid landowners or general creditors: it is binding only on persons who have assented or who are of a class who are bound by the assent of the required majority of that class (*m*).

Appeal.

The jurisdiction of the court to hear an appeal against a grant of confirmation is not ousted by the fact of enrolment (*n*).

Notices in *Gazette*.

1636. Notice must be published in the *Gazette* of the filing of a scheme (*o*), of the intention to apply for confirmation (*p*), and of the confirmation and enrolment (*q*). The company is bound under pain of a penalty to keep printed copies of the scheme for sale at a price not exceeding 6*d*. (*r*).

Copies of scheme.

English company with railway in Scotland.

1637. When a company whose principal office is in England has a railway or part of a railway in Scotland, a scheme must be filed in England, but notice of the filing of the scheme must also be published in the *Edinburgh Gazette*, and the Court of Session has power to stay proceedings against the company or execution against its property (*s*).

Rules.

1638. There is power to make rules regulating the procedure with regard to schemes of arrangement (*t*).

(*l*) Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 18. See R. S. C., Ord. 61, rr. 10, 11; Order of Court, 24th January, 1868, and notes to these rules in the Yearly Practice of the Supreme Court, 1913, pp. 970, 1529 *et seq.* Where the defendant (a debenture-holder) had obtained judgment against the company before enrolment, it was held that he was none the less bound by the scheme and would be restrained from proceeding on his judgment (*Potteries, Shrewsbury and North Wales Rail. Co.* v. *Minor* (1871), 6 Ch. App. 621).

(*m*) *Re Cambrian Railways Co.'s Scheme* (1868), 3 Ch. App. 278. Where plaintiff had obtained judgment and registered a writ of *elegit* against the company before confirmation of the scheme, it was held that he was not bound by the scheme, but that he had no priority over mortgagees whose charges took priority of him before the scheme (*Stevens* v. *Mid-Hants. Rail. Co., London Financial Association* v. *Stevens* (1873), 8 Ch. App. 1064). Where a judgment creditor had converted his judgment into a statutory mortgage under stat. 13 & 14 Vict. c. 29 (an Act applying only to Ireland), held, that he was not bound by the scheme to which he had not assented (*Stephens* v. *Cork and Kinsale Junction Rail. Co.* (1872), 6 I. R. Eq. 604).

(*n*) *Re Irish North-Western Rail. Co.'s Scheme* (1868), 3 I. R. Eq. 190.

(*o*) Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 8.

(*p*) *Ibid.*, s. 16.

(*q*) *Ibid.*, s. 19.

(*r*) *Ibid.*, s. 20. The penalty is a fine not exceeding £20, and a further fine not exceeding £5 a day during which the provision is disregarded. Penalties are recoverable as under the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20); see p. 734, *ante*.

(*s*) Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 21.

(*t*) *Ibid.*, s. 22. An order of court regulating the practice is in force, dated 24th January, 1868.

Part XI.—Abandonment and Dissolution.

SECT. 1. Abandonment of Railways.

SECT. 1.—*Abandonment of Railways.*

Where works not commenced.

1639. A company which is authorised by a special Act (*u*) to construct a railway is, in general, under no obligation to construct the railway, and the scheme may be abandoned at the discretion of the company where none of the authorised works has been begun (*a*).

Whether works commenced or not.

1640. In any case, however, when a company, which is authorised by a special Act to construct a railway, desires to abandon a railway or part of a railway, whether it has been commenced or not, it may with the consent of three-fifths of the shareholders apply to the Board of Trade for a warrant authorising abandonment (*b*).

Meeting to give consent.

To obtain the required consent, a general meeting must be called specially for the purpose, and the directors are bound to call such meeting at the request of five or more shareholders holding between them not less than one-twentieth of the capital of the company (*c*).

Effect of calling meeting.

After the meeting is called it is unlawful for the directors to make any payments for the purposes of the railway, except in discharge of *bonâ fide* debts previously contracted, or to enter into any contracts with respect to the railway proposed to be abandoned (*d*).

Notice of meeting.

1641. The meeting must be advertised, and a notice thereof must be sent to every shareholder requesting him to signify his assent or dissent to the proposal on an enclosed form (*e*).

Chairman.

The chairman, or in his absence the deputy-chairman, of the directors is chairman of the meeting; but if neither is present, any shareholder chosen by a majority of the shareholders present is chairman (*f*).

Scrutineer

At the meeting three scrutineers, who must be shareholders, are elected by the shareholders present to reckon the amount of stock held by the assenters and the dissenters respectively, whether assent or dissent has in any case been expressed in person or by the return of the form; and, after receiving their report, the chairman of the meeting must announce the figures, stating whether or not the necessary three-fifths of the shareholders have assented to the proposal (*g*).

Adjournment.

The chairman may, at the request of any one scrutineer, if he

(*u*) As to the meaning of "special Act," see pp. 622, 626, *ante*.

(*a*) *York and North Midland Rail. Co.* v. *R.* (1853), 1 E. & B. 858, Ex. Ch.; see *Edinburgh, Perth and Dundee Rail. Co.* v. *Philip* (1857), 2 Macq. 514; and see pp. 626, 627, *ante*.

(*b*) Abandonment of Railways Act, 1850 (13 & 14 Vict. c. 83), s. 1. As to the substitution in this Act of the Board of Trade for the Commissioners of Railways, see the Railway Regulation Act, 1851 (14 & 15 Vict. c. 64); and see p. 738, *ante*.

(*c*) Abandonment of Railways Act, 1850 (13 & 14 Vict. c. 83), ss. 2, 3.

(*d*) *Ibid.*, s. 4.

(*e*) *Ibid.*, s. 5.

(*f*) *Ibid.*, s. 7.

(*g*) *Ibid.*, ss. 6, 8.

thinks fit, adjourn the meeting in order to receive the report of the scrutineers, and must so adjourn if requested by more than one scrutineer (*h*).

If the meeting has assented to the proposal, the chairman must certify the fact under his hand and deposit the certificate with the Board of Trade (*i*).

Certificate of assent.

1642. If any five or more shareholders, holding between them not less than three-fifths of the capital of the company, desire abandonment, but allege that any such meeting was not duly called or that the sense of the meeting was not duly taken, they may apply to the Board of Trade stating the grounds of their complaint and praying that a further meeting be called. If then the Board is of opinion, after making inquiry, that the application to the Board would have been assented to by the necessary majority if the sense of the meeting had been duly taken, it must give a certificate to that effect and order a further meeting to be called by the directors. If the directors disobey such order, the complainants may call the meeting (*k*).

Further meeting on complaint to Board of Trade.

1643. If a meeting determines in the prescribed manner that application to the Board of Trade for authority to abandon any railway or part of a railway shall be made, or if the Board gives any such certificate as above mentioned, then, as from the date of the resolution or of the certificate, as the case may be, the directors may not proceed any further with the making of the railway or part thereof proposed to be abandoned until the decision of the Board is made known, and then only in accordance with such decision (*l*).

Stay of execution of works pending decision of Board of Trade.

1644. Where less than three-fifths of the capital of a company has been subscribed, the Board of Trade may, if it thinks fit, and without the consent of the shareholders, authorise the abandonment of the railway on the application of any person named as a member or director of the company in the special Act, or of any person named in the order directing the parliamentary deposit (*m*), or who has lent the amount of such deposit, or of any person who has entered into any bond to secure the completion of the railway (*n*).

Application for abandonment when less than three-fifths of capital subscribed.

1645. When no part of the railway has been opened for traffic, the Board of Trade may also authorise abandonment on the application of a judgment creditor of the company whose judgment has not been satisfied (*o*).

Application for abandonment by judgment creditors.

1646. It is never obligatory on the Board of Trade to authorise abandonment; it always has a discretion in the matter, and it has

Discretion of Board of Trade.

(*h*) Abandonment of Railways Act, 1850 (13 & 14 Vict. c. 83), s. 9.
(*i*) *Ibid.*, s. 10.
(*k*) *Ibid.*, s. 11.
(*l*) *Ibid.*, s. 12.
(*m*) As to parliamentary deposits, see title PARLIAMENT, Vol. XXI., p. 735.
(*n*) Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 32. For an example of an application for a warrant of abandonment by a person who had given such a bond, see *Webster* v. *Petre* (1879), 4 Ex. D. 127.
(*o*) Abandonment of Railways Act, 1869 (32 & 33 Vict. c. 114), s. 8

SECT. 1. Abandonment of Railways.

discretion also to authorise abandonment only upon condition that the amount of the parliamentary deposit, or the money secured by bond conditional on the completion of the railway, is applied as part of the assets of the company (*p*).

Application of securities.

Powers of Board of Trade prior to warrant.

The Board may order a company to advertise the fact that an application for a warrant authorising abandonment has been made; and it may inspect all the books and papers and the works of the railway for the purpose of deciding on the expediency of the proposed abandonment (*q*).

Warrant for abandonment.

1647. After considering objections, and on being satisfied that the required conditions have been fulfilled, the Board of Trade may if it thinks fit, and on such terms as it thinks fit, by warrant under its seal authorise the abandonment of the railway or the portion of the railway described in the warrant (*r*).

When consent of party to agreement required.

The Board has no power to authorise a company to abandon any railway or part of a railway which the company has agreed under seal to construct, without the consent of the other party to such agreement (*s*).

Conditions attached to partial abandonment.

When it is proposed to abandon part only of an authorised railway the Board must have regard to the situation, as regards the proposed railway, of the lands or residences of shareholders objecting to the proposal; and the Board may at the request of such shareholders and as a condition of abandonment cancel or reduce the shares of such objectors if in the circumstances the Board think fit (*t*).

Notification and advertisement of warrant.

1648. The warrant when granted must be notified in the *London Gazette* (*a*) and advertised; and persons having claims for compensation or otherwise against the company must be required to send their claims to the secretary of the company within four months of the date of the warrant (*b*). When the Board of Trade is satisfied that notice of the warrant has been duly published it must certify the same, and such certificate is conclusive evidence that the notice was duly published (*c*).

Effect of warrant upon contractual obligations.

1649. The warrant releases the company from all liability to construct, maintain or work the railway or portion of railway authorised to be abandoned, or to purchase any of the land required therefor, or to complete the purchase of land in regard to which notice to treat (*d*)

(*p*) Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 31.

(*q*) Abandonment of Railways Act, 1850 (13 & 14 Vict. c. 83), ss. 13, 14. For refusing to produce any book or document demanded a company incurs a forfeiture of £20 and a further sum of £5 a day while refusal is continued (*ibid.*, s. 14). As to legal proceedings, see p. 734, *ante*.

(*r*) Abandonment of Railways Act, 1850 (13 & 14 Vict. c. 83), s. 15.

(*s*) *Ibid.*, s. 36.

(*t*) *Ibid.*, s. 16.

(*a*) Or in the *Edinburgh* or *Dublin Gazette*, according to the situation of the railway (*ibid.*, s. 17).

(*b*) *Ibid.* If there is no secretary or office, the Board of Trade may give directions as to where claims are to be sent (Abandonment of Railways Act, 1869 (32 & 33 Vict. c. 114), s. 9.

(*c*) Abandonment of Railways Act, 1850 (13 & 14 Vict. c. 83), s. 18.

(*d*) As to the effect of a notice to treat, see title COMPULSORY PURCHAS

has been given or a contract entered into, or to complete any contract relating to the railway; but the company remains liable to complete the purchase of land when the contract to purchase has been part performed (*e*); and where contracts have been made or notices to treat have been given, the parties to such contracts or the owners of land to whom such notices were given are entitled to compensation for all injury or damage sustained by them by reason of a contract not being performed or by reason of the land not being purchased (*f*).

Compensation to which adjoining owners are entitled.

1650. Where any part of the abandoned railway has been made, the owners of adjoining lands are entitled to compensation for any injury they have suffered by reason of the failure of the company to construct any accommodation works to which such persons would have been entitled if the abandonment had not been allowed (*g*).

Compensation in discharge of liability in respect of roads and tunnels.

1651. Compensation also must be paid in lieu and discharge of the company's liability to maintain any bridge or tunnel carrying the abandoned railway over or under any road, unless such road can in the opinion of the Board of Trade be restored to its former state and the company with the permission of the Board do so restore it (*h*). In the case of public roads, the road authority receiving any such compensation must pay it over to the treasurer of the county to be invested and the proceeds applied to the maintenance of the bridge or tunnel in such manner as quarter sessions may direct (*i*).

Assessment of compensation.

1652. The amount of any compensation payable as above mentioned must be ascertained, in case of difference, by arbitration under the Railways Clauses Consolidation Act, 1845 (*k*); but the company is not liable to make any compensation unless the claim is made within six months after the publication in the *Gazette* of the prescribed notice of the warrant of abandonment (*l*).

Compensation in respect of entry upon land.

1653. Where a company has entered upon any land in order to survey and take levels, or to probe or bore to ascertain the nature of the soil, or to set out a proposed railway, under the powers given by the Lands Clauses Consolidation Act, 1845 (*m*), the rights of the owners or occupiers of such land to receive compensation for such

OF LAND AND COMPENSATION, Vol. VI., pp. 33, 35, 36. The effect of the service of such notice is to establish a relation between the company and the owner of the land analogous to that of vendor and purchaser (see title SALE OF LAND), and the company are thenceforward bound to take the land; see *Adams* v. *London and Blackwall Rail. Co.* (1850), 2 Mac. & G. 118.

(*e*) Abandonment of Railways Act, 1850 (13 & 14 Vict. c. 83), s. 19.

(*f*) *Ibid.*, s. 20.

(*g*) *Ibid.*, s. 21. As to accommodation works, see pp. 666 *et seq.*, *ante*.

(*h*) Abandonment of Railways Act, 1850 (13 & 14 Vict. c. 83), s. 22. As to the construction and repair of bridges, see pp. 655 *et seq.*, *ante*.

(*i*) Abandonment of Railways Act, 1850 (13 & 14 Vict. c. 83), s. 23.

(*k*) 8 & 9 Vict. c. 20; see p. 733, *ante*.

(*l*) Abandonment of Railways Act, 1850 (13 & 14 Vict. c. 83), s. 25. As to this publication, see p. 774, *ante*.

(*m*) 8 & 9 Vict. c. 18, s. 84; see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 97.

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entry are not prejudiced or affected by the authority given to the company to abandon the railway (*n*).

Sale of land acquired by abandoned company.

1654. All land already acquired by the company at the time of abandonment must be sold within the time named in the warrant, or within two years from the date of the warrant if no time is named, in the manner prescribed by the Lands Clauses Consolidation Act, 1845 (*o*), with respect to the sale of superfluous lands; but the offer to be made by the company to sell such lands to the person entitled to the lands from which the same were severed must be made at a price not greater than that at which they were purchased by the company (*p*).

Cancellation of bonds and application of deposits.

1655. In case of a warrant of abandonment being granted, the Treasury may cancel any bond to secure the completion of the railway, and may order any deposits to be paid to the persons who would be entitled to them if the railway were completed (*q*).

Reduction of capital.

1656. Where the Board of Trade authorises the abandonment of part only of a railway, it may require that the amount of the capital which the company is authorised to raise and the amount which the company is authorised to borrow shall be reduced (*r*).

Effect of warranty on powers of company.

1657. The effect of the granting of a warrant of abandonment by the Board of Trade is to put an end to all the powers conferred on the company, and to cause the existence of the company to cease except so far as is necessary to enable it to wind up its affairs (*s*).

Creditors in winding-up in respect of compensation.

In the winding up of a company, which has been authorised by warrant to abandon a railway, those persons who are entitled to compensation as above mentioned (*t*) are creditors of the company in respect of such compensation (*u*).

Papers to be laid before Parliament.

1658. Whenever the Board of Trade authorises abandonment it must lay a copy of the warrant before both Houses of Parliament, together with such report and observations as it thinks necessary to explain the reasons for granting the same (*v*).

Cases in which abandonment must

1659. The Board of Trade has decided that its powers to grant warrants for the abandonment of railways only apply to companies

(*n*) Abandonment of Railways Act, 1850 (13 & 14 Vict. c. 83), s. 26.

(*o*) 8 & 9 Vict. c. 18, ss. 127—132; see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 26—31.

(*p*) Abandonment of Railways Act, 1850 (13 & 14 Vict. c. 83), s. 27. As to original owners' right of pre-emption, see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 28.

(*q*) Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 34. The Chancery Division must make the necessary orders for payment out on the certificate of the Board of Trade that the warrant has been granted (*ibid.*). The Board is protected from all liability for error in regard to the issuing of any warrant or certificate relating to any money or securities (*ibid.*, s. 35). As to the application of such securities as assets of the company, see p. 774, *ante*. As to the application of such securities in winding-up, see p. 778, *post*.

(*r*) Abandonment of Railways Act, 1850 (13 & 14 Vict. c. 83), s. 28.

(*s*) *Ibid.*, s. 29.

(*t*) See p. 775, *ante*.

(*u*) Abandonment of Railways Act, 1850 (13 & 14 Vict. c. 83), s. 34.

(*v*) *Ibid.*, s. 37.

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authorised to make railways by Acts passed before 1867, and the Board accordingly has refused to grant warrants in any other case (*a*). With regard to a railway authorised to be constructed by an Act passed since 1866, a company can only be expressly authorised to abandon the railway by a special Act (*b*). Abandonment may, however, be impliedly effected by an Act which authorises the company to present a petition for the winding up of the company (*c*), or by an Act which authorises the conveyance by the company of an incomplete undertaking to another body (*d*). Also, when the powers of a company to make a railway have expired without any part of the railway ever having been made, the court may presume that the railway has been abandoned in the absence of any Act expressly or impliedly authorising abandonment (*e*).

be authorised by special Act unless it is implied.

SECT. 2.—*Dissolution of Railway Companies.*

SUB-SECT. 1.—*Under Abandonment Acts.*

Petition for winding-up.

1660. Where a warrant has been granted by the Board of Trade for the abandonment of the whole undertaking of any railway company (*f*), a petition for winding up the affairs of the company under the Companies (Consolidation) Act, 1908 (*g*), may be presented by the company, or by any person entitled under that Act to present a petition for winding up a company (*h*), or by any person entitled to apply to the Board for a warrant of abandonment (*i*); and, for the

(*a*) The Abandonment of Railways Act, 1850 (13 & 14 Vict. c. 83), applied originally (*ibid.*, s. 1) only to companies authorised to make a railway by Act of Parliament theretofore passed. The Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 31, amended the Abandonment of Railways Act, 1850 (13 & 14 Vict. c. 83), by extending it to companies authorised to make railways by Acts passed before 1867. Then the Abandonment of Railways Act, 1869 (32 & 33 Vict. c. 119), was passed, which provided that it should be construed as one with the Abandonment of Railways Act, 1850 (13 & 14 Vict. c. 83), as amended by the Railway Companies Act, 1867 (30 & 31 Vict. c. 127). As the power of the Board is discretionary the court has no jurisdiction to review its decision, the correctness of which has been questioned. If the Board is right there has clearly been an oversight of the legislature; see *Re Birmingham and Lichfield Junction Rail. Co.* (1881), 18 Ch. D. 155, *per* JESSEL, M.R., at p. 158; *Re Uxbridge and Rickmansworth Rail. Co.* (1890), 43 Ch. D. 536, *per* COTTON, L.J., at p. 557.

(*b*) As to the notices required to be given by the promoters of an abandonment Bill, see title PARLIAMENT, Vol. XXI., p. 731.

(*c*) *Re Potteries, Shrewsbury and North Wales Rail. Co.* (1883), 25 Ch. D. 251, C. A. For a form of bill for abandonment, see Encyclopædia of Forms and Precedents, Vol. IX., p. 249.

(*d*) *Re Peckham, Dulwich and Crystal Palace Tramways Bill*, [1909] 2 Ch. 540.

(*e*) *Re Torrington and Okehampton Railway Bill*, [1907] 1 Ch. 186.

(*f*) See p. 774, *ante*.

(*g*) 8 Edw. 7, c. 69. By *ibid.*, s. 291, the provisions of this Act are substituted for the provisions of the repealed Companies Acts.

(*h*) As to the persons entitled to petition for the winding up of a company, see title COMPANIES, Vol. V., pp. 398 *et seq.*

(*i*) *I.e.*, under the Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 32; see pp. 772, 773, *ante*. For examples of the granting of a warrant followed by an order for winding up a railway company, see *Re Kensington Station Act* (1875), L. R. 20 Eq. 197; *Re Barry Rail. Co.* (1876), 4 Ch. D. 315, C. A.

SECT. 2. **Dissolution of Railway Companies.**

purpose of the winding up, the railway company is deemed to be an unregistered company within the meaning of the Companies (Consolidation) Act, 1908 (*j*).

Application of securities for completion of railway.

1661. If the warrant for abandonment was granted by the Board of Trade on condition that the money deposited as security for the completion of the railway, or the money secured by bonds conditional on such completion, should be applied as assets of the company (*k*), the court may direct that such money shall not be applied to the payment of any debt incurred in promoting the company, regard being had to what the court considers in the circumstances to be fair and reasonable as between all parties (*l*).

Who may apply for direction.

Any person who has provided such money or entered into such a bond may apply to the court for such direction and may attend all the proceedings in the winding up (*m*).

Nature of directions which may be made.

In the case of the Board making such condition the court may order such money to be paid to the liquidator and to no other person, unless satisfied that the money or any part thereof is not required to be applied as assets (*n*). Any such bond may, on the application of the liquidator, made with the sanction of the court, be assigned with all rights therein by the Treasury to the liquidator, and may be enforced by him with the sanction of the court (*o*). Any such bond so assigned may be cancelled by the court after a sufficient sum has been paid thereunder as assets of the company (*p*).

Rights to residue of deposit.

The right to any part of such money which is not applied in satisfaction of the liabilities of the company is not affected by the foregoing provisions (*q*).

SUB-SECT. 2.—*Under Other Acts.*

Companies which cannot be wound up without warrant of abandonment.

1662. A company incorporated by special Act for the purpose of constructing a railway and not registered under the Companies

(*j*) Abandonment of Railways Act, 1869 (32 & 33 Vict. c. 114), s. 4; as to unregistered companies, see title COMPANIES, Vol. V., pp. 646 *et seq.*

(*k*) See p. 774, *ante*. For an example of such a condition, see *Re Barry Rail. Co.* (1876), 4 Ch. D. 315, C. A.

(*l*) Abandonment of Railways Act, 1869 (32 & 33 Vict. c. 114), s. 5. As to the application of deposits under the Parliamentary Deposits Act, 1846 (9 & 10 Vict. c. 20), the Railways Construction Facilities Act, 1864 (27 & 28 Vict. c. 121), and the Parliamentary Deposits and Bonds Act. 1892 (55 & 56 Vict. c. 27), s. 1, see title PARLIAMENT, Vol. XXI., pp. 735, 736. As to payments out of deposits to engineers, solicitors and others employed in carrying the company's Bill through Parliament, see *Muir* v. *Forman's Trustees* (1903) 5 F. (Ct. of Sess.) 546.

(*m*) Abandonment of Railways Act, 1869 (32 & 33 Vict. c. 114), s. 5. See *Re Lancashire, Derbyshire and East Coast Railway Acts*, 1891—1896, *Re Lincoln and East Coast Railway Acts*, 1897—1902, [1903] 2 Ch. 711.

(*n*) Abandonment of Railways Act, 1869 (32 & 33 Vict. c. 114), s. 6 (1).

(*o*) *Ibid.*, s. 6 (2).

(*p*) *Ibid.*, s. 6 (3).

(*q*) *Ibid.*, s. 7. The deposit and security required from the promoters of railway companies are regulated by the standing orders of the two Houses of Parliament and by the Parliamentary Deposits Act, 1846 (9 & 1. Vict. c. 20), the Railways Construction Facilities Act, 1864 (27 & 28 Vict. c. 121), and the Parliamentary Deposits and Bonds Act, 1892 (55 & 56 Vict. c. 27); see titles PARLIAMENT, Vol. XXI., pp. 735, 736; COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 154.

Acts (*r*) cannot be dissolved or wound up under any general Act (*s*) unless a warrant of abandonment (*t*) has been granted by the Board of Trade. This, however, only applies to a company the principal object of which is the construction of a railway; it does not apply to a company having some other principal object merely because such company has power to construct a railway (*u*).

Necessity for special Act.

A railway company may be registered under the Companies Acts (*a*), and if so may (it seems) be wound up under the Companies (Consolidation) Act, 1908 (*b*). Hence, where no warrant of abandonment is granted by the Board of Trade, the only way in which a railway company can in general be dissolved or wound up is by a special Act of Parliament (*c*).

Part XII.—Canals.

SECT. 1.—*Constitution of a Canal Company.*

Application of general and special Acts.

1663. A canal company is usually formed by a special Act (*d*) which incorporates the company and authorises the construction of the canal. Since most of the canals in England were constructed before 1845, no general Acts are, as a rule, incorporated in such special Acts, as they are in the Acts of railway companies (*e*). Hence, as a general rule, to ascertain the rights and liabilities of a canal company, only the special Act of that company is material (*f*). Such an Act is in the nature of a bargain between the company and the public, and in case of any ambiguity in its provisions must be construed so as to operate against the company and in favour of the public (*g*). In modern times, the special Act of a canal company incorporates general Acts, which then determine the rights of parties affected (*h*). In other cases, when the canal company does

(*r*) *I.e.*, the Companies Act, 1862 (25 & 26 Vict. c. 89), and the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69).

(*s*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 267; see *Ward* v. *Sittingbourne and Sheerness Rail. Co.* (1874), 9 Ch. App. 488, *per* MALINS, V.-C., at p. 491, n.

(*t*) See p. 774, *ante*.

(*u*) *Re Exmouth Docks Co.* (1873), L. R. 17 Eq. 181. In this case a dock company incorporated by special Act had power to make a branch railway in connection with the dock.

(*a*) See note (*r*), *supra*.

(*b*) 8 Edw. 7, c. 69; see *Re Ennis and West Clare Rail. Co.* (1879), 3 L. R. Ir. 94.

(*c*) For examples, see Lincoln and East Coast Railway and Dock (Abandonment) Act, 1902 (2 Edw. 7, c. iii.). As to notices of intention to promote a Bill, see title PARLIAMENT, Vol. XXI., p. 731.

(*d*) As to special Acts in relation to railways, see pp. 622 *et seq.*, *ante*.

(*e*) See p. 623, *ante*.

(*f*) See *Stourbridge Canal Co.* v. *Wheeley* (1831), 2 B. & Ad. 792.

(*g*) *Ibid.*; compare p. 626, *ante*.

(*h*) *E.g.*, the three Clauses Consolidation Acts of 1845 (see pp. 622, 623, *ante*), and the Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), Part I., are incorporated in the Manchester Ship Canal Act, 1885 (48 & 49 Vict. c. clxxxviii.), so far as applicable (*ibid.*, s. 5). For cases on the construction of the Manchester Ship Canal Acts, see *Manchester Ship Canal Co.* v.

SECT. 1. Constitution of a Canal Company.

anything authorised by its Act which injures any person, that person must depend for his remedy, if any, on the compensation clauses of the special Act (*i*).

Shares.

1664. Shares in a canal company are pure personalty (*k*).

Subscriptions to capital.

Where a canal is about to be made upon or near land which is likely to be improved or benefited by the undertaking, the owner of the land, if he desires to subscribe to the capital of the canal company, may apply to the Board of Agriculture and Fisheries for an order charging the land with the amount of his subscription (*l*).

Prohibition against application of funds of railway company.

1665. No railway company (*m*) may, without express statutory authority, use any of the company's funds (*n*) to acquire, directly or indirectly, any interest in a canal (*o*). In the event of any contravention of this provision the interest purchased is forfeited to the Crown, and the directors or officers responsible for the transaction are liable at the suit of any shareholder to be compelled to repay the sum expended to the company (*p*).

Returns to Registrar of Joint Stock Companies.

1666. Every canal company must on or before the 1st January in every year send to the Registrar of Joint Stock Companies (*q*) a return stating the name of the company, a short description of the canal, the name of the principal officer, and the place of its office or principal office (*r*).

SECT. 2.—*Construction and Maintenance of a Canal.*

Acquisition of land.

1667. Where a company is authorised by special Act to acquire land for the purpose of constructing a canal and works, the land when acquired is vested in the company in fee, but only for the purposes of its Act (*s*); and it will be restrained from using the land for profit in any way not authorised (*t*). Where a company

Manchester Racecourse Co., [1901] 2 Ch. 37, C. A.; *Crossfield & Sons, Ltd.* v. *Manchester Ship Canal Co.* (1903), 19 T. L. R. 398; *Crosfield & Sons, Ltd.* v. *Manchester Ship Canal Co.* (1905), 22 T. L. R. 192, C. A.

(*i*) *Redler* v. *Great Western Rail. Co.* (1906), 96 L. T. 98, H. L.

(*k*) *Edwards* v. *Hall* (1855), 6 De G. M. & G. 74; see *Robinson* v. *Addison* (1840), 2 Beav. 515; *Re Dilworth, Ex parte Lancaster Canal Co.* (1832), 1 Deac. & Ch. 411. As to shares in river navigation companies, see *Buckeridge* v. *Ingram* (1795), 2 Ves. 652; *House* v. *Chapman* (1799), 4 Ves. 542.

(*l*) See Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), ss. 78—82, the provisions of which apply to canal companies as well as to railway companies; and see p. 631, *ante*; title LAND IMPROVEMENT, Vol. XVIII., p. 300.

(*m*) This provision applies also to any director or officer of a railway company (Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 42 (1)).

(*n*) The "company's funds" are the corporate funds of any railway company, and include any funds under the control of, or administered by, a railway company (*ibid.*, s. 42 (3)).

(*o*) *Ibid.*, s. 42 (1).

(*p*) *Ibid.*, s. 42 (2).

(*q*) See title COMPANIES, Vol. V., p. 37.

(*r*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 39 (1).

(*s*) *Bostock* v. *North Staffordshire Rail. Co.* (1855), 4 E. & B. 798.

(*t*) *Bostock* v. *North Staffordshire Rail. Co.* (1856), 3 Sm. & G. 283 (a canal company restrained from using a reservoir, made under the company's powers for the purposes of supplying water to the canal, for letting

exceeds its powers, the ordinary courts have as a rule jurisdiction to interfere, although the special Act of the company appoints a particular jurisdiction (*a*).

Execution of works.

1668. If a time is fixed within which the works are to be executed, no works adverse to the interests of any individual can be executed after the expiration of such time (*b*); but, if the Act which authorises the execution of works contains no limitation of time, such works may be executed at any time after the passing of the Act (*c*).

Construction of accommodation works.

1669. A company may from time to time be compelled to construct such accommodation works as are provided for in its Act, and the decision of any tribunal authorised by the Act to decide as to the necessity of such works is final (*d*).

Construction and maintenance of bridges.

1670. When a company is given authority to construct a bridge for the use of the public, in lieu of public rights interfered with by the construction of the canal, the company is bound for all time to maintain the bridge in proper condition for the use of the public although its Act may be silent on the subject of such maintenance (*e*); and if, in connection with a bridge which the company

Liability to fence.

pleasure boats for hire or for holding regattas). But a canal company may dedicate part of its land to the use of the public as a footpath so far as such use does not interfere with its use as a towing-path (*Grand Junction Canal Co.* v. *Petty* (1888), 21 Q. B. D. 273, C. A., following *R.* v. *Leake* (*Inhabitants*) (1833), 5 B. & Ad. 469, and followed by *Arnold* v. *Morgan*, [1911] 2 K. B. 314). As to acts *ultra vires*, generally, see title CORPORATIONS, Vol. VIII., pp. 359 *et seq.*; and see pp. 627 *et seq.*, *ante*.

(*a*) *Shand* v. *Henderson* (1814), 2 Dow, 519, H. L. Where a company has executed works in excess of its powers, but over sixty years have elapsed before any question of such excess is raised, the court may refuse relief (*A.-G.* v. *Grand Junction Canal Co.*, [1909] 2 Ch. 505).

(*b*) *Glamorganshire Canal Co.* v. *Blakemore* (1832), 1 Cl. & Fin. 262, H. L.; *River Tone Conservators* v. *Ash* (1829), 10 B. & C. 349; compare pp. 626, 627, *ante*.

(*c*) *Thicknesse* v. *Lancaster Canal Co.* (1838), 4 M. & W. 472. Where, however, a company was cutting a canal under its powers through the plaintiff's land, and it had no funds to complete the authorised scheme, it was restrained from proceeding with the work (*King's Lynn Corporation* v. *Pemberton* (1818), 1 Swan. 244).

(*d*) *Birmingham Canal Navigation* (*Proprietors*) v. *Hickman* (1892), 56 J. P. 598. In this case the special Act provided that the company should construct such bridges over its canal as justices "should from time to time judge necessary" for the use of occupiers of the adjoining land; and it was held that it was for the justices to decide whether a bridge was reasonably necessary, and, they having decided it was necessary, the company was bound to erect the bridge. As to accommodation works in the case of a railway, see pp. 666 *et seq.*, *ante*.

(*e*) *R.* v. *Kent* (*Inhabitants*) (1811), 13 East, 220; *R.* v. *Lindsey Parts* (*Inhabitants*) (1811), 14 East, 317; see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 191. A company bound to repair the fabric of a bridge is probably bound also to maintain the roadway over the bridge; but where persons who are not legally bound to repair such a roadway voluntarily do so, they cannot recover the expense of repairing from the canal company even though such company is bound to repair (*Macclesfield Corporation* v. *Great Central Railway*, [1911] 2 K. B. 528, C. A.). As to the statutory liability of railway companies to maintain bridges, see pp. 655 *et seq.*, *ante*.

SECT. 2. Construction and Maintenance of a Canal.

is bound to maintain, fencing is reasonably necessary for public safety, the company is bound to fence sufficiently; and it is liable, apart from negligence, as for a nuisance, for injury caused by the want of such sufficient fencing (*f*).

The company is not, however, bound to fence as against persons merely permitted to pass alongside the canal (*g*).

Duty to licensees.

Summary procedure for protection of canals in County of London.

1671. If the bank or towing-path of any canal within the administrative County of London is so insufficiently protected at any place where it abuts on a public highway as to involve danger to human life, the local authority (*h*) within whose jurisdiction that place is situated may by notice require the canal company (*a*) to erect and maintain such fences, gates, turnstiles, or rails as may be required, in the opinion of the local authority, to obviate the danger (*b*). The company cannot, however, be compelled to erect anything between the waterway of the canal and the towing-path, or anything which would interfere with the free passage of traffic (*c*). If the canal company makes default in complying with such notice complaint may be made to a court of summary jurisdiction (*d*); and such court, after inquiry, must determine whether the alleged danger in fact exists and whether the required works are necessary or such as the company should reasonably be required to carry out. The court may then make an order as to the works, if any, which are to be constructed and the time within which they are to be completed, and also determining whether the expenses of such works and their future maintenance are to be borne by the company

(*f*) *Manley* v. *St. Helens Canal and Rail. Co.* (1858), 2 H. & N. 840, where a highway was carried across a canal by a swivel bridge, and a penalty was imposed by the Act upon any person leaving the bridge open; the bridge was left open at night by a boatman, and a person fell in and was drowned; there was no fence when the bridge was open and there was no light: it was held that the company, having a beneficial interest in the tolls, was liable for a nuisance arising from its property. But in a similar case, where contributory negligence was established against the person falling into the water, it was held that the company was not liable (*Witherley* v. *Regent's Canal Co.* (1862), 12 C. B. (N. S.) 2); and see titles HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 153 *et seq.*; NEGLIGENCE, Vol. XXI., pp. 447, 464, 465; NUISANCE, Vol. XXI., pp. 520 *et seq.* As to the statutory obligation of railway companies to fence, see pp. 658, 670, *ante*.

(*g*) *Binks* v. *South Yorkshire Railway and River Dun Co.* (1862), 3 B. & S. 244; and see title NEGLIGENCE, Vol. XXI., pp. 386, 392, 397, 398. As to liability for nuisance arising from dangerous property, see title NUISANCE, Vol. XXI., p. 515.

(*h*) "Local authority" includes the London County Council, any metropolitan borough council, and the Corporation of the City of London (Canals Protection (London) Act, 1898 (61 & 62 Vict. c. 16), s. 8, as modified by the London Government Act, 1899 (62 & 63 Vict. c. 14)); and see title METROPOLIS, Vol. XX., p. 402.

(*a*) "Canal company" means any company or person owning or in possession of a canal or any part thereof (Canals Protection (London) Act, 1898 (61 & 62 Vict. c. 16), s. 8).

(*b*) *Ibid.*, s. 1.

(*c*) *Ibid.*

(*d*) As to procedure before courts of summary jurisdiction, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*

or by the local authority, or in what proportions between them (*e*). If such order is not complied with, the local authority may itself execute the works and recover the cost thereof from the company so far as payable by the company (*f*). There is an appeal to quarter sessions against any such order (*g*).

Liability to repair.

1672. Where a company is obliged by its Act to repair a canal and to keep it in repair for the use of those of the public who desire to use it and are prepared to pay the prescribed tolls, an injunction will be granted restraining the company from impeding navigation by failing to keep in repair; but a mandamus to repair will not be granted (*h*). But where the construction and maintenance of a canal is permissive only, and part of it is closed to navigation for want of repair, the question of reopening is one of reasonable facilities for decision by the Railway and Canal Commissioners (*i*), and such reopening will not be enforced if the expense of so doing makes it unreasonable (*k*).

Duty to licensees.

When persons lawfully using a canal for hire suffer damage through the canal being out of repair, the company is liable (*l*); but the company is not liable in the case of persons merely allowed to use the premises of the company, but who are not using the premises on business or for the benefit of the company (*m*).

Liability of railway company owning or managing a canal.

1673. Every railway company which owns or manages (*n*) a canal is bound at all times to keep or maintain the canal and all the works appertaining thereto in thorough repair and in good working condition; and it must preserve the supplies of water thereto, so that the whole canal may be kept open and navigable for the use of all

(*e*) Canal Protection (London) Act, 1898 (61 & 62 Vict. c. 16), s. 2.

(*f*) *Ibid.*, s. 3. By *ibid.*, s. 4, the costs are recoverable under the Summary Jurisdiction Acts; see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*

(*g*) Canals Protection (London) Act, 1898 (61 & 62 Vict. c. 16), s. 5. As to appeals to quarter sessions, see title MAGISTRATES, Vol. XIX., pp. 642 *et seq.*

(*h*) *Lane* v. *Newdigate* (1804), 10 Ves. 192.

(*i*) As to "reasonable facilities," see title CARRIERS, Vol. IV., pp. 65 *et seq.*; and as to the jurisdiction of the Railway and Canal Commissioners, see pp. 753—755, *ante*.

(*k*) *Rothschild* (*Lord*) v. *Grand Junction Canal Co.* (1904), 91 L. T. 386.

(*l*) *Shoebottom* v. *Egerton* (1868), 18 L. T. 889. Just as a shopkeeper is liable for the safety of his premises to persons invited to enter his shop, to such extent is a canal company bound to keep its premises in repair (*ibid.*); and see title NEGLIGENCE, Vol. XXI., pp. 386, 388, 389, 392, 397, 398.

(*m*) *Gautret* v. *Egerton* (1867), L. R. 2 C. P. 371.

(*n*) Where a railway company managed a canal, collected tolls, executed repairs, and paid rents in order to prevent the canal becoming unfit for navigation, it was held that it was a company having the management of the canal within this provision, although it was doubtful whether it was acting *intra vires*; but, as the company had discontinued such management some time before an application was made to the Commissioners to restrain it from allowing the canal to remain out of repair, it was held that the company had not the management of the canal at the time of the application and the order asked for could not be made (*Foster* v. *Great Western Rail. Co.* (1877), 3 Ry. & Can. Tr. Cas. 14).

SECT. 2. Construction and Maintenance of a Canal.

persons desiring to use and navigate it, without any unnecessary hindrance, interruption, or delay (*o*).

Interference by owners of right to cross land.

1674. Persons who are entitled to rights of crossing a canal subject to a condition that the navigation of the canal is not to be obstructed may be compelled from time to time to alter their works if they interfere with navigation, although the interference is not due to any negligence or default on their part (*p*).

Right to support.

1675. The owners of a canal made under statutory powers are, as a rule, entitled to reasonable and necessary support for their canal from the adjacent land (*q*). But the right of such owners to support from the subjacent soil, and the right of the owners of the subjacent soil to work mines and minerals under the canal, depends in every case on the provisions of the special Act under which the canal was made (*r*).

Right to use of water.

1676. The rights and liabilities of a canal company in regard to the use of water depend on the provisions of their special Acts and the common law (*s*).

Right to use of towing-path.

1677. The towing-path is part of the canal, and so when a special Act gives the owners of lands through which the canal passes the right to make and use wharves on lands adjoining the canal, provided the navigation is not obstructed, the owner of land adjoining the towing-path has the right to erect a wharf on his own property and to land goods on the towing-path, provided he does not interfere with the navigation (*t*).

Report to Board of Trade as to stoppage of canal.

1678. Whenever a canal company intends to stop its canal for more than two days, it must report such intention to the Board of Trade, stating the time the stoppage is intended to last, and when the canal has been reopened it must also so report to the Board (*a*).

(*o*) Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 17. As to the form of an application to the Commissioners to enforce these provisions against a railway company, see Railway and Canal Commission Rules, 1889, r. 12.

(*p*) *Rhymney Rail. Co.* v. *Glamorganshire Canal Navigation Co.* (1904), 91 L. T. 113, H. L.; *North Staffordshire Rail. Co.* v. *Hanley Corporation* (1909), 26 T. L. R. 20, C. A.

(*q*) *North British Rail. Co.* v. *Turners, Ltd.* (1904), 41 Sc. L. R. 706.

(*r*) See titles COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 55, 56; MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 579, 580; NEGLIGENCE, Vol. XXI., pp. 401, 402; see also *Knowles & Sons* v. *Lancashire and Yorkshire Rail. Co.* (1889), 14 App. Cas. 248; *Chamber Colliery Co.* v. *Rochdale Canal Co.*, [1895] A. C. 564; *Glamorganshire Canal Navigation Co.* v. *Nixon's Navigation Co.* (1901), 85 L. T. 53, C. A.

(*s*) See title WATERS AND WATERCOURSES.

(*t*) *Monmouthshire Canal Co.* v. *Hill* (1859), 4 H. & N. 421; and see title TRESPASS.

(*a*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 39 (3). A company failing to comply with this provision, and also the officer in default, is liable to a fine of £5 a day during which default lasts, recoverable summarily (*ibid.*, s. 39 (4)).

SECT. 3.—*Powers.* SECT. 3. Powers.

SUB-SECT. 1.—*Power to be a Carrier.*

General statutory power to be a carrier.

1679. Canal companies have not as a rule been given powers by their special Acts to be carriers, and they have looked for their profits to tolls paid by carriers and traders passing with their boats along the canal. A canal company may be a carrier upon its own canals and upon canals communicating therewith or upon railways belonging to it, although not so authorised by its special Act; and for that purpose it may construct or procure and use boats, barges, wagons and other vehicles, and may furnish steam, animal or other haulage power for propelling them (*b*). The canal company may also provide vessels for the use of other persons and power for hauling the vessels of other persons on such canals (*c*). In using steam on any canal or navigation not its own, the canal company must observe the regulations and bye-laws of the proprietors of such canal or navigation (*d*).

Right and liabilities of common carrier.

1680. A canal company which thus exercises the powers of a carrier has all the powers and is under all the liabilities of a carrier at common law (*e*); but it is under no further liabilities than a common carrier, and is entitled to all the protection afforded by law to a common carrier (*f*).

Reasonable facilities and contracting out.

1681. A canal company must according to its powers afford all reasonable facilities for traffic on its own canals (*g*) and on canals communicating therewith as provided by the Railway and Canal Traffic Act, 1854 (*h*), and is bound by the provisions of that Act in regard to contracting out of its liability for negligence in receiving, forwarding, or delivering goods (*i*).

SUB-SECT. 2.—*Power to Lease Canal.*

Lease of tolls and duties.

1682. A canal company may, after giving public notice by advertisement of its intention, from time to time lease the tolls and

(*b*) Canal Carriers Act, 1845 (8 & 9 Vict. c. 42), s. 1. The powers of this Act cannot be exercised until such exercise is approved of by a majority of two-thirds of the shareholders voting at a meeting specially summoned after due notice (*ibid.*, s. 12), and the Act does not exempt any railway company from the operation of any general Act as to tolls and charges (*ibid.*, s. 13). Canal companies do not appear to have largely availed themselves of the power of becoming carriers on their canals.

(*c*) *Ibid.*, s. 3.

(*d*) *Ibid.*, s. 2. Where any person has the right of passing along a canal with a boat, he has the right to use steam provided no injury is done to the canal, although in fact this method of propulsion was unknown when the canal was made (*Case* v. *Midland Rail. Co.* (1859), 27 Beav. 247).

(*e*) Canal Carriers Act, 1845 (8 & 9 Vict. c. 42), s. 5. As to these powers and liabilities, see title CARRIERS, Vol. IV., pp. 1 *et seq.*

(*f*) Canal Carriers Act, 1845 (8 & 9 Vict. c. 42), s. 6.

(*g*) "Canal" here includes any navigation whereon tolls are levied under statutory authority, and also the wharves and landing places of such canal or navigation used for purposes of public traffic (Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 1).

(*h*) *Ibid.*, s. 2. As to reasonable facilities, see title CARRIERS, Vol. IV., pp. 65 *et seq.*; and as to the jurisdiction of the Railway and Canal Commissioners, see pp. 753—755, *ante*.

(*i*) Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 7; see title CARRIERS, Vol. IV., pp. 27 *et seq.*

SECT. 3. Powers.

duties on the whole or any part of its canal to any other canal company for any period not exceeding twenty-one years (*k*).

When statutory authority necessary.

A canal company which is also a railway company may not, however, accept a lease of any part of a canal, or of the tolls and charges in respect thereof, except under the powers of some Act of Parliament in which the parties to such lease are specifically named and given authority (*l*).

Powers of lessees during continuance of lease.

1683. During the continuance of any such lease the lessees and their servants have the same powers as to collecting and recovering tolls and charges, and are subject to the same rules, duties, and penalties in reference thereto, as if they had been appointed for that purpose by the lessors (*m*).

Forfeiture and determination of lease.

1684. If the lessees under any such lease incur forfeiture thereof, or if the rent is twenty-one days in arrear, justices have power on the application of the lessor company to order a constable to enter upon any toll-house, dwelling-house, office, weighing machine, or other building of the company, to remove therefrom any servant of the lessees and to deliver the premises to the lessor company (*n*). Upon possession being thus obtained, the lease is determined, except as to the remedies of the lessor company for rent due and for breaches of contract, and the lessor company has power to relet the tolls as if the former lease had never been made (*o*).

SUB-SECT. 3.—*Power to Borrow.*

General statutory power.

1685. A canal company which has determined to become a carrier, and for that purpose adopted the statutory powers (*p*), may for that purpose alone borrow on mortgage or bond in the manner prescribed by the Companies Clauses Consolidation Act, 1845 (*q*), any sum or sums not exceeding at any one time one-tenth part of the paid-up capital of the company, nor exceeding in all one-third of such capital, but no such mortgage or bond may affect any security previously granted under statutory authority (*a*).

(*k*) Canal Carriers Act, 1845 (8 & 9 Vict. c. 42), s. 8; but see the text, *infra*. Where a railway company obtained powers to purchase the property of the X canal, and the exercise of all the "rights, powers and privileges" of that company, it was held that, after such purchase, the railway company had power to take a lease of the Y canal, this being a "right, power or privilege" of the X company which passed to the railway company; and a motion by a shareholder of the railway company for an injunction restraining that company from taking a lease of the Y canal was therefore refused (*Rogers* v. *Oxford, Worcester and Wolverhampton Rail. Co.* (1858), 25 Beav. 322).

(*l*) Cheap Trains and Canal Carriers Act, 1858 (21 & 22 Vict. c. 75), s. 3, made perpetual by stat. (1860) 23 & 24 Vict. c. 41.

(*m*) Canal Carriers Act, 1845 (8 & 9 Vict. c. 42), s. 9.

(*n*) *Ibid.*, s. 10.

(*o*) *Ibid.*, s. 11.

(*p*) *I.e.*, under the powers of the Canal Carriers Act, 1845 (8 & 9 Vict. c. 42); see p. 785, *ante*.

(*q*) 8 & 9 Vict. c. 16; see title COMPANIES, Vol. V., pp. 730 *et seq.*; and see p. 634, *ante*.

(*a*) Canal (Carriers) Act, 1847 (10 & 11 Vict. c. 94), s. 2, incorporating the clauses of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict.

1686. Any other power to borrow money possessed by a canal company must be given to it by its special Act (*b*).

SUB-SECT. 4.—*Agreements with Railway Companies.*

Special statutory power.

1687. No agreement may be made without statutory authority between a canal company and a railway company by which any control is given to the railway company over the traffic of the canal, or any right is given to interfere in such traffic or in the charges levied on the canal, unless the Railway and Canal Commissioners sanction such agreement. Such sanction must be withheld if in the opinion of the Commissioners the agreement is prejudicial to the interests of the public (*c*).

Agreement conferring control upon railway company.

1688. Before any such agreement is sanctioned, certified copies of the intended agreement must be deposited at the office of the Railway and Canal Commissioners and with the clerk of the county council of the county in which the head office of the canal company is situated, and notice of such intended agreement must be given by advertisement in the *Gazette* (*d*), and otherwise as the Commissioners direct, and also sent to every canal company any of whose canals communicate with the canal of the company party to the agreement (*e*).

Deposit of certified copies and notice to interested bodies.

SUB-SECT. 5.—*Bye-laws.*

1689. Canal companies have by their special Acts usually been given powers of making bye-laws. Now, however, all bye-laws are subject to the approval of the Board of Trade, and no bye-law or regulation disallowed by the Board can have any effect (*f*).

Control by Board of Trade.

No bye-law or regulation of a canal company has any force or effect until two months after a certified true copy thereof has been forwarded to the Board, unless the Board before the expiration of that period has signified approbation thereof (*g*).

When bye-law takes effect.

c. 16), which relate to borrowing on mortgage; see title COMPANIES, Vol. V., pp. 730 *et seq.*

(*b*) Where a special Act gave power to borrow on the security of the undertaking and the tolls and rents authorised to be charged, it was held that the property mortgaged was alone liable, and that the company was not liable in an action for interest due (*Pontet* v. *Basingstoke Canal Co.* (1837), 3 Bing (N. C.) 433; see *Rogers* v. *Oxford, Worcester and Wolverhampton Rail. Co.* (1858), 25 Beav. 322).

(*c*) Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 16. As to the jurisdiction of the Railway and Canal Commissioners, see pp. 753—755, *ante.*

(*d*) *I.e.*, in the *London, Edinburgh,* or *Dublin Gazette,* according as the head office of any canal company party to the agreement is in England, Scotland, or Ireland (*ibid.*).

(*e*) *Ibid.*

(*f*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 40 (3). By *ibid.*, s. 40 (1), every such company had to forward to the Board by a certain day certified copies of all bye-laws and regulations then in force, and all bye-laws of which copies were not so forwarded ceased to have any operation. As to bye-laws of railway companies, see pp. 728 *et seq.*, *ante.*

(*g*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 40 (2). As to bye-laws for the carriage of explosives, see title EXPLOSIVES, Vol. XIV., p. 385; and see p. 730, *ante.*

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Regulations as to publication.

The Board has power from time to time to make, rescind, or vary such regulations as it thinks fit with respect to the publication of bye-laws and regulations by canal companies, and with respect to the publication by such companies of their intention to apply for the allowance of any intended bye-laws and regulations (*h*).

SUB-SECT. 6.—*The Clearing System.*

Control by Board of Trade.

1690. Any canal companies upon whose canals through tolls, rates, or charges are in operation may unite in establishing a canal clearing system. The principles upon which such clearing system is established, the regulations for the admission or retirement of other companies, the rules for the appointment of a committee and officers, and the mode of conducting business are all subject to the approval of the Board of Trade (*i*).

Application of funds and general statutory regulation.

A canal company may apply its funds for the purpose of establishing or carrying into effect any such system; and the statutory provisions (*k*) with regard to the powers of the committee and secretary, as to the settlement and adjustment of accounts, the receiving of sums due by companies, and the keeping of books apply, *mutatis mutandis*, to such clearing system (*l*).

SECT. 4.—*Charges and Traffic.*

Right to tolls and charges.

1691. The right of a canal company to take tolls and make other charges is derived as a rule from its special Act, and it can only recover such sums as they have statutory power to demand (*m*).

Rates of charges.

A canal company which has determined to become a carrier, and for that purpose has adopted the statutory powers (*n*), may demand and receive such reasonable remuneration for carriage and haulage as the directors of the company may fix, or as may be

(*h*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 40 (4).

(*i*) *Ibid.*, s. 44.

(*k*) *I.e.*, those contained in the Railway Clearing Act, 1850 (13 & 14 Vict. c. xxxiii.), ss. 11—26; see pp. 713 *et seq.*, *ante*.

(*l*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 44.

(*m*) Thus, where a company's special Act gave all persons the right to navigate the canal upon payment of the charges lawfully demanded, and gave the company power to demand certain payments from every boat passing through one or more of the locks, it was held that in the case of a boat navigating a stretch of the canal where there was no lock the company could demand no tolls (*Stourbridge Canal Co.* v. *Wheeley* (1831), 2 B. & Ad. 792). Again, where tolls were made to depend entirely on the load carried, it was held that there was no power to charge tolls to empty boats (*Leeds and Liverpool Canal Co.* v. *Hustler* (1823), 1 B. & C. 424; see *Grantham Canal Navigation Co.* v. *Hall* (1845), 14 M. & W. 880, Ex. Ch.). Where an Act provided that the A canal company should in no case receive any higher rates of tonnage than the B company, and the B company by resolution reduced its rates, held, that the A company were bound by such reduction (*Monmouth Canal Navigation Co.* v. *Kendall* (1821), 4 B. & Ald. 453). For other cases as to tolls, see *Keppell* v. *Bailey* (1834), 2 My. & K. 517; *Fisher* v. *Lee* (1840), 12 Ad. & El. 622; *Coulton* v. *Ambler* (1844), 13 M. & W. 403; *R.* v. *Leicestershire and Northamptonshire Union Canal Co.* (1845), 3 Ry. & Can. Cas. 730, Ex. Ch.; *Tame* v. *Grand Junction Canal (Proprietors)* (1856), 11 Exch. 786; *Dant* v. *Moore* (1863), 9 L. T. 381; *Tamar Manure Navigation Co.* v. *Wagstaffe* (1863), 4 B. & S. 288.

(*n*) See p. 785, *ante*.

agreed (*o*). All charges, however, for carriage, or for the use of vessels, or for haulage, must be made equally to all persons at the same rate in respect of goods of a like description carried or hauled in a vessel of a like description in like circumstances over the same portion of any canal (*p*).

Tolls.

With regard to tolls charged for the use of the canal, although uniform rates are fixed by its special Act, a canal company may vary such tolls on the whole or any part of its canal, and may reduce or raise such tolls from time to time subject to the maximum sums fixed by its Act (*q*). Such tolls must, however, be charged equally to all persons at the same rate in respect of all boats of a like description using the same portion of any canal, and upon all goods of a like description; and no reduction or advance in any tolls for the use of the canal, or for the supply of power, may be made directly or indirectly in favour of or against any particular company or person (*r*).

Consent to variation.

If under the special Act of any canal company the consent of any person is required to vary the tolls and charges for the use of the canal, the provisions of the Railway and Canal Traffic Act, 1854 (*s*), as amended by the Regulation of Railways Act, 1873 (*t*), extend to that person as if he were a canal company (*a*).

General traffic provisions.

1692. Certain provisions relating to railways as to undue preference (*b*), terminal charges (*c*), rates, tolls and dues (*d*), traffic (*e*), and other matters (*f*) apply also to canals.

The Railway and Canal Commissioners have power to hear and determine any question or dispute as to the terminal charges

(*o*) Canal Carriers Act, 1845 (8 & 9 Vict. c. 42), ss. 1, 3. These charges may be in addition to tolls (*ibid.*, s. 1).

(*p*) *Ibid.*, s. 4.

(*q*) Canal Tolls Act, 1845 (8 & 9 Vict. c. 28), s. 1. This Act, however, does not apply to any company existing at the time of its passing until a meeting of the shareholders has determined by a two-thirds majority that it shall so apply (*ibid.*, s. 3). The Act also preserves all rights given by previous Acts (*ibid.*, s. 4), and all liabilities in respect of charges and traffic under subsequent general Acts (*ibid.*, s. 6).

(*r*) *Ibid.*, s. 2. A company may always make proportionally lower charges for goods carried long distances than for short (*Strick* v. *Swansea Canal Co.* (1864), 16 C. B. (N. S.) 245).

(*s*) 17 & 18 Vict. c. 31.

(*t*) 36 & 37 Vict. c. 48.

(*a*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 37 (2).

(*b*) Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 2, as explained by the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 25; see title CARRIERS, Vol. IV., p. 76; and see p. 756, *ante*.

(*c*) Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 15, applied to canals by the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 37 (1); see title CARRIERS, Vol. IV., p. 83; and see p. 746, *ante*.

(*d*) Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31); Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), applied to canals by the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 37 (3); see title CARRIERS, Vol. IV., p. 83; and see pp. 744 *et seq.*, *ante*.

(*e*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), ss. 24—35, applied to canals by *ibid.*, s. 36; and see p. 745, *ante*. As to through traffic, see title CARRIERS, Vol. IV., pp. 72 *et seq.*

(*f*) Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), ss. 14, 16; see p. 787, *ante*.

SECT. 4. Charges and Traffic.

of any canal company, unless such charges are fixed by Act of Parliament (*g*).

Through rates.

1693. No agreement, whether confirmed by Parliament or not, prevents the Railway and Canal Commissioners from making or enforcing any order they see fit to make for a through rate (*h*).

The statutory provisions as to through rates on railways (*i*) extend to any canals which, in connection with any river or other waterways, form part of a continuous line of water communication, notwithstanding the absence of any statutory authority to levy tolls upon such other waterway (*k*).

Through traffic.

1694. Canal companies may make agreements with other canal companies for through traffic on their respective canals, and for the vessels of one company to pass over the canal of another company, and to use their wharves and other works; and they may agree as to the through rates and charges, and as to the division, apportionment, adjustment and collection of the tolls from through traffic (*l*). All through charges for traffic on more than one canal may be computed at a lower rate than the charges for traffic on one canal only, without it being necessary to reduce such last-mentioned charges (*m*).

Jurisdiction of Railway and Canal Commissioners as to variation of tolls, rates or charges.

1695. Where a railway company (*n*) has control over, or the right to interfere concerning, the traffic conveyed on a canal, or the tolls, rates or charges levied in respect of such traffic, and the Railway and Canal Commissioners are satisfied that such tolls, rates or charges are such as are calculated to divert traffic from the canal to the detriment of the canal or persons using it, the Commissioners may, on the application of any persons interested, make an order requiring such tolls, rates or charges to be altered and adjusted in such a manner that they shall be reasonable as compared with the rates and charges on the railway (*o*). If such tolls, rates or charges are not altered as required by such order within the time prescribed by the order, the Commissioners may themselves by order effect such alteration

(*g*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 37 (1); Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 15. As to terminal charges, see title CARRIERS, Vol. IV., p. 83. As to the jurisdiction of the Commissioners, see pp. 753—755, *ante*.

(*h*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 37 (3). Any company allowing traffic to pass from a canal on to any other canal or railway, or from a railway on to a canal, is a "forwarding company," and the allowing of traffic so to pass is forwarding of traffic (*ibid.*, s. 37 (4)).

(*i*) *I.e.*, the provisions contained in the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31); the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48); and the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25); see title CARRIERS, Vol. IV., p. 72.

(*k*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 37 (5).

(*l*) Canal Carriers Act, 1845 (8 & 9 Vict. c. 42), s. 7; Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 43 (1).

(*m*) *Ibid.*, s. 43 (2).

(*n*) Or the directors or officers of a railway company, or any other persons on their behalf (Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 38).

(*o*) *Ibid.*, s. 38 (1).

as they think just and reasonable, and the tolls, rates and charges so altered and adjusted by the Commissioners are binding on the canal company (*p*). No person is entitled to make an application for such order unless he obtains a certificate from the Board of Trade that he is a fit person to apply, and that the application is a proper one; and no such order may be made by the Commissioners unless notice of the application is given to such companies and persons as the Board directs (*q*). Any such order made by the Commissioners may be rescinded or varied by them after notice to and hearing such companies or persons as they direct (*r*).

SECT. 5.—*Control of the Board of Trade.*

Inspection.

1696. Whenever the Board of Trade has information that the works of any canal are in such a condition as to be dangerous to the public, or to cause serious inconvenience or hindrance to traffic, it may direct some person to inspect the canal and report thereon to the Board (*s*). Such inspector has in relation to such canal all the powers of an inspector appointed under the Regulation of Railways Act, 1871 (*t*), in relation to a railway (*a*).

Returns.

1697. The Board of Trade may require a canal company to forward to the Board returns showing the capacity of the canal for traffic, and the capital, revenue, expenditure, and profits of the company. Such returns must be made in such form and manner as the Board from time to time prescribes, and must be made within such time as may be prescribed and whenever required, not being oftener than once a year (*b*).

Reference to Railway and Canal Commissioners.

1698. When any difference to which a canal company is a party is required or authorised by any Act to be referred to the arbitration of the Board of Trade or to some person appointed by the Board, the Board may, if it thinks fit, refer the matter to the Railway and Canal Commissioners (*c*).

SECT. 6.—*Abandonment.*

Abandonment of unnecessary or derelict canal.

1699. When the Board of Trade is satisfied on the application of a canal company (*d*) that any canal or part of a canal belonging

(*p*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 38 (2).
(*q*) *Ibid.*, s. 38 (3).
(*r*) *Ibid.*, s. 38 (4).
(*s*) *Ibid.*, s. 41.
(*t*) 34 & 35 Vict. c. 78. As to these powers, see pp. 738, 739, *ante*.
(*a*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 41.
(*b*) *Ibid.*, s. 39 (2). Failure to comply with this provision renders the company and the officer responsible liable to a fine not exceeding £5 a day during default (*ibid.*, s. 39 (4)). As to the recovery of fines, see pp. 734 *et seq.*, *ante*.
(*c*) Board of Trade Arbitrations, etc. Act, 1874 (37 & 38 Vict. c. 40), s. 6; see pp. 739, 740, *ante*. For further powers of the Board of Trade, see pp. 738 *et seq.*, *ante*. As to reference of disputes to the Commissioners in lieu of arbitration, see pp. 718, 719, *ante*.
(*d*) The term "canal company" includes a "railway and canal company" so far as relates to the canal of such company (Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 46).

SECT. 6. Abandonment.

to the applicants is unnecessary for the purpose of public navigation, it may by warrant authorise the abandonment thereof (*e*); and when the Board is satisfied on the application of any local authority (*f*), or of three or more owners of adjoining land, that any canal or part of a canal is derelict (*g*), they may by warrant authorise the abandonment thereof (*h*).

Warrant for abandonment of derelict canal.

1700. In the case of a derelict canal, the warrant may be granted on condition that the canal, or any part thereof, with all powers relating thereto, is transferred to any person, body of persons, or local authority (*i*); and in such case the Board of Trade may, if it thinks fit, frame and embody in a provisional order a scheme for the management of the transferred canal (*k*).

Conditions for grant of warrant of abandonment of unnecessary canal.

1701. No warrant may be granted for the abandonment of an unnecessary canal unless the Board of Trade is satisfied—(1) that it is unnecessary for public navigation; (2) that the application has been approved of by a majority of the shareholders of the company voting on a resolution to abandon; (3) that such notices as the Board may require have been given; and (4) that compensation, the amount of which is to be determined in case of difference as the Board directs, has been made to all persons entitled to compensation for the closing of the canal (*l*).

Release of company.

1702. After the granting of a warrant for the abandonment of an unnecessary or derelict canal and the due publication of a notice thereof as required by the Board of Trade, the Board may make an order releasing the company from all liability to maintain the canal, and from all statutory and other obligations in respect thereof or consequent on the abandonment thereof (*m*).

(*e*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 45 (1). Such a canal is hereafter referred to as an "unnecessary canal" (see *ibid.*). For the purpose of information the Board may hold such inquiry and require such information as it thinks fit (*ibid.*, s. 45 (8)).

(*f*) The term "local authority" means any harbour board, or conservancy authority, the Common Council of the City of London, any council of a city or borough, any county council, any quarter sessions, or any district council (*ibid.*, s. 45 (7)).

(*g*) A derelict canal is one which for at least three years has been disused for navigation, or one which by reason of the default of the owners has become unfit for navigation, or one from which water has escaped and injured adjoining lands, and the owners decline, or are unable, to effect such repairs as are necessary to prevent further injury (*ibid.*, s. 45 (1)).

(*h*) *Ibid.*

(*i*) *Ibid.*, s. 45 (3).

(*k*) *Ibid.* Such provisional order may provide for the constitution of a body to manage the abandoned canal, or for its transfer to a local authority (*ibid.*, s. 45 (4)). It must be submitted to Parliament (*ibid.*, s. 45 (5)), and, if a petition is presented against the Bill for its confirmation, the petitioners may appear and oppose before a select committee (*ibid.*, s. 45 (6)). As to such procedure, see title PARLIAMENT, Vol. XXI., pp. 729 *et seq.*

(*l*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 45 (2).

(*m*) *Ibid.*, s. 45 (1).

SECT. 7.—*Police.*

Order on company for payment of expenses.

1703. Whenever the appointment of special constables is found to be necessary owing to the behaviour of persons employed upon any canal, the justices may order the canal company to pay the expenses of such constables (*n*). The company is, however, entitled to notice before such order can be made (*o*).

Appointment of canal police.

1704. A canal company may procure the appointment of special constables to keep order on its canal; such constables are paid by the company (*p*), and are liable to punishment for breach of duty, or for failing on dismissal to deliver up all accoutrements and other things supplied to them by the company (*q*).

Powers of canal police.

1705. Special constables so appointed may enter any boat on the canal, arrest any person reasonably suspected of having committed or being about to commit an offence (*r*), and, without warrant, may arrest any idle and disorderly person disturbing the peace on the canal, or reasonably suspected of having committed or being about to commit any offence, or loitering on the bank of the canal or on any of the canal works by night and unable satisfactorily to account for himself (*s*). They may also stop and search any boat on the canal on reasonable suspicion that stolen property is on board (*t*).

SECT. 8.—*Offences.*

Offences triable summarily.

1706. An offence, punishable on summary conviction (*u*) by two justices, is committed by any person who assaults or resists a special constable, appointed on behalf of the canal company, in the execution of his duty (*a*); by any person who is found on the canal or on board any vessel in the canal, having in his possession any tube or instrument for unlawfully obtaining liquor or any utensil for secreting or carrying away such liquor, or who unlawfully attempts to obtain such liquor (*b*); and by any person who injures any box, cask, case or package on board any vessel or wagon, or in or on any warehouse, wharf, quay, or bank belonging to the canal

(*n*) Special Constables Act, 1838 (1 & 2 Vict. c. 80), s. 1. The Home Secretary has power to disallow any such order or to reduce the amount ordered (*ibid.*, s. 2). If the amount is not paid it may be recovered by distress of the company's property (*ibid.*, s. 3); and see, further, title POLICE, Vol. XXII., pp. 494, 495. As to railway police, see p. 739, *ante*.

(*o*) *R.* v. *Cheshire Lines Committee* (1873), L. R. 8 Q. B. 344.

(*p*) Canal (Offences) Act, 1840 (3 & 4 Vict. c. 50), ss. 1, 2, 3. As to their appointment and dismissal, see title POLICE, Vol. XXII., p. 495.

(*q*) Canal (Offences) Act, 1840 (3 & 4 Vict. c. 50), ss. 4, 5.

(*r*) *Ibid.*, s. 9.

(*s*) *Ibid.*, s. 10.

(*t*) *Ibid.*, s. 11.

(*u*) As to procedure before courts of summary jurisdiction, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*

(*a*) Canal (Offences) Act, 1840 (3 & 4 Vict. c. 50), ss. 6, 14. Penalty, a fine not exceeding £10, or imprisonment, with or without hard labour, for a term not exceeding two months (*ibid.*, s. 6).

(*b*) *Ibid.*, s. 7. Penalty, a fine not exceeding £5, or imprisonment, with or without hard labour, for a term not exceeding one month (*ibid.*).

SECT. 8. Offences.

with intent to steal (*c*). In case of a fine being inflicted of over £3, the person convicted has a right to appeal to quarter sessions (*d*).

Felony.

1707. It is a felony unlawfully to break down or destroy the bank of any canal or reservoir, whereby any land or building is endangered or damaged (*e*).

(*c*) Canal (Offences) Act, 1840 (3 & 4 Vict. c. 50), s. 8. Penalty, a fine not exceeding £5, or imprisonment, with or without hard labour, for a term not exceeding one month (*ibid.*). As to the above offences when committed in the Metropolitan Police District, see Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), ss. 30—34.

(*d*) Canal (Offences) Act, 1840 (3 & 4 Vict. c. 50), s. 19. As to appeals to quarter sessions, see title MAGISTRATES, Vol. XIX., pp. 642 *et seq.*

(*e*) See Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), ss. 30, 31; title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 784.

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See CRIMINAL LAW AND PROCEDURE.

END OF VOL. XXIII.

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BRADBURY, AGNEW, & CO. LD., PRINTERS, LONDON AND TONBRIDGE.

309558 [Earl of and others (eds.) Law.D
Author Halsbury, Hardinge Stanley Giffard, 1st H19.3
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